

PATENTS, PILLS, POVERTY AND PANDEMIC: THE ETHICAL ISSUES

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WALTER BROWN

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PREFACE

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ABSTRACT

This thesis argues that corporations *qua* corporations are moral agents *sui generis* and hence capable of being held morally responsible. I argue that corporations *qua* corporations are responsible for the actual and foreseen consequences of their actions. I analyse normative theories and the different proscriptive responsibilities they place on moral agents and hence corporations. I examine Kantianism, utilitarianism and virtue ethics. I argue for a unique normative ethical theory that incorporates reasoning from all three of the normative theories. I argue for a broad range of reasons to factor into deciding whether an act is ethical or not. One of the claims of this thesis is that ethical theories must incorporate an agent's motivation, intention and character traits as relevant to deciding on whether an action is ethical or not. My thesis argues for an indispensable role for the virtues while at the same time incorporating impartial beneficence and universal rationality from utilitarianism and Kantianism. This position I, following the literature, refer to as moderate virtue theory. Having established corporate *qua* corporate responsibility I question the pharmaceutical corporation's practice of patenting life saving medication during a state of pandemic in poor countries. The moderate virtue theory position prioritises contexts and the actual human condition and criticises normative theories that attempt to give universal, abstracted answers to ethical problems. It is for this reason and the current (2003) HIV/AIDS pandemic that I focus on a particular context. I examine the practice of patenting life saving medication within South Africa and argue, applying moderate virtue theory, that this act cannot be justified. I argue that a pharmaceutical corporation that patents life saving medication in South Africa cannot justify that action and thus is morally responsible for that action. I also argue that corporations patenting HIV/AIDS medication in South Africa have unethical motivations and intentions.

TABLE OF CONTENTS:

Introduction	1
Chapter 1: Corporate responsibility	4
Chapter 2: Moderate virtue theory and corporations	52
Chapter 3: The relevant facts to the HIV/AIDS pandemic in South Africa and the pharmaceutical corporation's response	96
Chapter 4: Application	108
Conclusion	125
Reference materials	128

INTRODUCTION

Ethics, the philosophical study of the good and the right, consists of meta-ethics (the study of the nature and status of moral claims and values), normative ethics (the study of theories that guide action and inform character), and applied ethics (the practical application of normative theories to concrete moral issues). My thesis straddles the latter two areas. I explore the contribution that the three major normative theories - utilitarianism, deontology and virtue ethics - can make to an important actual issue. I develop a unique moderate virtue theory that incorporates certain aspects of these three normative theories. I apply this moderate virtue theory to the ethical question: should a pharmaceutical corporation patent pharmaceuticals that treat a pandemic afflicting poor countries? I look specifically at the context of patenting HIV/AIDS medication in South Africa and argue that it is unethical for pharmaceutical corporations to patent the medication in South Africa. I argue that doing so reflects unethical motivations, characters and desires. I do this in four chapters.

In chapter one I argue that corporations *qua* corporations are moral agents. I do this in order to hold corporations responsible for their actions, motivations, characters and desires. I argue that corporations *qua* corporations are moral agents *sui generis*. In chapter one I argue that corporations can meet the necessary requirement for being persons and that they should be required to act in morally responsible ways. The main priority of the chapter is asking what is meant by a moral agent and moral responsibility and deciding whether corporations are the 'right sort of things' to be moral agents and be held morally responsible. I follow Dennett¹ setting out necessary conditions for personhood and argue that corporations *qua* corporations are persons. Having argued that corporations are persons I argue that they are also capable of acting in morally responsible or irresponsible ways due to their CID (Corporation's Internal Decision-making) structures. Having argued that corporations are moral agents I examine what the scope of moral responsibility is before asking the question that dominates my second chapter – what should we be held morally responsible for?

I explore three normative ethical theories, namely, utilitarianism, Kantian deontology and virtue ethics. Utilitarianism is a form of consequentialism, that is, the focus is on the consequences of our actions. We should act in order to achieve the best consequences.

¹ Dennett, D. in his chapter "The conditions of personhood" in Rorty, A. O. (ed.) 1976 *The identities of persons* London: University of California Press, Berkeley pp 175-195

Different versions of utilitarianism give different accounts of what the best consequences are. One common defence of patenting is that it has various good consequences, for instance, the stimulation of crucial medical research. Kantian deontology focuses on the intrinsic nature of the action, not on the consequences. For an act to be ethical it must be an act that all rational beings could perform. Kant sees ethics as operating on a system of categorical, not hypothetical, imperatives. In my thesis I examine Kant's approach to property rights, since patents are intellectual property. Virtue ethics, a recent revival of Aristotle, starts from questions about the lives we should live or the persons we should be. What is ethical is what a virtuous person would perform. Virtue ethics offers valuable insight into what we mean when we claim, for example, that a corporation is caring or ruthless. I argue, however, for a moderate virtue theory that incorporate impartial beneficence from utilitarianism and universal rationality from Kantianism. This moderate virtue theory argues that the virtues form an essential aspect of any normative theory and I argue for this without making virtues primary to the normative theory as virtue ethics does. Having set out what normative theory I use in my thesis I examine in chapter three a specific applied ethics issue.

This thesis develops out of the current Southern African context of the HIV/AIDS pandemic. I set out the context and the relevant facts for this pandemic in chapter three. According to the Mail & Guardian approximately 47 million people are currently HIV infected. The overwhelming majority of these people - 95% of the global total - live in the developing world. According to UNAIDS and the World Health Organisation (WHO)² the total number of adults living with HIV in South Africa is 5, 000, 000. Of the five million people living with HIV in South Africa, 4.7 million are aged between fifteen and forty nine; of those adults aged fifteen to forty nine, 2.7 million are women; and in addition 250 000 children are living with HIV. According to UNPOP South Africa has a total population of 43 792 000, and these figures mean that 20.1% of adults aged fifteen to forty nine are HIV positive in South Africa and over 10% of the entire population is HIV positive. HIV/AIDS is a disease that is ultimately deadly and these figures represent an ever-growing health disaster on a catastrophic scale.

² UNAIDS/WHO Epidemiological Fact Sheets by Country for the year 2002 (updated)
<http://www.who.int/emc-hiv/fact_sheets/pdfs/Southafrica_EN.pdf> 3 January 2003

One of the most pressing issues concerning this pandemic is whether patent rights on pharmaceuticals that could be used in the treatment of the disease should be retained. More specifically, there is intense pressure on pharmaceutical companies to relinquish their patent rights in the case of poor countries. I focus on the moral, rather than the legal or political, aspects of this issue.

In chapter four I argue that it is wrong of pharmaceutical corporations to patent pharmaceuticals in poor countries during a pandemic. I argue specifically that they are unethical in patenting this medication in South Africa. Applying the moderate virtue theory position developed in chapter two I also argue that their actions show them to be cruel, callous, selfish, and uncaring.

Chapter 1: Corporations and moral responsibility

This chapter considers whether corporations can be morally responsible. I argue that corporations *qua* corporations are the ‘right sort of things’ to be held morally responsible. I argue that it makes sense to say that a corporation acted immorally or that a corporation is morally responsible for certain actions. I distinguish this responsibility from the responsibility of the individuals who are members of the corporation, either as employers, employees, shareholders or executives. That is, a corporation’s moral responsibility is separate from the moral responsibility of the persons within the corporation. This is neither an easy nor an obvious argument to make. This is because we usually only hold individual biological human beings morally responsible for their actions. I argue that there are reasons to ascribe moral responsibility to corporations; that such ascriptions are rationally grounded and not mere anthropomorphizing. To do this I explore what is meant by moral responsibility and set out the requirements for a thing to be held morally responsible. I work from the paradigmatic case of the individual. I also argue that corporations can meet the requirements for membership in the moral community. I argue that corporations are moral agents³ *qua* corporations. I analyse arguments that support and do not support this conclusion. I explore the claim that it is not advisable to hold corporations morally responsible, even if they are moral agents. I argue that it is both advisable to hold corporations morally responsible and that it ought to be done. I explore the relationship between the moral responsibility of the individual(s) acting within the corporation and the moral responsibility of the corporation *qua* corporation. I argue that holding corporations accountable does not make individuals within the corporation less morally responsible for their actions. I argue that there are two levels of moral responsibility ascriptions, one at the level of the individual and another at the level of the corporation. These two levels of responsibility ascriptions are possible because of the “referentially opaque” ways we can describe intentional actions; one at the level of the person, and the other at the level of the corporation. Lastly, I explore the scope of this responsibility.

What is moral responsibility: finding the path

In this section I start by probing the notion of moral responsibility and end with a “map” or “path” that I argue will lead to correct attributions of moral responsibility. I begin by examining how we use some of these words in our everyday discourse.

³ In this thesis I use the terms moral person and moral agent interchangeably.

In our everyday discourse we use the notions of wickedness and evil to describe certain non-human actions. For example we sometimes say that a dog acts badly or that it is naughty. We say that the storm is violent or that a company acts cruelly when it retrenches certain employers. Language cannot be used to settle the debate. We say that the storm is violent but storms have no emotions. In these instances we are anthropomorphizing nature. It will help to examine a case in which most people would be happy to hold the person morally responsible. Most⁴ of us would be happy with using language to communicate that “Janet is responsible for killing her grandmother” given that Janet is a morally responsible agent⁵. When we say that Janet is morally responsible for killing her grandmother it could be that this sentence does not reflect a real feature about Janet but rather our own cultural beliefs, biases or prejudices.

The cultural relativist for instance starts off with the empirical observation that different cultures have different moral codes and then moves to the conclusion that holding someone morally responsible has no foundation except in the standards of the culture’s moral codes. Rachels⁶ set out this argument as follows:

- 1) Different cultures have different moral codes
- 2) Therefore, there is no objective “truth” in morality. Right and wrong are only matters of opinion, and opinions vary from culture to culture.

A standard example used to support this conclusion is the difference noted between the Persians who ate their dead and the Greeks who did not. Rachels⁷ points out difficulties with this view. First, if this view is correct it precludes individuals from judging other customs. This may seem a strong point of the theory: its ability to accept other cultures and to be tolerant. However, there are cases where this theory will offend our moral intuitions. For instance, it precludes us from judging a culture that has a custom of waging war against other tribes in order to capture and torture them. Second, the only requirement for deciding whether an action is moral would be to investigate whether it conformed to one’s societal standards. A person in Nazi Germany would just need to ask whether it was against her society’s code to be anti-Semitic. But this fails to recognize that our society’s codes are not perfect. Third, this view negates the possibility of moral progress within a society. This view denies that South

⁴ I use the word ‘most’ because certain cultural relativists, emotivists or psychological egoists will deny that such an ascription is obvious.

⁵ I clarify this concept later but some intuitive excusing conditions would be if she were drugged or mentally insane. I argue that these excusing conditions reduce one’s moral agency and rather than removing moral agency as a necessary condition for moral responsibility shows us when a person’s moral agency break down.

⁶ 1999:24

⁷ 1999

Africa has made moral progress in removing its racial segregated policy of apartheid⁸. In this thesis I take it that ascriptions of moral responsibility do make sense and that there is such a thing as moral objectivity⁹. The point I want to pick up on, and one that is often missed, is that cultural relativism does not deny that a person can be held morally responsible. Although the cultural relativist denies that we may judge other culture's moral codes she does not deny that internal to a culture certain ascriptions of moral responsibility can be correctly or incorrectly made. The cultural relativist merely defines moral responsibility as acting in accordance with one's cultural codes. What do we mean when we hold someone morally responsible, irrespective of that for which we hold them morally responsible? What can be included in the group of things that can correctly be the subject of an attribution of moral responsibility? That is, what are the necessary and sufficient conditions for entry into, and under what conditions can something be excluded from, this moral community? What defines a moral agent and can corporations *qua* corporations be moral agents?

Moral agency and moral responsibility are intimately connected. Being a moral agent is a necessary but not sufficient condition for moral responsibility. Something has to be a moral agent for us to hold them morally responsible but if they are moral agents we may still not want to hold them morally responsible in certain situations¹⁰. Being morally responsible is a sufficient condition for being a moral agent. If we can hold something morally responsible then we can conclude that they are moral agents. This I summarise with the conditional: **if** you are morally responsible **then** you are a moral agent. A point of clarification: one may object that holding someone morally responsible is not a sufficient condition for ascribing moral agency to them. In certain cases a moral agent may be responsible even though they were not acting as a moral agent. This may even be the reason we hold them morally responsible¹¹. I

⁸ Rachels *ibid*.

⁹ Whether we can know what these moral objective facts are or whether there is a culture-neutral standard of right or wrong is not the subject of this thesis.

¹⁰ There are excusing conditions, such as a lack of knowledge or a reduction in rationality or an ability to act in accordance with one's decisions.

¹¹ Unless otherwise noted, references to Dennett, D. are to Rorty, A. O. (ed.) 1976 **The identities of persons** London: University of California Press, Berkely pp 175-195 and I now only use page numbers. Dennett, D. pp 193/194 states: "There is no objectively satisfiable sufficient condition for an entity's *really* having beliefs, and as we uncover apparent irrationality under the Intentional interpretation of an entity, our grounds for ascribing any beliefs at all wanes especially when we have (what we always *can* have in principle) a non-Intentional, mechanistic account of the entity. **In just the same way our assumption that an entity is a person is shaken precisely in those cases where it matters: when wrong has been done and the question of responsibility arises. For in these cases the grounds for saying that the person is culpable (the evidence that he did wrong, was aware he was doing wrong, and did wrong of his own free will) are in themselves grounds for doubting that it is a person we are dealing with at all.** And if asked what could settle our doubts, the answer

take the position that although a moral agent may not be acting as a moral agent at the time that we hold them morally responsible, they still need to be a moral agent for us to hold them morally responsible, even though they do not act as one at all times¹². A moral agent does not act from her moral agency when she loses her temper, but losing one's temper is something for which a moral agent can still be held morally responsible. I have said enough about the relationship between being a moral agent and moral responsibility. I now wish to investigate the notion of moral responsibility itself.

Following the literature there are, broadly, three different senses of moral responsibility. The causal sense, which is also called retrospective responsibility,¹³ the rule following sense, which is also called prospective responsibility and the decision making sense.¹⁴

According to the first sense we say Janet is responsible for killing her grandmother because we want to hold her accountable for the event. This sense of responsibility is one in which we want to praise or blame someone and we aim to determine the cause of the praiseworthy or blameworthy past action. Here we determine someone's intentions, free will, degree of participation, and appropriate reward or punishment. We determine whether, and to what degree, the person is responsible in terms of causing the outcome under consideration, in this case the killing of Janet's grandmother. The causal chain and the person's participation in that causal chain are at issue. This is generally the "who-dun-it/what-done-it"¹⁵ variety of responsibility ascriptions.

The second sense in which we hold a person morally responsible is the rule-following sense or prospective responsibility. This sense of moral responsibility is in terms of social and legal

is: nothing. When such problems arise we cannot even tell in our own cases if we are persons." (Emphasis added)

¹² It is for this reason that I argue that the moral projection of Goodpaster, K. and Matthews, J. B., 1982: 132-141 is not complete without addressing whether a corporation is a moral agent, as French, P. 1998: 207-215 does. : Unless otherwise noted, when I refer to French, P. in this thesis I refer to French, P. 1998 "The corporation as moral person" in *American Philosophical Quarterly* 16, January 1998, pp 207-215 and use page numbers only. Unless otherwise noted, when I refer to Goodpaster, K. and Matthews, J. B. I refer to: Goodpaster, K. and Matthews, J. B. Jr. 1982 "Can a corporation have a conscience?" in *Harvard Business Review* 60, January-February 1982, pp 132-141 and use page numbers only.

¹³ Duff, R. A. Unless otherwise noted when I refer to Duff, R. in this thesis I refer to his entry "Responsibility" in Craig, E. ed. 1998 *Routledge Encyclopaedia of Philosophy* New York: Routledge. In the rest of the thesis I use page numbers only.

¹⁴ Goodpaster, K. and Matthews, J. B. *ibid.* as well as Shaw, W. H. and Barry, V. 1995 also reiterate these three senses in "Moral issues and business 6th ed." and although French, P. only considers the first and the last senses, he too has a similar account of moral responsibility.

¹⁵ French's two types of moral responsibility can be seen as mapping onto the account of Goodpaster, K. and Matthews, J. B. See French, P.: 210

norms. The roles that people fulfil in society transmit certain responsibilities to them. For instance a shepherd is responsible for looking after sheep and it is his responsibility to make sure that none of them go missing, get killed, get too cold at night, dehydrate or starve. Janet may be responsible as the caregiver to her grandmother and is responsible to the degree she fails to fulfil this role, quite dismally in the case of killing her.

The third sense of moral responsibility is the decision-making sense. In this sense of moral responsibility the emphasis is on the individual's independent judgment. It depends on the ability of the person to take the "moral point of view" and it focuses on the intellectual and emotional processes of the individual.

The relationship between all three of these senses is that the third is a necessary but not sufficient condition for the other two. If a person cannot be morally responsible in the third sense then they cannot be morally responsible in either of the other two senses.¹⁶ It is a necessary condition for the other two senses because if Janet cannot make rational or moral decisions on her own then she cannot be accountable for her past actions even though she may be a part of a causal chain, nor can she have any morally responsible roles to fulfil in society such as caring for the welfare of her grandmother. The third is not a sufficient condition for the others, as I can be capable of independent rational and moral decision making but not have the role of a shepherd or any other role, nor ever act in any morally causal sense- never perform any actions worthy of praise or blame¹⁷. However, if she is capable of the third sense in which we hold a person morally responsible then in theory she can be held accountable for her actions or the welfare of others. It is this conceptual priority of the third sense that makes it fundamental for ascriptions of moral responsibility. That is, if a corporation can be morally responsible in the third sense then it is theoretically possible that it can be responsible in the first two senses. It is moral agents who have this ability and it will be necessary to discover what the conditions are for being a moral agent. Before addressing this I first clear up what we mean by this third sense of moral responsibility i.e. what it means to be rational and make

¹⁶ When I refer to Shaw, W. H. and Barry, V. I refer to: Shaw, W. H. and Barry, V. (eds.) 1995 Moral issues in business (6th edition) Belmont, California: Wadsworth Publishing Company and use page numbers only. Shaw, W. H. and Barry, V.: 204

¹⁷ This is a conceptual possibility. In actuality whenever we interact with other persons we will necessarily either act towards them in a morally responsible, indifferent or morally irresponsible way. This feature of interpersonal relationships is brought out by Rawls's original position where rational calculators are required to consider the best system for interpersonal relations, given a certain set of constraints. It is conceptually possible that those constraints, such as that other people die, may not hold for all persons. C.f. Dennett's (*ibid.*) account of this in his paper on the identity of person's referred to in this thesis.

moral decisions or, said another way, the ability to take the “moral point of view”¹⁸. In the section on the scope of moral responsibility I return to retrospective and prospective responsibility and discuss the relationship between the two. Where are we so far? I have said that independent rational decision-making (i.e. the ability to take the “moral point of view”) is a necessary condition for moral responsibility and that to be morally responsible one must be a moral agent. So, being capable of taking the “moral point of view” is a necessary condition for moral agency that is in turn a necessary condition for moral responsibility.

Two central notions capture what is meant by the “moral point of view”, the ability for rationality¹⁹ and respect²⁰. Rationality from the “moral point of view” is the lack of impulsiveness, the care in mapping out alternative courses of action and consequences, having clarity of goals and purposes, and paying attention to details of implementation²¹. Respect is the awareness and concern for the effects of one’s decisions and policies on others and moves beyond pure rationality. Being respectful requires treating people as ends and not means only²². This requirement for treating persons as ends and not as means is a Kantian idea and is captured in the ultimate goal of creating a kingdom of ends. These two components are indispensable for taking the “moral point of view”. A friend who is rational but not respectful will lie when they are certain they can get away with it, but a friend who is both respectful and rational will not lie to you. (Unless having become a member of the SS I asked that friend whether she was hiding Anne Frank in her attic²³). She weighs her actions rationally and respects other persons and takes care in how her actions impact on others. Someone who is merely respectful but not capable of weighing his or her actions and acting appropriately will not know what actions are respectful and will not be capable of taking the “moral point of view”. We can already see that whatever else a moral agent is, it must be capable of both rationality and respect and hence able to take the “moral point of view”²⁴.

¹⁸ Goodpaster, K. and Matthews, J. B. make use of this term (*ibid.*) and I adopt the same term for the primary sense of moral responsibility in this thesis.

¹⁹ The account of responsibility in this chapter is not meant to intimate any normative theory. Rationality is intimately tied to Kantianism for instance. By rationality and respect I mean merely what any of the normative theories would require as capabilities of moral agents.

²⁰ Goodpaster, K. and Matthews, J. B. *ibid.*

²¹ Goodpaster, K. and Matthews, J. B. *ibid.*

²² Goodpaster, K. and Matthews, J. B. *ibid.*

²³ Kantianism can deal with this objection and it is well dealt with in Korsgaard's paper: “The right to lie: Kant on dealing with evil”. Rachels, J. 1998 **Ethical theory 2: theories about how we should live** Oxford: Oxford University press. Pp 282-304. Unless otherwise noted, when I refer to Korsgaard in this thesis I refer to this paper and use page numbers only.

²⁴ This insight is from Goodpaster, K. and Matthews, J. B. *ibid.*

The relationship between personhood and moral agency is an interdependent relationship or at the very least some form of personhood is a necessary condition for moral agency²⁵. Arguing that a corporation is a person faces a few challenges. The first is overcoming the bias we have of only considering biological human beings capable of making any decisions (moral or otherwise) or of being persons. We do not usually think of other entities as being capable of rational decision-making, respect or moral responsibility. To merely insist on the definition of persons as biological human beings, however, is a form of chauvinism. As Dennett correctly notes:

At this time and place human beings are the only persons we recognize, and we recognize almost all human beings as persons, but on the one hand we can easily contemplate the existence of biologically very different persons- inhabiting other planets perhaps- and on the other hand we recognize conditions that exempt human beings from personhood, or at least very important elements of personhood. For instance, infant human beings, mentally defective human beings, and human beings declared insane by licensed psychiatrists are denied personhood, or at any rate crucial elements of personhood²⁶.

Being a biological human being is thus neither a necessary condition nor sufficient condition for personhood. Again, where are we so far? I claim that some form of personhood is required for being capable of both independent rational decision-making and taking the “moral point of view”, which is in turn a necessary condition for being a moral agent, which is in turn a necessary condition for being morally responsible in any of the senses of moral responsibility. Or to put it another way, all correct attributions of moral responsibility are made to moral agents. All moral agents are entities capable of both independent rational decision-making and taking the “moral point of view”. All of these entities have some form of personhood. Finally, not all persons are biological human beings, but is there any sense of personhood in which a corporation can be a person and hence possibly a moral agent? Answering this primary question will allow me to travel down this conceptual path of necessary conditions, ultimately arriving at the goal of deciding whether corporations can be held morally responsible. Before going down this path we need to know what we are looking for, and to spot whether a corporation can satisfy these conditions, we need to know something about corporations: their

²⁵ The term person is used loosely here; I mean it to be something like an individual, something that can act as an indivisible whole. There will be more requirements added to this in the section on personhood below. What is important though is that the notion of personhood is not co-extensive with biological human beings nor is it co-extensive with moral agents, for not all persons are moral agents.

²⁶ Dennett, D.: 175

history, structure and legal status. Then we can make our first stop on this conceptual path by deciding whether corporations can be morally responsible by investigating whether corporations are persons.

How to spot a corporation²⁷

In this section I first give a functioning definition and brief historical overview of corporations. I follow this with an investigation into the legal intricacies of corporations, what their legal status is, and how attributions of wrongdoing are made to corporations in the law. This latter topic will lead into the philosophical underpinnings of the law and an investigation concerning whether a corporation is more than a legal fiction. Whether attributions of wrongdoing apply to a corporation *qua* corporation in the law and how this culpability should be attributed will involve questions about the nature of corporate personhood. This discussion of the nature of corporate personhood will then begin my answer to the question of whether corporations *qua* corporations can be held morally responsible. It will be the first stop down the conceptual path of necessary conditions.

Shaw and Barry²⁸ define a corporation as an entity that can endure beyond the natural lives of its members. These members can sue and be sued as a unit and are able to consign part of their property to the corporation for ventures of limited liability. Limited liability is central to the modern corporation. It allows the members of the corporation to be liable for the corporation's financial debts only to the extent of their investment in the corporation²⁹. A corporation can hold property and transact, and can incur criminal liability in its own name and on its own account³⁰. A succinct rationale is given for the creation of the corporation by Blackstone³¹:

²⁷ This section draws heavily on the work by Shaw, W. H. and Barry, V. (eds.) 1995 **Moral issues in business** (6th edition) Belmont, California: Wadsworth Publishing Company in their chapter on corporations. My own unique stamp on the material is to argue that the question whether corporations can be held morally responsible is primarily a philosophical rather than a legal question. In the next section I begin to answer the philosophical question of whether a corporation can be morally responsible by arguing that they fulfil the necessary conditions for being held morally responsible.

²⁸ Shaw, W. H. and Barry, V.: 200

²⁹ Shaw, W. H. and Barry, V.: 200

³⁰ Wells, C.: 653 When I refer to Wells in this thesis I refer to her entry "Corporate Responsibility" in Chadwick, R. ed. 1998 **Encyclopaedia of Applied Ethics** London: Academic Press and use only page numbers.

³¹ Quoted in Shaw, W. H. and Barry, V.: 200

As all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impractical; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct³².

The above brings out other features of a corporation besides the legal rationale for their existence. Corporations can be either profit making organizations or non-profit organizations. They may be privately owned or they may be publicly owned by being publicly registered³³.

Corporations began in the middle ages and were more like guilds that had a “newfound mechanism”³⁴ for controlling their right to engage in certain business activities. The origins of the notions of separate personality and the connected development of limited liability can be traced as far back as Roman law and were used to protect municipalities³⁵. In Roman legal tradition persons are “creations, artefacts, of the law itself...”³⁶ According to this tradition, persons only incidentally have any existence outside of the legal sphere and are not necessarily biological persons. The corporation is as such a legal person, and may sit on either side of a legal dispute.

The legal regulation of the corporation and the responsibility attributed to it varies with the area of law involved. There are three areas of law governing the corporation as a legal person, namely corporate law, civil law and criminal law.³⁷

³² Blackstone. 1765. *Commentary on the Laws of England*, 1, 455 quoted in Shaw, W. H. and Barry, V.: 200

³³ Shaw, W. H. and Barry, V.: 200

³⁴ Shaw, W. H. and Barry, V. *ibid.*

³⁵ Wells, C. *ibid.*

³⁶ French, P.: 208

³⁷ Wells, C.: 654

Corporate law is that body of law which deals with such matters as the procedure for being established and functioning as a corporation, and the duties and roles of directors and shareholders. The civil law of obligation -contract and tort- applies equally to corporations as it does to individuals. The attribution of wrongdoing in criminal law is more problematic and raises the same concerns about the status of personhood in legal theory as I here raised with regard to philosophy. Wells notes that this is because:

criminal law is pre-eminently concerned with standards of behaviour enforced, not through compensation, but through a system of state punishment negotiated via standards of fault such as intention, knowledge, and subjective recklessness. Whether and how that system should be applied to corporations thus attracts more controversy than does ascriptions of civil liabilities.³⁸

It is for this reason that the criteria for deciding the criminal responsibility of a corporation creates the same philosophical questions as that of the moral responsibility of corporations³⁹. The reason is that non-human entities are not usually considered capable of having intentions or knowledge or any other subjective mental state. The theoretical basis for the agreement that a corporation is a legally distinct entity has recently been questioned. I now set out how the law has viewed corporations and the theoretical basis on which this view has been informed.

At the outset of criminal and civil cases involving corporations there was an anthropomorphic conception of the corporation. This conception informed legal determinations and the law attempted to treat corporations as far as possible as natural men. This anthropomorphic conception is evident in the nominalist view of attributing wrongdoing to corporations. According to the “nominalist view⁴⁰” attributions of legal wrongdoing cannot be made beyond the level of the individuals who comprise the corporation. On this view blameworthiness and legal responsibility is derivative from the individual employees or employers. A competing view, the “realist view”, is indicative of a shift in the law away from the anthropomorphic conception of the corporation. On the “realist view” the corporation may incur culpability that is beyond the culpability of the individuals who comprise it. This view takes it that there are other avenues for attribution of culpability beyond the level of the

³⁸ Wells, C.: 654

³⁹ The criteria for criminal responsibility should match those of moral responsibility. Reasons for this will become clear later. A useful discussion of this topic can be found in Duff's entry on responsibility.

⁴⁰ Both the terms “nominalist view” and “realist view” are used in Shaw, W. H. and Barry, V. *ibid.*

individual. At the base of this theoretical disagreement is the question whether a group can be regarded as an individual in the sense of an indivisible whole for which attributions of wrongdoing make sense. The law cannot answer this question; a study of legal statutes and theory will only answer how the law has dealt with this pressing issue. Philosophical investigations can aid the law in clarifying this issue. It is for this reason that I describe the question as primarily a philosophical question with legal ramifications. Whether the law treats a corporation as an entity capable of being attributed wrongdoing will not settle whether it is the correct philosophical view to take towards attributing responsibility to corporations. That it is practically and legally efficient to attribute blame in this way will not settle the philosophical questions. Before answering these philosophical questions, I set out what legal theorists have said about this issue.

In the law, corporations “traditionally fell with animals, children and the insane as non-accountable.⁴¹” This was as a result of the presupposition in law that corporations were incapable of rationality and autonomy and that these were necessary for fault attribution. The rationale behind the criminal law having the requirements of rationality, autonomy and subjective mental states such as knowledge, intention and recklessness, for attributions of fault and wrongdoing is the desire of the law to hold persons accountable for more than their bodily movements. When a prosecutor prosecutes Janet, she would have to prove that Janet herself recognised that her actions would inevitably lead to her grandmother’s death (intention); that Janet herself was aware of the fact that pushing her grandmother into the freezing cold would kill her (knowledge); or that Janet herself was aware that pushing her grandmother into the freezing cold might have the result of killing her grandmother or that the temperature might have been cold enough to kill her grandmother (recklessness). That Janet either accidentally pushed her grandmother or intentionally pushed her creates two different fault attributions for the same bodily movements. The law has found it useful to locate the additional feature, beyond one’s bodily movements, in mental states of persons. This makes attributions of responsibility at the level of the corporation *qua* corporation a difficult procedure. The condition of rationality requires that the subject of attributions of wrongdoing be capable of acting for reasons and that those reasons should both rationalise the action and causally explain it. The condition of autonomy requires that the agent have control over his or her own body. Someone who acts under duress would not be acting autonomously. This

⁴¹ Wells, C: 656

approach draws a link between fault ascription, autonomy and ultimately bodily movements of human bodies and thus excludes corporations at the outset. To summarise, this problem for legal theory is a philosophical problem and is derived from two philosophical assumptions: first, that rationality and autonomy are preconditions for attributing wrongdoing⁴², praise or blame; and second, that corporations cannot fulfil these requirements. These philosophical presuppositions have been raised in legal theory and three philosophically informed mechanisms for establishing corporate responsibility have made their debut at different times and in different legal judgements. I will set them out and argue that there is a lacuna in any legal account of responsibility attributions that can only be filled by a philosophical account of the nature of corporate personhood and moral agency. This philosophical account, I argue, is available and allows for responsibility attributions grounded in the moral agency of the corporation *qua* corporation. I set out these three mechanisms and later in this chapter, under the subsection on personhood, argue that “systems theory” presupposes the most defensible account of the nature of corporations as moral persons and is the most suitable for attributing wrongdoing to corporations *qua* corporations.

The three different mechanisms for establishing corporate culpability that have functioned in legal theory are “vicarious liability⁴³”, “alter ego (identification) theory”, and “holistic approaches” of which “aggregation”, “systems theory” and “reactive fault” are all forms of this latter mechanism⁴⁴.

To render a corporation “vicariously liable” an employer or principle is liable for the acts of any employee so long as the conduct of that employee is within the scope of the individual’s employment or authority. This mechanism for establishing corporate culpability only allows

⁴² Three lines of argument have surfaced to refute this legal rendition of the conditions for fault ascriptions. These arguments are philosophical in nature and question the philosophical presuppositions on which the legal theory of fault attribution is built. The first argument claims that these two conditions for fault ascription are the result of the quirks of history, culture and language. As Wells summarises “deploying the descriptive language of an individualist rationality and autonomy will inevitably limit the debate that should be conducted at a different level. A more useful notion than autonomy might be that of a unified actor or decision-maker.” Wells, C.: 656. The second argument is Hegelian and questions the assumption of their existing isolated actors as paradigms for fault ascriptions. This theory questions the existence of independently rational and autonomous agents. Rather, actors should be seen as products of their social context, thinking not as individuals but rather reflecting the logic of their social context. If Hegel is correct, the argument goes, the distinction between individuals and corporations is not as great as many have thought. Finally, a third line of philosophical reasoning attacks the requirement of mentalism and autonomy for fault attribution.

⁴³ The terms “vicarious liability”, “alter ego”, “identification theory”, “holistic approaches”, “aggregation”, “systems theory” and “reactive fault” are all used by Wells, C. (*ibid.*) and I also use them in this thesis.

⁴⁴ These three mechanisms are extensively discussed by Wells, C. (*ibid.*). What I present here is a brief exposition of her work in this area, for a more in depth discussion of these issues see Wells, C. (*ibid.*).

for liability if it flows through some individual. Another theory that is of the same form in ultimately investing the liability of the corporation in some individual is the “alter ego” or “identification theory”. This form of responsibility arose from the acceptance by the courts that corporations could commit serious offences. “Alter ego theory” identifies certain key personnel as the corporation and they act as the corporation as opposed to “vicarious responsibility” where the person acts on behalf of the corporation. This view holds a version of the anthropomorphic approach and certain persons are seen as the “hands⁴⁵” and certain persons as the “brains⁴⁶” of the corporation; this latter group allowing attributions of criminal wrongdoing that have historically required proof of some mental element such as knowledge, intention or recklessness. This approach and the rationale for it is given by Viscount Haldane⁴⁷,

[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.⁴⁸

The problems for identification theory can be seen in cases where culpability arises from neglect. If a corporation is held accountable for the death of a person due to a failure in having safety standards (e.g. a Chernobyl type accident), this may be a direct result of there being no person who occupies a position responsible for safety. This restriction of identification theory would make it impossible to convict the corporation, as there would be no person in the upper management who could be identified with the blame. This is a problem for both “vicarious” and “identification liability”, where the individual company employee can be prosecuted in her own right but the company can only be liable if fault is found in at least one individual biological human being. The problems for this view are cogently summarised by Fisse and Braithwaite⁴⁹:

⁴⁵ Wells, C., *ibid.*

⁴⁶ Wells, C., *ibid.*

⁴⁷ Quoted in Wells, C.: 658

⁴⁸ 1915 Lennard’s Carrying Co Ltd v Asiatic Petroleum Co. Quoted in Wells, C.: 658

⁴⁹ Quoted in Wells, C.: 658/9

[The Tesco⁵⁰] principle is highly unsatisfactory mainly because it fails to reflect corporate blameworthiness. To prove fault on the part of one managerial representative of a company is not to show that the company was at fault as a company but merely that one representative was at fault. ...This compromised form of vicarious liability is doubly unsatisfactory...it is difficult to establish corporate criminal liability against large companies. Offences committed on behalf of large concerns are often only visible at the level of middle management whereas the Tesco principle requires proof of fault on the part of a top-level manager. By contrast, fault on the part of a top-level manager is much easier to prove in the context of small companies. Yet this is the context where there is usually little need to impose corporate criminal liability in addition to or in lieu of individual criminal liability⁵¹.

What this quote reflects is a need in the criminal law to capture the “ ‘corporateness’ of corporate conduct⁵²” Instead they reduce corporate conduct and attributions of responsibility to the individuals within the corporation. Attempts to capture this “corporateness” have led to “holistic” approaches of attributing corporate wrongdoing. The three theories that predominate here are “aggregation”, “systems theory”, and “reactive fault”, and all of them attempt to be non-derivative from individual responsibility.

“Aggregation theory” does not locate or identify responsibility in any one echelon of management but rather diffuses responsibility throughout the corporation as a result of the diffused and highly specialised way in which knowledge is distributed throughout the corporation. On this view no one individual has access to all the knowledge and thus the corporation, as a whole, is responsible. Celia Wells (ibid.) correctly notes two difficulties with this theory that make it untenable. First, it fails to capture the “corporateness” of corporate responsibility. It still relies on the individuals within the corporation even though it does this by spreading the responsibility throughout the individuals within the corporation. Its usage of knowledge represents an incomplete shift to “corporateness”. It also depends on a fiction that if person A knows p and person B knows q then the corporation knows p and q. As Wells notes: what is needed is rather “a scheme of corporate responsibility that looks further than

⁵⁰ The Tesco principle is named after the court case: *Tesco v Natrass* (1972) and it is the principle that employs the “identification theory”. It is dealt with in Wells, C.: 658

⁵¹ Fisse and Braithwaite 1993: 47 quoted in Wells, C.: 658/9

⁵² Wells, C.: 659

the individual (atomised or aggregated) to the corporation *qua* corporation”.⁵³ “Systems theory” shifts corporate responsibility to the internal decision-making structure and corporate culture of the corporation itself. This view of corporate responsibility is in the Australian Criminal Code act of 1995:

Under the code, knowledge or recklessness will be attributed to a body corporate whenever it expressly, tacitly or impliedly authorised or permitted the commission of the offence. Such authorisation or permission may be established, inter alia, where its culture encourages situations leading to an offence. “Corporate culture” is defined as an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred. Thus evidence of tacit authorisation or toleration of non-compliance or failure to create a corporate culture of compliance will be admissible⁵⁴.

This theory implicitly presupposes that attributions of corporate responsibility are justified. It points to features of the corporation itself. Thus, this theory reflects the conviction that a corporation *qua* corporation may be held responsible beyond the responsibility of the individuals within the corporation. It is only defensible to the extent that such attributions of responsibility are philosophically justified. The “corporateness” of the corporation is captured by its culture, decision-making structure, policies, rules and defined roles of employers and employees.

Lastly I mention “reactive theory”, as it typifies the pragmatic approach in legal theory that does not resolve the philosophical problems of attributing responsibility to corporations *qua* corporations but only gives a useful legal mechanism for such attributions. Although it too presupposes that corporations *qua* corporations may be held responsible I argue that this theory only solves legal problems and not philosophical problems. This approach shows clearly how the legal notions of personhood will not be relevant for my discussion of whether corporations *qua* corporations may be held morally responsible. “Reactive theory” infers fault when a corporation does not take remedial steps in response to some harm causing-act or omission on the part of its employees. Wells (ibid.) notes three legal advantages gained from this approach: it avoids the problem of proving antecedent fault; it gives corporations the opportunity for remorse and rehabilitative measures; and it introduces a forward looking dynamic into the problem of corporate harm.

⁵³ Wells, C.: 659

⁵⁴ Wells: 659

Celia Wells notes the strengths of this theory but the problem with this theory is that it sidesteps whether the corporation was responsible for the initial offence. I rather view it as a weakness that the theory “avoids the problem of proving antecedent fault.” On this view responsibility means learning from one’s past mistakes. This is not a useful answer to whether the corporation should be held morally responsible; it merely claims that corporations are obliged to correct past indiscretions. This is not useful when we want to hold a corporation responsible in the first instance. If a corporation creates a Chernobyl we want to hold the corporation responsible for that act and not merely their consequent rehabilitative actions or lack thereof. This mechanism for attributing responsibility cannot justify why the corporation *qua* corporation should display remorse or perform rehabilitative acts if no antecedent fault can be ascribed. It is for this reason that I consider this a legally pragmatic response that still requires an initial attribution of fault to the corporation *qua* corporation that needs to be justified by corporations being the right sort of things to be held morally responsible.

Having set out a definition of a corporation, the nature of its legal personhood, how the law attributes wrongdoing to the corporation, and why a legal account needs a philosophical account of whether the corporation *qua* corporation can be correctly attributed moral responsibility, I now pursue such a philosophical account. We are now ready to investigate whether a corporation can meet the first of the necessary conditions for moral responsibility.

First Step: Personhood⁵⁵

The concept of personhood can be divided into three separate notions: legal, metaphysical and moral personhood. These three senses of personhood are generally accepted in the literature⁵⁶. It is the relationship between these three that is contested. Are the three interdependent, identical or distinct? Is legal personhood or metaphysical personhood, or both, necessary for moral personhood?

⁵⁵ This section draws heavily on the paper by Dennett, D. in Rorty, A. O. (ed.) 1976 *The Identities of Persons* London: University of California Press, Berkely pp 175-195. My own unique stamp on the work is using Dennett’s necessary conditions for personhood and showing how a corporation can satisfy these conditions I do this by extending the argument of French, P. in his 1998 article “The corporation as moral person” in *American Philosophical Quarterly* 16, January 1998, pp 207-215. I do this before showing how it makes sense to say that a corporation can and should take the moral point of view and is thus a moral agent capable of being held morally responsible.

⁵⁶ Dennett, French, Shaw, W. H. and Barry, V. *ibid*.

I have already shown how a corporation is a legal person, and why this is neither a necessary nor sufficient condition for metaphysical or moral personhood. The above legal interpretations of the correct way to attribute responsibility to corporations *qua* corporations require philosophy to discover what the metaphysical and moral status of corporations are. Peter French⁵⁷ sets out different views of the relationship between these three notions and I have argued in support of his conclusion that the legal notion of personhood is completely irrelevant for deciding whether a corporation, or any entity for that matter, is a metaphysical or moral person. His reasons supplement mine, namely that the law recognises a subject of a right and an administrator of a right, and that the subject and administrator of the rights need not be co-extensive. Cases where they are not are infants and the deceased, who are subjects of rights but not able to administer them. For this reason, legal personhood is ineffective in settling whether a corporation is a mere possessor of a right or whether it can also administer such a right. The latter is required for moral personhood. I also agree with his conclusion that metaphysical personhood is not a precondition for moral personhood but rather that the relationship between the two should be seen as an interdependent relationship. As Dennett claims, “The moral notion of a person and the metaphysical notion of a person are not separate and distinct concepts but just two different and unstable resting points on the same continuum.” (1969:193) Following French⁵⁸ I argue that we should treat corporations as metaphysical persons *qua* moral persons. Let us first get the three notions of personhood clear.

I have said enough by way of laying out what a legal person is, why a corporation is a legal person, and why this does not settle whether it is a metaphysical or moral person.

Metaphysical personhood is a more difficult notion. Although we use the notion of person to describe each other we have not as yet arrived at all the necessary and sufficient conditions for deciding whether an entity is a person. Daniel Dennett in his paper entitled “Conditions of Personhood⁵⁹” presents an enlightening discussion on the metaphysical notion of personhood and its relationship to moral personhood. I set out his account as it is essential to French’s position, which I support, that corporations can satisfy the conditions for being a moral agent.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ pp. 175-196

At the basis of French's argument for treating corporations as metaphysical and moral agents is the idea that there is a logical difference between a mere mob that is nothing more than the sum of the individual members and a structured corporation. This logical difference, brought about by the corporation's internal decision making (CID) structure, entitles French to argue that corporations meet the requirements for being treated as an Intentional system and hence as capable of moral agency and hence capable of being morally responsible. What are Intentional systems and how does the corporation's CID structure justify attributing metaphysical *qua* moral agency?

I now set out Dennett's necessary requirements for metaphysical and moral personhood and show how the CID structure, building on French's account, can satisfy them. This will lead into the next section (Second Step: The "moral point of view") on how a corporation can be said to take the "moral point of view" and hence can act as a moral agent (*qua* corporation) and be morally responsible.

Dennett's six conditions of personhood are: first, that the entity be a rational being; second, that the entity be something we can attribute conscious mental states to (an Intentional system); third, that the entity be the object of a certain stance; fourth, that this entity be capable of reciprocating this stance; fifth, that it be capable of communication; and sixth, that the entity be in some special way conscious. Once the conditions are fleshed out I will, building on French's account, show how corporations can satisfy all of them. First Dennett sets out the relationships between the requirements. The first three are mutually interdependent: "being rational is being Intentional is being the object of a certain stance."⁶⁰ These three mutually interdependent conditions form a necessary but not sufficient condition of reciprocity that is in turn a necessary but not sufficient condition for having the capacity for communication, which is in turn the necessary condition for having a special sort of consciousness. So the task is to set out what these conditions are, see how the requirements are related to each other and to moral personhood attribution, and to argue that a corporation can fulfil these requirements because of their CID structure.

The first three are mutually independent and are captured by Dennett's conception of an Intentional system. Briefly, an Intentional system is a system whose behaviour can sometimes

⁶⁰ p. 178

be predicted by ascriptions of beliefs and desires such as hopes, fears, perceptions, expectations etc.⁶¹ An Intentional system being predicted in this way does not exclude other methods of prediction, especially when the Intentional stance fails. When this occurs a mechanistic or physicalist explanation may yield better results in predicting the systems behaviour. The class of Intentional systems is very large, and includes chess computers, plants growing towards the light, or a dog fetching a ball. The group of Intentional systems is larger than a group of persons and is thus not a sufficient condition for being a person. Are corporations Intentional systems?

Ascribing Intentions to corporations is an effective predictive tool. When a corporation raises its prices it makes sense to say that the corporation has the goal of increasing profits and believes that raising prices will do this. When there is an economic recession we can predict that the corporation will retrench workers. We take the Intentional stance towards the corporation and say that it knows that there will be less income generated through consumer spending and that it believes it can maintain profitability by becoming more efficient and by reducing expenses on salaries and wages. For this to be an Intentional stance towards the corporation *qua* corporation it cannot just be shorthand for taking the Intentional stance towards the biological persons within it. Obviously corporations act by biological persons acting, thus any description of the corporate act will have a description under which it is biological persons who act. Given this fact, what entitles taking the Intentional stance towards the corporation *qua* corporation?

French argues that it is the CID structures that license taking the Intentional stance towards the corporation *qua* corporation. CID structures are constitutive rules that operate by mapping the interdependent and dependent relationships, responsibility flow-charts, corporate decision recognition rules, and policies that determine corporate (*qua* corporate) decisions and actions⁶². They allow for descriptive transformations of individual biological actions and intentions. Corporate actions thus become “referentially opaque⁶³” with respect to other descriptions of the same event. This “referential opacity” allows us to distinguish between the individual’s intentional actions and the corporation’s intentional actions. So if Janet were a member of a corporation that specialised in the killing of the elderly, say a euthanasia

⁶¹ Dennett, D.: 179

⁶² French, P.: 213

⁶³ French, P. uses this term in his paper (*ibid.*). I use the same terminology in this thesis.

corporation, and the corporation had a CID structure that allowed for the act of killing her grandmother to be recognised as a corporate act, then there would be two intentional descriptions of the same event. The first would be that the corporation intended to kill Janet's grandmother⁶⁴ and the second would be that Janet intended to kill her grandmother. French summarises:

Simply, when the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional⁶⁵.

Having argued that corporations *qua* corporations are Intentional systems, this puts them in the same category as chess computers, plants and animals in being able to predict their behaviour by taking the Intentional stance. We need to move beyond this point to establish personhood (metaphysical or moral).

The second condition is reciprocity and is the ability of an Intentional system to exhibit higher-order intentions such as believing that some or other Intentional system believes that p or that another Intentional system desires that q or fears that s. These Intentional systems are called by Dennett second-order Intentional systems. This group will include certain human beings and certain animals, for instance the low-nesting bird that feigns a broken wing to deceive a predator. In this example, although the bird's action is "instinctual", the requirement for the bird to be deemed a second-order Intentional system is not that it runs through the "conscious thoughts" of deception. As Dennett argues, "it is far from clear that all or even any of the beliefs and other Intentions of an Intentional system need be *represented* "within" the system in any way for us to get a purchase on predicting its behaviour by *ascribing* such Intentions to it"⁶⁶. It is not required that second-order Intentional systems have the Intention represented in any "thought" or "minds"⁶⁷

A corporations can act reciprocally and it makes sense to ascribe second-order intentions to it such as when it tries to convince people that no serious harm was done by an environmental disaster. When it does this it treats other entities as Intentional systems. Again its acting in

⁶⁴ This supposing that a part of the CID structure was to choose a specific elderly person.

⁶⁵ French, P.: 213

⁶⁶ Dennett, D.: 185

⁶⁷ Dennett, D.: 185

this way will be based on the CID structures and be “referentially opaque” with regard to other descriptions of the act. At this point in the chapter I have shown how a corporation *qua* corporation may be considered both an Intentional system and a second-order Intentional system that is capable of treating other entities as Intentional systems. I now show that it can satisfy the other conditions of personhood as well.

In exploring what the fifth requirement is Dennett turns to Grice’s theory of non-natural meaning. This theory of meaning has the central feature of requiring a third-order Intentional system. According to this theory of meaning some Intentional system (*A*) means something when it has the third-order Intention that some other Intentional system (*B*) (the audience) recognise that *A* intends that *B* produce a certain response *p*. *A* must be a third-order Intentional system and there must be some encounter or mutual recognition as in reciprocity⁶⁸. Grice’s theory of meaning is useful in answering such questions as “do we communicate with a machine using Fortran?”⁶⁹ Dennett claims that at present we are unable to and the reason for this is that, “Achieving one’s ends in transmitting a bit of Fortran to the machine does not hinge on getting the machine to recognise one’s intentions”⁷⁰. I argue that a corporation is a third-order Intentional system. It makes sense to say that the corporation intends that the consumer recognise that the corporation intends the consumer to produce a certain response *p*, where *p* could be that the consumer believe a piece of public relations material, or that the consumer recognise that the corporation intends developing a new product line, or lowering their costs or instituting new labour laws etc. In this sense it makes sense to ascribe third order intentions to corporations *qua* corporations and to say that they do communicate. The previous five conditions do not require consciousness. They do play a role in ethics, and showing how they play a role will introduce consciousness, the sixth requirement for personhood, as a necessary condition for moral personhood.

In Rawls’s theory of justice, entities in the “original position” are rational and self-interested and capable of making calculations “under certain constraints about the likely and possible interactive effects of their individual and antagonistic interests (which will require them to frame higher-order Intentions, for example, beliefs about desires of others, beliefs about the

⁶⁸ This is why reciprocity is a necessary condition for communication.

⁶⁹ Dennett, D.: 193

⁷⁰ Dennett, D.: 193

beliefs of others about their own desires, and so forth)”⁷¹ This is analogous to the chess computer deciding on the best move to make given certain constraints and the most rational move given that the other agent is playing rationally. These entities are rational calculators and thus their outcomes are intrinsically normative and this makes justice the norm of interpersonal interactions. Justice on this view becomes the inevitable result of personal interaction. As Dennett notes:

To recognise another as a person one must respond to him and act towards him in certain ways; and these ways are intimately connected with the various *prima facie* duties. Acknowledging these duties in some degree, and so having the elements of morality, is not a matter of choice or intuiting moral qualities or a matter of the expression of feelings or attitudes...it is simply the pursuance of one of the forms of conduct in which the recognition of others as persons is manifested⁷².

When we interact with other persons moral considerations develop. In our interactions with other persons, we will respect, be indifferent to, or disrespect them, given the nature of personal interactions⁷³.

Although morality is derived from the interaction of these entities it is not presupposed that these entities are moral persons merely that they are rational calculators. The question of when and why we have the right to hold persons morally responsible has not yet been settled and answering this introduces the sixth condition, namely consciousness. This condition requires that if I am going to hold Janet responsible for some action x (where x is a behaviour: e.g. pushing her mother into the cold, under some description, killing her grandmother) Janet must be aware of that action, pushing her grandmother into the cold, under that description, killing her grandmother. If Janet is unaware of her behaviour under that description she cannot say why she did that action under that description. She cannot say why she pushed her mother into the cold to kill her. If this is the case she is not in a privileged position to justify the action of was pushing her grandmother into the cold, as she is ignorant of the description of that act as murder. Thus, she cannot enter the question-and-answer game of giving reasons for her actions. If Janet is not in a privileged position to justify her action under the description of killing her grandmother, then there is no reason to ask Janet rather than anyone

⁷¹ Dennett, D.: 190

⁷² Dennett, D.: 191

⁷³ Putting aside the logical possibility of us all being omnipotent, omniscient beings which would make it impossible to kill each other or lie to each other.

else⁷⁴. Thus it is necessary for ascriptions of moral responsibility that “only those capable of participating in reason-giving can be argued into, or argued out of, courses of action or attitudes, and if one is incapable of “listening to reason” in some matter, one cannot be held responsible for it”⁷⁵ Thus being a reason-asker and persuader are necessary conditions for moral responsibility to apply, and this moves persons from being mere communicators to being entities cable of adopting attitudes towards themselves. This is intimately tied to Frankfurt’s requirement that persons be capable of second-order volitions, where one adopts the attitude of wanting to have a certain desire. It is this “reflective self-evaluation” that is a key ingredient in our conception of moral personhood. That is, there is a distinction between freedom of action and freedom of the will and the latter is a capability of moral persons. Although we may be responsible according to Frankfurt-type counter-examples for cases even when we don’t have freedom of the will, it must still be true, for us to be the correct objects for attribution of responsibility, that we are capable of wanting to have certain first order desires, i.e. capable of second order volitions. Non-human animals, small children and defective human beings all fail to meet this condition and are referred to as ‘wantons’ and are those “who have first order desires but...no second-order volitions.”⁷⁶ That this condition excludes small children and certain mentally deranged persons, like psychopaths, means that it is not strictly speaking a necessary condition for personhood in general. We do consider young children and psychopaths as persons but not as moral persons. It is for this reason that metaphysical and moral personhood should rather be seen, as Dennett suggests, as different unstable points on a continuum. I argue that a corporation can fulfil the sixth condition. A corporation can take the objective attitude towards itself, it can have reflexive policies such as public relations policies that require it to develop new desires when changes in fashion occur, or new profit goals when the market changes, or desire a different segment of the market when economic demographics change. In none of this talk has the phrase “actually have the desires or intentions” been used. A possible line of attack would be to say that although corporations meet all the necessary condition for personhood they don’t “actually have” personhood, or that they are not the right sort of entities for being persons. The first answer to this objection would be that the condition of “actually having” mental states puts into doubt whether other people or myself “actually have” these mental states. This requirement is too strong. Second, and I think this is partly the reason why someone would make the first

⁷⁴ Dennett, D. *ibid*

⁷⁵ Dennett, D.: 191

⁷⁶ Dennett, D.: 192

objection, in denying that corporations are not the right sorts of things to be considered persons one is exhibiting the anthropocentric bias.

The second condition, namely that we take the Intentional stance towards an entity, implicitly acknowledges that treating an entity as a person is in some way and to some extent constitutive of its being a person.⁷⁷ Personhood is to some extent an attitude we take towards something that is guided by our emotions, aesthetic sensibilities, considerations of policies, but can be more refined by using the above necessary conditions. To exclude corporations from being persons is to unnecessarily and unjustifiably make persons co-referential with a biological entity, human or otherwise.

To summarise, being an Intentional system is a necessary condition for being able to treat other systems as Intentional systems, which is a necessary condition for being capable of communication, which is a necessary condition for consciousness because of the ability for reason-asking and persuading, which is a necessary condition for being a moral person. I have argued that corporations *qua* corporations are capable of fulfilling these requirements and that it thus makes sense to talk of corporations as Intentional systems that act reciprocally, communicate, and have second-order volitions indicative of the ability to treat themselves as an object of their own will, and thus have a form of consciousness. They thus meet the requirements for being moral persons. I now argue that it is not only a conceptual possibility for corporations *qua* corporations to be moral agents but that they are capable of taking the “moral point of view”, that some corporations do take the “moral point of view” and that others do not. The ability for corporations *qua* corporations to take the “moral point of view” has already been argued for by arguing that they can meet Dennett’s six requirements and that they are Intentional systems showing their intentions through their CID structures. For this reason it makes sense to talk about corporations that do and do not take the “moral point of view”.

⁷⁷ Dennett, D.: 178

Second Step: Taking the “moral point of view”⁷⁸

I have argued that a corporation *qua* corporation fulfils the requirement for being considered a person; some may think that this is enough to show that they may be held morally responsible. Certainly, the final condition of having second order volitions seems sufficient for moral personhood. I take it that I have only proven the weaker claim that corporations *qua* corporations have met the necessary requirements for entry at some level on the continuum of metaphysical and moral personhood. I have not yet shown that they are at a level on the continuum whereby we can consider them full-blown moral agents, even though this point on the continuum is unstable itself. Having shown that a corporation is some sort of person does not go far enough. Not all persons are moral agents. Psychologically disturbed persons, children, and the mentally handicapped are all considered persons but are not considered moral agents. Although one should treat them with respect they are not held morally responsible if they do not show the same respect or moral attributes to others. These people are deficient because they are incapable of taking the “moral point of view”. Their ability to make independent rational decisions or of having respect is in some way diminished so that we exculpate them from moral responsibility. Although they have some form of consciousness⁷⁹ and are able to communicate and fulfil the other conditions of personhood set out by Dennett they are still not held morally responsible. Thus, corporations could be persons and still not morally responsible; they could still be treated like young children, mentally handicapped persons or psychologically disturbed persons. This section argues that corporations may have CID structures that are capable of reflecting independent rational decision-making and respect and thus we may ascribe taking the “moral point of view” to corporations *qua* corporations. In the Goodpaster and Matthews paper, “Can a corporation have a conscience?⁸⁰”, they argue for an analogy between a person and a corporation and are

⁷⁸ This section draws heavily on the “moral projection” argued for my Goodpaster, K. and Matthews, J. B. in their 1982 paper: “Can a corporation have a conscience?” in *Harvard Business Review* 60, January-February 1982, pp 132-141. My own unique stamp on the material is that I argue their “moral projection” cannot justify attributions of moral responsibility without first showing that corporations are moral agents. I argue that they are moral agents because they satisfy the necessary conditions for being a moral agent. One of these conditions that they satisfy is that they are persons.

⁷⁹ Perhaps not the strong sense required by Frankfurt, but none of us fulfil this at all times. We all have weakness of the will and we all have certain aspects of our motivational structure that we are incapable of changing. In these areas we are very much like a wanton.

⁸⁰ *Ibid.*

interested in knowing whether it is meaningful to apply moral concepts to actors who are not persons but who are instead made up of persons. I have already argued that corporations *qua* corporations can be considered persons and thus their position is strengthened by my above arguments. They argue that given the similarities between a human moral agent and a corporation we may justifiably project moral responsibility onto the corporation. Thus, they ultimately argue that it makes sense to speak of a corporation taking the “moral point of view” and as such should be held morally responsible in a manner analogous to how we hold human agents morally responsible. I set out their account and argue that their insight in projecting the “moral point of view” and hence moral responsibility onto the corporation is correct, but that there is a lacuna in their account. This lacuna is a need for a justification for their ascriptions of moral responsibility to the corporation *qua* corporation that is not merely justified by its usefulness. Their account, as with the mechanisms for attributing wrongdoing in legal theory above, needs a justification for attributions of moral responsibility that are grounded in corporations *qua* corporations being the right sort of things to be attributed moral responsibility. This requirement on their account is an outcome of my assertion that correctly attributing moral responsibility is a sufficient condition for concluding that the entity held morally responsible is a moral agent. This lacuna is filled by my above discussion of how corporations *qua* corporations meet the requirements for being persons. Thus, I use Goodpaster and Matthews’s account to show that corporations *qua* corporations are capable of taking the “moral point of view” as their lacuna has been filled in this thesis. This section will set out their argument for why a corporation can be said to take the “moral point of view” and I will show how such a “moral point of view” can be instantiated in the CID structure of a corporation.

Goodpaster and Matthews begin their arguments for the projection with an observation of how different corporations act. They state:

As a matter of course, some corporations attend to the human impact of their operations and policies reject operations and policies that are questionable. Whether the issue be the health effects of sugared cereal or cigarettes, the safety of tyres or tampons, civil liberties in the corporation or the community, an organization reveals its character as surely as a person does⁸¹.

⁸¹ p. 136

It is this fact that corporations are capable of having CID structures that institutes rationality and respect within the corporation that justifies the claim that corporations are capable of taking the “moral point of view”. Take for example two different corporations both setting out to build a factory on some piece of land. The one corporation has a policy of having environmental impact studies done and employs someone to fulfil this role. They perform the environmental study and discover that alterations will need to be made to their plans to produce a less hazardous effect on the environment. The CID structure is such that this environmental impact study results in the needed alterations to the factory’s construction being made. The second company has no such CID structure and although the environmental impact will be devastating and avoidable they do not make any alterations to their proposed building plan. We can say that the first company exhibited the “moral point of view” and that the other did not. Even though the first company did take the “moral point of view” and the other did not, both are capable of taking the “moral point of view”. The fact that the second corporation did not have a CID structure does not show that the corporation is incapable of creating such a structure. Although mentally deficient persons and infants are incapable of taking the “moral point of view”, this is not the case with a corporation. A corporation is capable of taking steps to alter its CID structure to reflect rationality and respect⁸². At this point I have argued that corporations *qua* corporations are Intentional systems and meet the requirements for personhood. I have argued that their CID structures can reflect rationality and respect, that certain corporation’s CID structures reflect this “moral point of view” and that others do not. They thus meet the requirements for being moral agents and hence being morally responsible.

It is not so obvious that corporations should take the “moral point of view”, and many people have argued against corporations pursuing any goals besides profit seeking. Milton Friedman is a prime example. In the next section I argue that corporations are not only capable of taking the “moral point of view” but should take it, and are thus members of the moral community of which we expect rationality and respect. It is for this reason that I argue they are moral agents. I thus define a moral agent as an entity that, besides being capable of taking the “moral point of view”, is required to take the “moral point of view”⁸³ and is thus a member of the moral

⁸² This final point adds an extra justification for a corporation being capable of Dennett’s (*ibid.*) sixth requirement of being able to act on oneself as an object, i.e. some form of consciousness.

⁸³Unless otherwise noted, when I refer to Anscombe I refer to her chapter in Crisp, R. and Slote, M. 1997 *Virtue ethics* Oxford: Oxford University Press and use page numbers only. I accept Anscombe’s: 26-44 criticisms of the

community of other entities that are both capable of, and required to take, the “moral point of view”.

Third Step: Moral agency

French claims, “moral responsibility relationships hold reciprocally and without prior arrangement among all moral person”⁸⁴. If I am correct that moral persons are persons that are both capable of taking the “moral point of view” and also required to take it then this claim by French makes sense. If all moral agents are required to take the “moral point of view” then reciprocal moral responsibility relationships would exist among all moral agents (as French notes). Furthermore, we do expect moral persons to act in ways that show respect and rationality and we hold them morally responsible if they do not show such rationality and respect, and only exculpate them if it was impossible for them to do so. This gives further backing to my claim that moral agents are persons who are both capable of taking, and who are required to take the “moral point of view”. Also, an agent capable of taking the “moral point of view” that we consider a moral agent is not excused from moral responsibility if they use the excuse that they performed the act without taking the “moral point of view”. If Janet were to say that she should not be held morally responsible for killing her grandmother because she didn’t really think rationally about killing her grandmother or didn’t really respect her grandmother, these would not excuse her. Janet is expected to take the “moral point of view” and hence is a member of the moral community of reciprocal moral responsibility relationships. We require her to take the “moral point of view”, and this requirement on her is constitutive of her being a moral agent. In this section I reject arguments purporting to show that corporations are not required to take the “moral point of view”, and hence would not be moral agents. These arguments have a narrow view of corporate responsibility whereby the only concern of the corporation is to make a profit and obey

normative ought without a lawgiver such as a deity, but the insight I gain from her is the same as that French, P.: 211. gains. That is, if I make a promise the other person should expect me to keep it. In French’s words “...for someone to legitimately hold someone else responsible for some event there must exist or have existed a responsibility relationship between them such that in regard to the event in question the latter was answerable to the former.” And continuing, “...moral responsibility relationships hold reciprocally without prior arrangement among all moral persons.” I will soon explain how my definition of a moral agent as something that is required to take the “moral point of view” makes this claim explicable.

⁸⁴ French, P.: 211

“common decency”⁸⁵ and the law. Given that no arguments exist why they should not be required to take the “moral point of view”, I then set out why they should be required to. Having argued that corporations *qua* corporation are capable and should take the “moral point of view” I conclude that they are moral agents.

Milton Friedman: The very invisible hand

One powerful argument for corporations not taking the “moral point of view” can be found in Milton Friedman and is referred to as the “invisible hand” argument, which is the belief that the power of market forces will moralise business. According to this view it is not advisable for corporations to pursue any goal, moral or otherwise, that is not related to the goal of increasing profits. Adam Smith claimed that if each person in a free-market economy pursued their own economic interests we would be led by the “invisible hand” to promote the general good. Milton Friedman agrees that the pursuance of profit by corporations is the most utility maximising and most likely to promote the overall good. If business were to base its policies and activities on anything besides profit making, so the argument goes, it would politicise business and hamper its ability to fulfil its true function of providing material goods for consumers. Corporations should only actively promote social welfare, environmental issues and other ethical concerns only insofar as these will result in improved corporate efficiency. This argument still implicitly allows for corporations to be praised or blamed, but only for performing or not performing this economic role. There are numerous problems with this view. First, the economic context in which the model was built no longer exists. The theory was developed in an economy where parties in the exchange were roughly equal. The modern corporation is nothing like the self-sufficient farmers and craftspeople of Adam Smith’s time. Second, the empirical evidence shows that the “invisible hand” has not been promoting the common good, but rather making the gap between the rich and the poor ever greater. The “invisible hand” is also less harsh on corporations during an economic downturn than those discriminated against: unskilled people, members of minority groups, women, the aged, the infirm, the poor and the environment. The ultimate reason that this argument fails is that the underlying assumption that market forces or the “invisible hand” will moralise society is wrong. Corporations left to their own devices will enrich themselves while impoverishing

⁸⁵ This term is exceptionally vague, and if fleshed out may be broad enough to require corporations to take the “moral point of view”. Authors who use the term “common decency” think it to be narrower, and do not think that it requires taking the “moral point of view”. I will not argue for this intuition here. An example of someone who uses this term is Sternberg.

society⁸⁶. Kenneth J. Arrow⁸⁷ gives some of the economic reasons why market forces alone are not sufficient to produce economic efficiency or the moralisation of business. Arrow begins by giving the economic justification for the view that market forces will lead to the maximisation of the common good. This argument states that a corporation buys the goods and services that they need for production; the fact that they have paid for these goods and services means that they have covered whatever costs there were for those good and services including the costs they have imposed on others for producing their goods. When the consumer voluntarily pays a certain price for the produced goods this means that the consumer has benefited from the goods equal to the price paid. Thus a benefit is accrued from the goods equal to the price paid by the consumer. This means that profit is the net contribution a corporation makes to society by purchasing goods and services to produce worthwhile goods that benefit the consumer. Thus, if a corporation only seeks to maximise profits it will inadvertently be maximising society's good. Competition is good for society because it will either lead to a lowering of prices or an increase in wages due to competition for skilled labour. It is a similar argument to this that is implicit in the invisible hand arguments of Milton Friedman and Adam Smith and it justifies a free competitive market as the best way to maximise the overall good in society. It is based on faulty assumptions and is ignorant of the modern economic realities of, for example, the large multinational corporations. First, this theory is ignorant of how the forces of competition become less vigorous when monopolies result. If there is no external control placed on monopolies a state arises where the consumer has no option but to pay the prices set by the monopoly. Second, the distribution of income that results from unrestrained profit maximisation is very unequal. Although competitive maximising economies will have high average incomes the gap between the average income of the poor and the rich is very large. Third, the profit maximising motive points away from "altruistic motives whose gratification is just as legitimate as selfish motives, and the expression of those motives is something we probably wish to encourage. A profit maximising, self-centred form of economic behaviour does not provide any room for the expression of such motives⁸⁸." There are two categories of effects however that clearly show why the argument for profit maximisation breaks down: first, when

⁸⁶ Shaw, W. H. and Barry, V.: 213

⁸⁷ Arrow, K. J. Unless otherwise noted, references to Arrow, K. J. are to his paper in Shaw, W. H. and Barry, V. (eds.) 1995 *Moral issues in business* (6th edition) Belmont, California: Wadsworth Publishing Company and I use page numbers only.

⁸⁸ Arrow, K. J.: 238

externalities are not paid for, and second, when the consumer has less knowledge than the seller.

One of the assumptions of the argument for profit maximisation is that the producer pays for all the costs imposed on others in the production of the goods. This is not the case when there are costs that are not internal to the trade but rather affect a third party, namely externalities. An example is environmental pollution; the benefit gained by the corporation is not as great as the cost it imposes on the environment. Given that it does not pay the cost to rehabilitate the environment or that it is not affected by the pollution, it has no profit incentive to refrain. In these cases some external control must be placed on the corporation to alter the profit-maximising behaviour of the corporation where it is imposing costs on others that are not easily compensated for through appropriate prices on the produced goods of the corporation⁸⁹.

The second of the categories can be clearly seen in the case of used cars. A consumer who does not know the quality of the car as well as the used car salesmen will pay the same price for two cars of differing quality. The result is that the consumer is unsatisfied and there is a loss in value for the good used car and a gain in value for the seller of the bad car. In this situation buying a used car becomes a gamble and the consumer will lose faith in buying used cars. This situation is economically inefficient and there needs to again be some external controls such as institutionalised moral responsibility or ethical codes like those that exist within the field of medicine where a similar knowledge differential exists.

The thought that business should take the “moral point of view” is not novel. In almost all economic transactions valuable assets are given before the others assets are received- either money before goods or goods before money. Business has always, even to this minimal degree, required trust. Another example is product safety where ethical codes will promote economic efficiency by allowing trust on the part of the consumer. In short, the invisible hand argument fails to realise that business essentially requires morality in trading such as trust, that without external controls monopolies will develop that will not increase the overall good, that unrestrained profit seeking results in a large gap between the rich and the poor, that we cherish other motives such as altruistic motives, that unrestrained profit-seeking will not curb environmental damage and product safety, and that we are not all equal in the knowledge

⁸⁹ Arrow, K. J.: 238

about the product and thus require trust, honesty and care from the seller. Without requiring corporations to be thoughtful and respectful, the overall good will not be maximised. However, some have seen these arguments against the invisible hand as not arguing that corporations should be required to take the “moral point of view” but rather that they are naturally profit motivated but should be curbed in this respect through government intervention, or some other external regulation. Both the invisible hand and hand of government arguments differ in identifying the locus of moral force but both positions agree that it is misguided to expect corporations to do anything other than pursue profits. Thus, both views reject broadening corporate social responsibility⁹⁰. I now examine this argument. A point of clarification before I begin: I do not reject either that the market or that government (or some other external force) should play a role in controlling corporations but rather argue that these are no substitutes for requiring corporations themselves to take the “moral point of view”. For instance, governments enact laws against murder or human rights violations but this is no substitute for requiring individuals to take the “moral point of view”.

The “hand of government”: biting the hand that feeds

The hand of government argument accepts that “what is profitable is not necessarily socially useful or desirable; and what is socially useful and desirable is not always profitable⁹¹.” The solution then is to control this ‘natural’ and ‘insatiable’ appetite for profit with government regulation through laws and incentives. The problem with this view is not that it argues for government regulation. This, I think, is needed. Requiring morality of other individual human moral agents is no substitute for laws and incentives for being morally responsible and likewise there should be laws that control corporations. What is wrong, I argue, with this view is that it does not require corporations to take the “moral point of view” itself but rather only to heed government insofar as they may break the law or incur financial penalties. My first concern with this argument is that I disagree with the premise that assumes moral ignorance of corporations, the people who constitute it, and the CID structures that a corporation is capable of creating. As has already been shown taking the “moral point of view” is something we do expect of corporations. When they create a new tyre brand we expect them not just to use the cheapest materials available but also to create safe tyres. We trust that when we send money to a corporation that they will send the goods we have purchased. We are outraged

⁹⁰ Shaw, W. H. and Barry, V.: 213

⁹¹ Shaw, W. H. and Barry, V.: 213

when we discover that the goods we have bought were produced by child labour and shocked if we discover that a corporation is funding diamond wars. This shock is not that we think these less efficient means of producing profit but rather that we expect corporations to have procedures and policies in place that rationally investigate the consequences of their actions and show respect for others and how they impact on them. In short we do expect corporations to take the “moral point of view”.

The “inept custodian”⁹² argument

This argument has two components. The first is that corporations lack the moral and social expertise to make anything other than economic decisions⁹³ and the second is that corporations have no mandate to pursue moral or social policies⁹⁴. The first requires a certain expertise to involve oneself in moral decisions and the second questions the political legitimacy of corporations taking the “moral point of view”. I argue that both have an incorrect view of the requirements for taking the “moral point of view”.

The first argument assumes that a person should only focus on their professional and occupational concerns. The correct sources, therefore, for moral thinking are trained philosophers or social scientists. This is a faulty assumption. Postal workers may involve themselves in the fight against world poverty, or doctors may throw themselves behind eradicating child labour. Our responsibility as individuals is not only limited to our narrow professional and occupational concerns. We expect teachers to recycle as much as we expect a member of Greenpeace to. We do not excuse a person who dumps environmentally hazardous material because they claim not to be environmental experts. If corporations are different, we need to ask, as Shaw and Barry ask: “What, if anything, makes the social role of the corporation unique, so that its responsibility and that of those it employs should be confined solely to profit making?”

A second reason why corporations are argued to be “inept custodians” is that they have no mandate from the public to pursue any other task but profit seeking. Corporations and their executives are not elected, anointed or appointed as social guardians. The power of corporations is kept in its correct place if they do not pursue any other objective than the

⁹² Goodpaster, K. and Matthews, J. B., *ibid.*, use this terminology in their paper and I use it in this thesis.

⁹³ Shaw, W. H. and Barry, V.: 214

⁹⁴ Goodpaster, K. and Matthews, J. B.: 140

pursuance of profit. This view reflects an oversimplified view of the relationship between the public and the private sectors. We expect private citizens and corporations to be guided by ethical and social values even if they are not elected. If there is no law against lying we still expect private citizens and corporations not to lie. We expect more from private citizens and corporations than doing whatever they are legally allowed to do and we expect this irrespective of whether or not they are elected. As Goodpaster and Matthews note, “The demands of moral responsibility are independent of the demands of political legitimacy...one might be forgiven the hope that the political process will not substitute for the moral judgement of the citizenry or other components of society such as corporations⁹⁵.” These two versions of the “inept custodian” arguments have questioned the moral expertise or political legitimacy of corporations taking the “moral point of view” and deny that corporation should do anything besides seek profits. I now look at arguments that claim that a corporation should not pursue anything besides profit as the consequences of them doing so would be terrible for society. I refer to these arguments, following Goodpaster and Matthews⁹⁶, as the “unleashing” of corporate power arguments.

The “unleashing” of corporate power

There are two versions of this argument. The first version by Shaw and Barry is that the ‘unleashing’ of corporate power away from its focus on economic matters will result in corporations and corporate officials imposing their materialistic values on all of society. The second version argues that allowing corporations to stray from purely economic matters would be dangerous, just as individuals who seriously believe that the most moral thing to do is support racial segregation are dangerous; likewise corporations allowed to pursue their own moral agendas would be exponentially more dangerous. Both versions argue that to avoid corporate imperialism over society’s values corporations should be constrained to purely economic activities.

These arguments assume that corporations do not already exert considerable power over us. Our society is already being indoctrinated with consumerism and corporations already do lobby government for certain of their own agendas. Society has entrusted to business large amounts of society’s resources and they are expected to manage those resources as wise

⁹⁵ Goodpaster, K. and Matthews, J. B.: 139/140

⁹⁶ *ibid.*

trustees of society. Business already uses these resources to propagate a view of humanity and the good life in advertisements and speaking out on issues such as the safety of nuclear power or environmental impact of business ventures. Furthermore, such corporate powers have an impact when used or not used, the question is not whether the power should be unleashed but how critically and self-consciously they should do so. Greater power does not called for moral disengagement but rather a higher level of moral awareness. Corporations already exert a large power over society and “Imperialism is more to be feared [when such power is present] when moral reasoning is absent than when it is present⁹⁷.” This moral awareness is not meant to dilute the economic discipline of the market but rather to supplement it with the discipline of moral reflection.

I have dealt with the three major objections. I now set out some other objections to requiring corporations to take the “moral point of view”. These will be dealt with briefly and serve to clarify what is meant by requiring the corporation to take the “moral point of view”.

First, it has been objected that the only duty of business is to promote profits, and to add moral discipline to this would dilute the market discipline. It is argued that no other imperatives should be allowed to dilute this discipline. People holding this view argue that corporations should not allow moral considerations to sacrifice profits. This view puts moral responsibility in opposition to profits. Although morality will require in certain circumstances that the profit margin be decreased, it is wrong to identify self-sacrifice with morality. Moral demands are containments and not replacements for self-interest and although profit-maximisation will often conflict with the demands of morality the point is to coordinate imperatives, not deny their validity. This view incorrectly assumes all morality is necessarily altruistic, “do-gooding” that can only mean bad business.

Second, those who accept that corporations have moral responsibility argue that this responsibility requires that they fulfil their obligation to shareholders and investors. This view holds that it is contrary to corporate moral responsibility to use funds for non-economic criteria. There is a three-prong reply to this argument. First, investors do not rely on purely economic criteria and are known to require socially responsible behaviour from those they invest with, for example not using child labour. Second, investors and shareholders expect

⁹⁷ Goodpaster, K. and Matthews, J. B.: 140

more than short-term profits and often require sustainable programs of economic advancement. This lengthening of the time span enlarges the class of fiduciary responsibilities, such as sustainable development that takes the interest of the environment into consideration. Third, the trust that the shareholders place in the managers of their funds is not that they may pursue profits by “any means available” but require morality from the corporation. The trust placed in the managers of shareholder’s and investor’s funds is qualified by legal and moral constraints and this qualification can be made in terms of a larger trust and more basic fiduciary responsibility to society at large that gives corporations certain legal rights and immunities. An investor does not expect a corporation to pursue profits by dumping nuclear waste, allowing infants to starve, creating unsafe tyres and other unethical activities.

Third, some may object that the task of defining corporate responsibility and corporate ethics is sufficiently discharged if we clarify the responsibilities of the men and women in corporations as “individuals”. My answer here is based on my account of the personhood of corporations. It is true that individuals within corporations also have moral responsibility and that the governance of the corporation ultimately rests in the hands of managers. Thus, managers need to act in morally responsible ways. However, this does not discharge the full responsibility that corporations *qua* corporations have. The whole is more than the sum of the parts and just as many intelligent people do not necessarily make an intelligent organisation, similarly a corporation filled with morally responsible persons will not necessarily be morally responsible. What it is for a corporation *qua* corporation to exhibit moral responsibility is structuring, organisation, and complex processes encapsulated in its CID structure and this will ultimately decide whether a corporation will act in a morally responsible way. As Goodpaster and Matthews comment:

Studies of management have long shown that attributes, success, and failures of organisations are phenomena that emerge from the coordination of persons’ attributes and that explanations of such phenomena require categories of analysis and description beyond the level of the individual. Moral responsibility is an attribute that can manifest itself in organisations as surely as competence or efficiency⁹⁸.

⁹⁸ 140

Without the CID structure putting in place policies and decision-making structures that enable rational decision-making, with insight into the impact of policies and goals that also enshrines respect, the moral attributes of the individuals within the corporation will be ineffective. Knowledge is a good example: a well-intentioned executive without the correct knowledge will be unable to make the best decisions possible.

Fourth, it is objected that a corporation need not take the “moral point of view”, as it need not have respect for others. Customer relations and public relations are already an integral part of rational economic decision making. “Market signals and social signals that filter through the market mechanism inevitably reflect the interests of parties affected by the behaviour of the company⁹⁹.” This argument assumes that corporations that only treat persons as economic variables have the structures in place to allow for morally responsible behaviour. This argument assumes that this morally responsible behaviour is possible without requiring these corporations to show respect or to take the “moral point of view”. The first problem with this view is that if corporations only treated persons as economic variables this would be to treat them as means and not as ends, but this is to reiterate the need for respect. The real problem is that this view does not take account of the under-represented, or those who do not have an “economic voice”. If corporations only had rationality and not respect there would be no need for them to stop polluting, exploiting or endangering people who are not represented economically. Furthermore, as Arrow has shown above, pure economic rationality is not congruent with the common good or moral responsibility. The most rational means to make profits and satisfy the economically active members of the market will not necessarily aid the common good.

Fifth, this objection correctly questions whether we can hold corporations morally responsible if we are uncertain of what responsibility is, even at the level of the individual. This is a correct requirement for holding corporations morally responsible but I argue it can be met. This challenge is not insurmountable and normative ethical and applied ethical theorising has come a long way in creating a common discourse about these issues that allows there to be dialogue. In this thesis I take an open-minded approach to normative theories and take a moderate virtue theory approach to that for which we are morally responsible. This account does not draw neat distinctions between deontological theories such as Kantianism and

⁹⁹ Goodpaster, K. and Matthews, J. B.: 140

teleological accounts such as utilitarianism but rather draws insights from different perspectives. This approach will be the subject of my second chapter but I answer one aspect of this question now. That is, what is the scope of moral responsibility? This is not the same question as: how do we judge whether an act is a morally responsible one or not?

I have thus far argued that corporations *qua* corporations are capable of taking the “moral point of view” and the way they behave is evidence of how some corporations do and how some do not take this “moral point of view”. I have also argued that corporations *qua* corporations should take the “moral point of view” and hence are moral agents. Moral agents are expected to act in a morally responsible manner and we hold them morally responsible if they do not. However, we do not hold persons morally responsible for everything that occurs in the world. There are certain things we hold persons morally responsible for and other things we do not. For instance, should we hold persons morally responsible only for the direct results of their actions or also for the foreseeable consequences of their actions? Should we hold persons responsible for their motivations or even their character? Is someone only responsible for what they intend or can we hold someone responsible for unintended consequences of their actions? Is the scope of corporate moral responsibility larger or less large than the responsibility of individuals? Can we speak of a corporation having motivations and character? Are we responsible only for acts or also for omissions? These are the questions that I address in the next section.

Fourth Step: The scope of moral responsibility

As was mentioned above, corporations are capable of taking the “moral point of view” and are moral agents because we require them to take the “moral point of view”. But what is the scope of moral responsibility? To answer this question I need to return to the other two senses of moral responsibility namely to retrospective and prospective responsibility.

Retrospective responsibility is what we can be held responsible for after the event and our prospective responsibilities are ones we have before an event such as being responsible for the care of a child or the health of a patient. Prospective duties are ones that we have as a result of some description of us such as teacher, electrician, human, mother, doctor, friend, moral agent etc. Different responsibilities attach themselves to the specific description and many people have more than one description. To be responsible for some action x I must be answerable for

it. I can be called to account for it: to explain, justify or admit culpability for bringing it about or failing to prevent it. It is for this reason that the final requirement of Dennett is again intimately tied to moral responsibility, namely some form of self-consciousness and ability to be a reason-giver and persuader. The scope of what we can be answerable for (retrospective responsibility) is intimately tied to what prospective duties we are required to discharge. This is because we can only say someone is responsible (retrospectively) for letting x happen or responsible (retrospectively) for failing to do y if there was an expectation that they would or should prevent x or do y (prospective responsibility). All moral agents will at the very least have the prospective responsibility of taking the “moral point of view”, that is, acting from rationality and respect. There are specific proscriptive responsibilities that corporations have in virtue of their description as corporations. The corporation also has a general description as a moral agent and will thus have the prospective duties that attach to that general description. I first examine the scope of responsibility broadly. Should we be responsible only for consequences resulting directly from our intentions or actions or also the foreseen consequences of those intentions and actions? Should we only be responsible for our acts or our omissions? I answer these questions and also look at the relationship between responsibility and luck and before finally examining the responsibility of corporations as instances of collective responsibility. Here I examine the scope of the responsibilities of the corporation and the members within that corporation and the relationship between these two responsibility ascriptions.

It is most obvious that we should be responsible for acts that we directly intend to occur. If I intend to kill someone and then kill that person I am most obviously morally responsible for the death of the person. However, if I intend to set a building on fire and I also know that someone in that building will die then I am responsible for that death whether I directly intended the death or not¹⁰⁰. The death of that person may be a matter of luck but I will deal with that below. Furthermore there is no intrinsic moral difference between ‘acts’ and ‘omissions’. Duff¹⁰¹ succinctly states my position, “...I am as responsible for events which I could, but do not, prevent as I am for effects which I actively bring about”¹⁰². The reason for me taking this position can be seen by examining two cases: in the first I act with the intention of bringing about x and in the second I know that x will result if I act in a certain way (perhaps

¹⁰⁰ See “Double effect, principle of” in Craig, E. ed. 1998 *Routledge Encyclopaedia of Philosophy* New York: Routledge

¹⁰¹ Duff, R. A.

¹⁰² Duff, R. A.: 291

this is to not act at all). In the first case I act to bring about x but in the second case I do not do what I know will prevent x . In both cases I know that I can determine, by my action or inaction, whether x occurs or not. The position I maintain is that we are morally responsible for that which is in our control. Here control is strictly defined in the following manner: something, x , is within my control if I knew that it was within my power to determine, by my action or inaction, whether x occurred or not¹⁰³. Control, in this sense, is a sufficient condition for moral responsibility and we are responsible for x if x was within our control and our prospective responsibility required us to attend to either bringing about or not bringing about x . This requirement to either bring about x or not bring about x being a result either of the prospective duty arising from a description of us as human beings, rational beings, moral agents, parents, friends, corporations etc. Control is not a necessary condition for in the case of recklessness I only know that the possibility of some harm may be brought about and in negligence I am unaware of the harm that may ensue. However we are still responsible for this, as we should be expected to know that the harm could have ensued. The condition of being expected to know follows naturally from our requirements on other moral agents to take the “moral point of view” and hence take care in considering the possible consequences of their actions. If I bring about some harm x I may deny the retrospective responsibility by denying some prospective responsibility with regards x . For instance, if a butterfly is killed I may deny retrospective responsibility for this act by denying that there is any description of myself with prospective responsibilities attached to that description such that it requires me not to kill butterflies. Arguments attempting to attribute the retrospective responsibility will then focus on either a) the description under which you can be held accountable for the death of the butterfly or b) whether the responsibility of not killing butterflies can be attached to a description of you that is not in question. So in this example one may describe humans and butterflies as essentially the same substance at different points in a reincarnation continuum and argue that the responsibility of not killing the butterfly attaches to this description of you as the same substance as the butterfly, and hence there is a proscriptive responsibility that we should not kill butterflies and having killed one you are retrospectively responsible, given that it was within your control. To summarise: when setting out to ascribe retrospective responsibility to y for some act or event x we need to ask:

- 1) Is there an appropriate description for y that has responsibilities attached to y , under that description, that requires y to bring about x or not x ?

¹⁰³ Duff, R.A.

- 2) Is bringing about x under y's control, as defined above?
- 3) Could y have been expected to know that y's actions would bring about x, i.e. was y being negligent or reckless in bringing about x?

Arguments to exculpate someone and thus lessen the scope of their moral responsibility will have to answer these questions in such a way that they are exculpated. Arguments to be exculpated based on the first question will deny that they have any prospective responsibility attached to any description of themselves to perform x. Alternatively, that the description under which they do fall is one that does not have that prospective duty attached. Arguments to be exculpated based on the second question will deny that y had control over x. Arguments based on the third question will deny that they could have known they could they would bring about x. That is, they were not acting recklessly or negligently.

A powerful argument against the control requirement for attributions of retrospective responsibility is that of moral luck. This argument states that the actual (intended or foreseen) effects of my action depend on factors outside my control. If I shoot a bullet at someone, and it kills them I am responsible for murder but if it misses them I am only responsible for attempted murder, the two different responsibility ascriptions being purely outside of my control. First, this argument misuses the contrastive notions of control and luck. The fact that some act depends on any factors outside of my control does not mean that I do not control it. The explosion of gunpowder and the trajectory of the bullet once it leaves the gun are external factors that I do not control but I can still be said to control it with respect to pulling the trigger. This argument moves from the true premise that I could lose my control of some event, e.g. the gunpowder not igniting, to the false conclusion that I thereby do not control it. In the cases where I lose control manslaughter is the result and where I do not it is murder. Second, the idea of luck here is a superficial metaphysical notion. On a deeper level all that we do is vulnerable to chance and this metaphysical notion undermines any conception of control. If it is correct it does not make sense to say that I control any of my actions or intentions. Third, this argument is correct that the actual outcome often is a matter of luck. But it is not clear that we need to treat attempted murder and murder the same; actual effects should matter in our moral reasoning. I have thus far clarified what the scope of our responsibility is and how it is related to descriptions of persons and the prospective duties that attach to those descriptions. We are retrospectively responsible when we perform acts within our control and within the scope of these prospective responsibilities. We are responsible for the intended and foreseen consequences of our act and omissions. This responsibility can

either lead to praise or to blame if one cannot give reasons that exculpate one from the responsibility. The exculpatory reasons can either be to deny the description or the responsibilities that attach to those descriptions for which we are considered prospectively responsible or to deny that the act or event was under our control. We are still morally responsible for negligent or reckless acts as control is not a necessary condition for retrospective responsibility although it is a sufficient condition. Luck does play a role in the actual outcomes of many events, but this should not lessen our attributions of retrospective responsibility for those actual outcomes. Finally, the above discussion does not presuppose any of the normative ethical theories: Kantianism, utilitarianism or virtue theory. These normative ethical theories differ in what they consider as the morally relevant description of moral agents, and what responsibilities they attach to those descriptions of moral agents. It can include not only our intentions but also our motivations and our character as within the scope of our moral responsibility. Before turning to the next chapter where I examine virtue theory I set out the scope of the responsibility of the individuals of the corporation and the corporation *qua* corporation.

I have argued above that corporations *qua* corporations are moral agents and are capable of acting purposively and being potentially answerable for what they do or fail to do. It is wrong to think that the descriptions of corporate *qua* corporate actions can be reductively analysed at the level of individual actions of the individual human agents that comprise it. This reductive analysis will fail to capture many important features of the corporation such as structure, efficiency, rationality and respect. The prospective and retrospective responsibilities of the individuals within the corporation will be defined partly by the roles they fill within the corporation. The accountant will have a set of proscriptive responsibilities that differ from those of the clerk that will also differ from those of the CEO. This will then affect what they are answerable for. Although there are the proscriptive responsibilities that attach themselves to individuals depending on the description of them as fulfilling some role within the corporation they too have a description as moral agents and this will sometimes override and transcend the proscriptive responsibilities that they have in virtue of a corporate role. If a person is in a corporation that has a CID structure that allows for deceptive accounting practices, such as in Enron, then the individual within the corporation should be held accountable even though they were fulfilling their proscriptive duties as defined by their corporate role as an Enron accountant. The proscriptive responsibility of being a moral agent will override the role in Enron. Enron as a corporation is also accountable as its CID structure

is such that it allows for actions that are retrospectively responsible. The reason is due to the proscriptive responsibilities that attach to corporations *qua* corporations. In order to understand what this description is of corporations and what the proscriptive responsibilities are attached to those responsibilities I will discuss the nature of corporations. This need to get a correct view of the nature of the corporation before deciding what they are retrospectively responsible for is very conducive to a virtue theory approach to corporate ethics. In the next chapter I set out virtue theory and how it applies to corporations.

Chapter 2: Virtue theory and corporations

This chapter sets out virtue theory and how it applies to attributions of moral responsibility as discussed in the previous chapter. I begin this analysis with the relationship between normative ethics, taking the “moral point of view”, retrospective and prospective responsibilities. I briefly set out Kantianism and utilitarianism and argue for taking a virtue theory approach to ethics. I set out virtue theory and argue that it does not exclude either Kantian or utilitarian reasoning. I set out both virtue theories’ “critical programme” with respect to other normative theories and its constructive programme. I explore the differences between modern and ancient virtue theories. I give my reasons for taking the virtue theory approach and do not argue for virtue theory as distinct from utilitarianism or Kantianism but rather give the strengths of the theory. One such strength is its ability to incorporate other reasons for moral responsibility that also include duties or impartial beneficence. I distinguish virtue theory from radical virtue theories such as agent-based theories that reduce all moral evaluation concepts to internal states of agents or to some concept based on an internal state of an agent such as motivation, character trait, intention etc. Here I show problems for such an attempt and why I rather follow a more ‘open-minded’ approach to virtue theory. I show how virtue theory is able to incorporate other moral evaluation concepts and to allow for other moral reasons to play a role in the reasoning of moral agents and the moral life. I set out what moral requirements virtue theory places on moral agents and how this is related to our motivations, character, intentions and our actions. I then explore some of the challenges that face virtue theory and some criticisms of taking the virtue theory approach. One of these being the charge that it is incapable of giving practical advice in moral dilemmas (the application problem). I set out how virtue theory can solve such problems and the method for applying virtue theory to ethical problems. I explore how virtue theory should be applied to corporations *qua* corporations. I explore its relevance to pharmaceutical corporations in particular before moving on in chapter three to setting out an ethical problem for pharmaceutical corporations and what guidance virtue theory gives on how they should act (thus normative) with regards patenting medication within the context of poverty and pandemic. I use as an example the patenting of medication to treat HIV/ Aids patients in developing countries, specifically in South Africa. Having explored virtue theory, what it holds persons retrospectively responsible for, the responsibilities it places on them prospectively, and how this applies particularly to pharmaceutical corporations, I have a solid base for beginning the main application of this thesis to patents, pills, poverty and pandemic.

The relationship between responsibility and normative ethics

Normative ethics relates to how we ought to act and live. It is best understood not in terms of the actions that they advocate but the reasons offered for acting and living in whatever way is in fact required. There are reasons for doing certain things (courageous acts) and also for being certain types of people (being courageous). How we are required to live and what we are required to do is intimately tied to what we are responsible for, and our prospective and retrospective responsibilities. Normative ethics operates by giving descriptions of moral agents and the prospective responsibilities that attach to those descriptions.

For instance Kantianism describes human agents as essentially rational beings and claims that this rationality we share in common with all other moral agents. The proscriptive duties that attach themselves to this description of the agent are related to this shared rationality. We have the prospective duty to act in a way that we could will all other rational agents to act and thus should not treat ourselves as exceptions to any rule. This approach to the prospective responsibilities of an agent is captured by the categorical imperative that all rational agents have a prospective responsibility, in the form of a duty, to obey this categorical imperative.

For simple act-utilitarianism we are also rational but the essential moral description of us as moral agents is our ability to feel or cause pleasure or pain. The prospective responsibilities that attach to this are that we should seek in our actions to maximise pleasure and minimise pain and that we should do this impartially only taking the description of persons as capable of feeling or causing pleasure or pain, as morally relevant. Thus, we should be impartially beneficent.

The retrospective responsibilities for both then become tied to these prospective responsibilities. For Kantianism we are retrospectively responsible for actions within our control, as defined in chapter one, either by our acts or omissions that are not in line with the categorical imperative. For simple act-utilitarianism we are retrospectively responsible for actions within our control, as defined in chapter one, either by our acts or omissions that bring about more pain than pleasure.

So the relation with normative ethics and moral responsibility is that it defines our prospective duties and our retrospective duties, these still being limited by the scope mentioned in chapter one. Virtue theory as I will presently argue, allows more descriptions of an agent, such as friend, parent, a moral agent with a character and certain motives etc. Each description has its own unique prospective responsibilities attached. These proscriptive responsibilities do not only attach to what we do but to certain internal states such as our characters and motivations that we either develop or fail to develop in certain ways. I now examine virtue theory and the best way to do this is to see why theorists returned to this Aristotelian inspired normative theory.

Virtue theory: the “critical programme”

Modern virtue theory began as a response to weaknesses and gaps in the predominant modern normative theories. This¹⁰³ to the predominant modern normative theories is referred to as virtue theory’s “critical programme”. Exploring the inadequacies that the beginners of the modern revival in virtue theory found in other normative theories will also locate where virtue theory seeks to improve on these theories. Before setting out some virtue theory critiques of Kantianism and utilitarianism I give a brief working account of these two theories only to bring out what **reasons** are meant to motivate us in order to lead the moral life.

Kantianism holds that we should be motivated by duty and that our moral duties are derived from the categorical imperative that binds all rational creatures unconditionally. The categorical imperative has two formulations: one in terms of always treating others as ends only and the other as only acting on principles that you could will to become universal laws. Both these formulations capture the same thought: being rational requires that we do not treat ourselves as exceptions to the laws of rationality. If you accept reasons for doing something in a certain situation and are faced with the same¹⁰⁴ situation again the same reasons should apply in both situations. Similarly reasons that should compel other people should also

¹⁰³ I follow other philosophers such as Louden, R. in using the term “critical programme”. When I refer to Robert Louden in this thesis I refer to his entry “Virtue ethics” in Chadwick, R. ed. 1998 Encyclopaedia of Applied Ethics London: Academic Press and use page numbers only.

¹⁰⁴ Same, here, is meant to be relevantly similar. What exactly is meant by ‘relevantly’ will involve isolating the features of the situation that are important for the reasoning to apply to that situation. This will be a major philosophical question and affects for instance how narrowly we want to define a situation. There is a sense in which the difference in time between killing someone at 12:00 p.m. rather than at 12:02 p.m. is not a relevant difference. It is this sense that I convey by saying “same situation”.

compel you, as you are similar in relevant ways to other people. I take the example of lying and show what reasons the Kantian gives for not lying. If I willed that lying became a universal law to achieve some end, it would no longer be possible to lie to achieve that end. Lying can only operate where there is a background of trust that others will tell the truth. If everyone were to lie no one would believe the lie and lying would become impossible. Thus, when a person lies they are treating themselves as special; they are not willing that others should lie but only themselves. The strength of this theory is its great explanatory power. It is able to capture most of our intuitions in showing why murder, lying, stealing etc. are morally impermissible. It also gives a rationale for the difference between perfect and imperfect duties, perfect duties being conceptual impossibilities in universalising and imperfect duties being practical impossibilities due to the contradiction in willing the act to be universalised. Kantianism is criticised most notably for its inability to deal with evil and cases where duties contradict. What is relevant for the “critical programme” of the virtue theorists is its insistence that what is most relevant to moral reasoning in a moral agent is their ability to act on duty as derived from rationality. Virtue theory claims that there are other important reason-constituting properties evident in the moral reasoning of an agent. An agent’s motivations, character, as well as other considerations are all relevant to living the moral life¹⁰⁵. I will show how the “critical programme” affects Kantianism below; I first briefly set out what is meant to motivate a utilitarian in their moral reasoning.

Utilitarianism is teleological: what is relevant to moral reasoning is that we impartially consider the best course of action by considering the consequences of those actions. The consequences that are relevant for moral reasoning vary with the version of utilitarianism concerned. The common feature of all versions of utilitarianism is that consequences are important for deciding the moral worth of an action and the consequences that are relevant are subjective mental states. Rule-utilitarianism still has this feature, but rather uses considerations of what rules are more likely to bring about the maximisation of the subjective mental state. Motive-utilitarianism decides what motives will bring about the maximisation of subjective mental states.

¹⁰⁵ Crisp, R.: 623 When I refer to Crisp, R. without a date in this thesis I refer to his entry “Virtue Ethics” in Craig, E. ed. 1998 Routledge Encyclopaedia of Philosophy New York: Routledge and use page numbers only. This is to be distinguished from Crisp, R. and Slote, M. 1997 Virtue ethics Oxford: Oxford University Press.

Both these theories see universal and invariable principles as exhaustive of ethics. For Kant we ought always and everywhere to act on the categorical imperative and for utilitarianism we should always and everywhere act in a way to maximise some subjective mental state such as happiness, pleasure or preference satisfaction. Following these principles or rules will entail that we are living the fully moral life.

However, real life moral exemplars, such as Gandhi, do not simply deduce what to do from a hierarchy of timeless, universal principles and rules. As Crisp notes, these exemplars “possess sound judgement skills that enable them to respond appropriately to the nuances of each particular situation in ways that go beyond mere mechanical application of rules¹⁰⁶.” Part of what it is to be moral will be elements of our character and our ability to make these judgements and respond in appropriate ways to actual situations. What is important to the moral life is sensitivity to actual moral issues rather than the application of principles and rules.

The first criticism, above, relates to the insensitivity of Kantianism and utilitarianism to the nuances of actual situations as a result of its desire to apply universal rules or principles. It thus leaves out the requirement that an agent have a certain *sensitivity* to moral issues and this is equally important to the moral life and is what we discover in certain moral exemplars e.g. Gandhi. The second criticism relates to the over rationalistic account of moral agency. Michael Stocker conveys this criticism in his influential paper entitled “The schizophrenia of modern ethical theories¹⁰⁷”.

In this paper we are made to consider a friend who visits us in hospital. We are happy to be visited by the friend and thank them for coming. They respond that they are only doing their moral duty. We think that they are just being modest but upon closer scrutiny we realise that they are being serious. We can think of this friend as being a supreme Kantian or utilitarian who has either realised that visiting you is their moral duty, it is required by the categorical imperative, or it is the most utility maximising act. Being moved by these considerations to act is what these two theories require for someone to fulfil their moral obligations but there is something lacking in their motivations and character. We expect that a friend who comes to visit us in hospital is visiting us because they care for us, are kind or have some other such

¹⁰⁶ Crisp, R.: 492

¹⁰⁷ In Crisp, R. and Slote, M. (ed.): 1997

motivation. Having this character and motivations are constitutive of friendship. Without certain character traits and motivational dispositions we would not be able to have a friendship. What this example shows is that acting from duty or the desire for maximising utility does not exhaust the reasons for a morally responsible act or living the moral life. This criticism shows that Kantianism and utilitarianism is wrong to claim that acting only from a desire to fulfil ones duty or be impartially beneficent is sufficient to fulfil our moral responsibilities. Although what the friend did, i.e. visiting the friend was right, theories of ethics that emphasise right action only will never provide a completely satisfactory account of the moral life¹⁰⁸.

Extreme versions of virtue ethics claim that this added feature in terms of motivations or character is sufficient to discharge our moral responsibility. This is equally wrongheaded. I argue for moderate virtue theory that allows more reasons to factor into moral reasoning and living the moral life, one that incorporates duties, what is impartially beneficial, character traits, motivations and right actions in living the moral life. My defence relies on two claims. First, motivations, character, beliefs, desires and other internal states are relevant to the moral life and need to be incorporated into any moral theory. Second, these internal states are not all that is relevant to the moral life and extreme versions of virtue ethics that reduce ethics to these internal states are deeply flawed. Can a utilitarian or Kantian respond to the criticism that they leave out essential elements, such as motivations and character, in their account of living the moral life?

The utilitarian can respond that we should act from love or friendship, as this is more likely to maximise utility. The utilitarian will say that a friend who only thinks of maximising utility will create less utility and paradoxically it will be better in these circumstances not to think as a utilitarian would and be motivated by true friendship. But this misses the point. What is wrong with the friend is not that they fail to maximise utility but that they lack certain motives and character like loyalty or caring or empathy- they fail to be a good friend and not because they fail to maximise utility. Certain motives and character traits will be more utility maximising, but this is not the justification one can use when being a true friend. True friendship seeks the good of friendship without thinking of the utility gained but rather for the love of the friend and friendship itself. Instrumental love or friendship is not true love or true

¹⁰⁸ Rachels 1999: 188

friendship. When we contemplate being friendly to maximise utility we have already excluded the ability to act from true friendliness. Having the ability to act from true friendliness and not merely moral duty is constitutive of friendship. We do not always act towards our friends from this friendliness but we still need to have a character trait that allows for friendliness and not only a desire to act from duty.

In some circumstances fighting your desire to be unfriendly to your friends may be the friendliest thing you can do. In these cases you show yourself to be a moral hero in overcoming your natural tendencies, but if you only ever acted from a restrained sense of unfriendliness towards others or from a sense of duty, you would not actually have any true friends. You may be able to deceive others that you are their friend but your character has excluded the good of friendship. The problem is even greater for the Kantian who insists on thinking about courses of action according to the categorical imperative and acting out of a sense of duty¹⁰⁹. Being a loyal friend and one who cares is a more primary moral reason for going to visit a friend than wanting to maximise utility or perform your moral duties.

The above has shown that an adequate theory of ethics must provide an understanding of moral character and that modern moral philosophy has failed to do this¹¹⁰. Living the moral life is not only being impartially beneficent or only thinking about duty but also about having certain motivations and character traits, and we can be responsible for the latter to the degree we do not develop such character traits and motivations by our acts and omissions. We are not only prospectively responsible in our capacity as rational agents but also as a friend, parent, lover etc.

The reason I say we can control our moral and cognitive character, as described in chapter one, is that we are able to perform the necessary investigative actions to decide whether our first order beliefs and desires, motivations and characters are appropriate. If they are not then we are able through habituation to develop our moral and cognitive characters so that they are appropriate. We are still responsible for actions that reflect our moral character. Frankfurt has shown that ‘could have done otherwise’ is not a requirement of control but only that we identify with our first order desires, beliefs, motivations and character¹¹¹. This identification

¹⁰⁹ Crisp. R *ibid.*

¹¹⁰ Rachels, 1999: 189

¹¹¹ Although the issue of whether we need control in the sense of ‘could have done otherwise’ at the second-order level when we either identify or do not identify with our first order beliefs, desires etc. becomes tricky. I hold that we do not require control here in the sense of ‘could have done otherwise’ but that we identify with our

shows that the action, desire, motivations, and character are ‘our own’ in a sense that is sufficient for moral responsibility without the requirement that we could have done otherwise. Identifying with your first order desires, motivations, beliefs etc, without any deviant causal paths forcing you to identify with them is sufficient for control and responsibility¹¹².

A third critique of the prevailing normative ethical theories of Kantianism and utilitarianism is that their methodological commitments focus on conceptual analysis and on agents trying to decide what to do in rarely occurring, problematic situations. This methodological commitment results in an account of morality that is impoverished and overly restrictive. Robert Louden notes “virtue theorists, on the other hand are much more open to drawing connections between morality and other areas of life such as psychology, anthropology, history, art, and culture¹¹³.” The agent is not just seen as their discrete actions but rather as a long-term agent, involving a certain character, psychology, emotions, motivations, intentions etc., and as a result correctly views moral deliberation and choice as involving much more than discrete decisions made in moments of uncertainty. In summary, virtue theory criticises the other normative theories in claiming that the moral life is satisfactorily achieved by applying universal rules or principles, by being overly rationalistic, and by deciding on principles that should govern action by looking primarily at ethical quandaries. This, virtue theory claims, results in a normative ethics that is overly simplistic, incapable of including other essential aspects such as character and motivations into what it is to live the moral life, and incapable of responding to the nuances of actual ethical decisions. It does not account for other important features that are also a part of the morally good life, namely loyalty, caring, friendship and love.

The above criticisms only point out gaps in Kantianism and utilitarianism where they fail to account for essential aspects of the moral life: by their focus on rules and principles, their employment of a certain methodology, their over-restrictive focus on actions and not the

identification with our first order desires. This can continue *ad infinitum*, but at some level we must just say that we just do identify with the first order level. Identification does not require ‘could have done otherwise’ than identify.

¹¹² Frankfurt uses the term accountable rather than responsible. But both are what I mean by responsible which is being subject to a judgement of justifications. If someone on a second order level believes that they are right to want to kill a person then it is irrelevant whether they could have done otherwise than believe that it was right for them to kill the person for responsibility. They have shown themselves to be a person who believes it is right to kill people and they are thus accountable for killing the person and can be held retrospectively responsible to the extent that they have the prospective responsibility not to kill people.

¹¹³ Louden, R. B. p. 493

agent, and for the limited range of what they consider moral reasons. It is still possible that utilitarians and possibly Kantians are able to enlarge their focus to incorporate agents' lives as a whole and their characters as well as their actions. It is this broadening of the range of reasons (utilitarian, Kantian or agent-based virtue reasons) that I argue for in this thesis. I now examine other criticisms that argue that there are deeper problems with utilitarianism and Kantianism that cannot be remedied by the addition of other virtue theory considerations but require a radical new approach to normative ethics. These criticisms have led to agent-based theories of normative ethics and other radical virtue ethics approaches to normative ethics.

The first of these critiques is Anscombe's and she states that normative theory in its present form, namely utilitarianism and Kantianism, has to rely on legislative concepts such as 'ought' that no longer make sense without a divine lawgiver. In other words, there is no reason to follow any of the rules or principles laid out by utilitarianism or Kantianism, insofar as they rely on obligation and Anscombe argued that they essentially do. Why ought we obey the categorical imperative or maximise utility? Why ought we be rational or impartially beneficent? These normative requirements she argues need to be tied to some reasons, apart from obligation and the route for this is in terms of human flourishing. Thus Anscombe insists we need to stop doing moral philosophy until we have our human psychology correct so that we can consider what virtues will lead to human flourishing. Insofar as utilitarianism and Kantianism seek a foundation for morality grounded in legalistic notions such as 'obligation', and these notions necessarily assume a divine lawgiver, their programmes will fail¹¹⁴. That is, we cannot answer the question, 'why should we be rational rather than irrational or malevolent rather than beneficent?' by stating that we are obligated to be rational or beneficent. The reason why we should be virtuous, according to Anscombe, is that we will flourish as human beings and this is not related to obligation but rather human psychology¹¹⁵.

¹¹⁴ Crisp, R. and Slote, M. 1997: 1-2.

¹¹⁵ Anscombe *ibid.* requires that there be some reason to act in certain ways that are not based on obligation and she sees the route for this in terms of human nature and our psychology. This reason to be virtuous is a reason irrespective of appeasing some divine lawgiver or merely fulfilling the requirements that other moral agents place on us to take the "moral point of view". This need for a reason to act that does not require an external lawgiver is not necessarily a version of internalism, the doctrine that an agent has no reason to act if they do not have a corresponding desire in their motivational structure; it could entail externalism whereby an agent has a reason to be virtuous because of their philosophical psychology. This philosophical psychology would justify certain character traits as leading to human flourishing irrespective of some individual's personally desires. An example is when an agent does not know what is best for them. The literature has not yet come to a conclusion on the

First why should we flourish if we are not obligated to flourish? Why should we flourish rather than deteriorate? An answer here in terms of consequences or selfishness etc. will start sounding like utilitarianism, or psychological egoism or some other theory. The correct response would be to give an answer internal to virtue and human nature that states that any meaningful life has projects and goals (whichever ones are chosen), and to fulfil those will require some virtues.

Second, I disagree with the conclusion she draws from her reasoning. Her insight does not remove obligations that exist between two people if they make a commitment to each other. In so doing they become mutually obligated to fulfil their requirements and no divine lawgiver needs to be postulated. We, as moral agents, are required to take the “moral point of view”. Just as there are commitments that hold between two people who enter into an agreement and each can require the other to hold to the agreement, similarly moral requirements hold on all moral agents reciprocally as we require them to take the “moral point of view”. These requirements on others do not need a divine lawgiver.

Agreements such as promises need a prior commitment between the two parties and once the agreement is made they are both bound and obligated to each other. The requirement to take the “moral point of view” binds all members of the moral community and does not require prior arrangement but is entailed by being a member of the moral community.

Anscombe’s attack can move to another level of debate that accepts this response but rather asks why we should require each other to take the “moral point of view” given that there is no divine lawgiver requiring us to require each other to take the “moral point of view”. It is this meta-moral consideration, namely why we should require taking the “moral point of view” at all that appears to be susceptible to Anscombe’s critique. This criticism would say that it is arbitrary for us to require each other to take the “moral point of view” and that we are not required to require others to take the “moral point of view”. And this requirement cannot be justified in terms of obligation.

externalism/internalism debate and I will not require that any normative theory be able to satisfy the demands of either internalism or externalism.

This attack does not hold. We do not need to be required to require others to take the “moral point of view”. We can require that they take the “moral point of view” just as we require that others keep their promises and the ensuing obligation does not come from a divine lawgiver but from our own agency. The reason we require each other to take the “moral point of view” is that we expect them to behave in certain ways that we consider moral or immoral. We could be wrong in what we think is moral or immoral but the obligation that holds from our requiring others to take the “moral point of view” still does not need a divine lawgiver to ground it. Normative theory will then operate by giving reasons that justify our human agency having certain expectations of others and obligating them to act in certain ways and have certain characters.

The requirements themselves need to be justified by reasons but the obligation that holds for acting according to those justified obligations does not require a divine lawgiver. For instance we required people to take the “moral point of view” in the seventeen hundreds, but we were wrong in thinking that slavery was compatible with taking the “moral point of view”. The obligation was an incorrect interpretation of what the “moral point of view” requires and to this extent our requirements on others to take the “moral point of view” were not fully realised by requiring them to be slaveholders. The requirement itself to take the “moral point of view” does not demand a divine lawgiver, but some of the actions we interpret to be expressions of the “moral point of view” will be wrong. To the extent that they are wrong they are not true expressions of our obligation to take the “moral point of view”. We are only obligated through human agency by justified obligations, ones that have reasons given for why we should require others to act in those ways or have those particular character traits, beliefs, desires etc.

What I have argued for in the preceding section is that there are justified obligations and unjustified obligations, and these do not require a divine lawgiver. Anscombe argues that all obligations will be unjustified, as they all require a non-existent divine lawgiver. I have argued that human agency can be a source for justified obligation. In my slaveholder example I noted that, if justified obligations can flow from human agency then the possibility arises that there may be justified immoral obligations, like promising to a friend that you will kill his mother. I argued that human agency that is not supplemented by reasons or justification is not sufficient for obligation. What is needed for obligation is not just human agency but that the acts, beliefs etc. that we require are themselves justified. The obligations then hold though our

human agency and not a divine lawgiver. How do we justify what we obligate people to do, believe, desire etc.?

As an atheist I could give a reason for not lying: we need a stable society and this requires a certain order and we need to be able to expect that others will be honest. This justification will not require any talk of a divine lawgiver. Normative theories operate by giving justifications for our obligations and these obligations then hold through human agency. Thus, not all obligations that flow through human agency will themselves be justified. What I argue, *contra* Anscombe, is that we can have obligations without a divine lawgiver and that these obligations hold because they are justified through reasons and enforceable through human agency. Just as true beliefs can be justified and we can be obligated to have true beliefs without a divine lawgiver, similarly we can be obligated not to murder, lie, be spiteful and so on. As a moderate virtue theorist I allow for a large range of reasons to determine what we are obligated to do such as impartial beneficence, rationality, character traits, desires, beliefs, consequences of actions and motivations for actions.

My second objection to Anscombe is that even her virtue concepts that speak of excellences and badness will entail obligations. If we view something as bad then we entail that it is wrong and thus that it should not be done and hence are obligated not to do it.

There are two insights I gain from Anscombe's critique. First, we should examine which of our moral concepts and reasons that justify obligations are a result of a 'religious hangover'. Second, that our obligations and the requirements we place on others need to relate to our human condition¹¹⁶. To return to the above example, if we are not friendly we will not have friends and a world without friendships would not be a good world for humans such as we are. To live the good life, to achieve human flourishing, we need to have traits of character that allow for friendship, love and caring. To live in a world without these would not be good for humans given essential facts about our human condition. Theories that require only abstract obligations to rules and principles are ignorant of our human condition and thus not capable of grounding their obligations. I take it that the rules and principles can be included in what it is to live the moral life and that we need to include other aspects such as motivations,

¹¹⁶ For instance we as humans require food and it is thus required of others not to poison our food. It is this principle of grounding the requirements in our human condition that will be a strength of virtue theory. For another example we all require courage because whatever life we live in our present human condition will require that we face certain fears and having courage will allow us to live more flourishing human lives.

character traits, health, humour etc. into living the good life. Not all of these elements will be moral considerations but will have to factor into our moral reasoning. One of the requirements of virtue theory is that it be capable of distinguishing between moral and non-moral virtues. It will be important to distinguish the moral life from the good life. What certain virtue theorists (ancient virtue theory and certain radical agent-based virtue theories) do is claim that the moral life is necessary for living the good life and that the good life and the moral life are both related to our human condition and the notion of human flourishing. We need some method for deciding which character traits or actions are essential for the good life and which are important for the moral life. The moral life is a constituent of the good life, and I consider the difference between moral and non-moral virtues as a continuum rather than an easy dichotomy. If we have moral virtues we have some of the constituents of the moral life and thus the good life. Living the good life will require moral virtues and non-moral virtues such as wit, intellectual prowess, attractiveness etc.

Virtue theory is correct that we cannot focus merely on discrete actions, such as visiting a friend in hospital, but must also focus on the moral agent's character. Focusing only on the discrete action excludes other important aspects of living the moral life. However, focusing only on character and motivations is also to miss out on other reasons, such as rules and principles that are also important for living the moral life. Attempting to classify moral thinking strictly into utilitarian, Kantian, deontological, teleological or virtue ethical frameworks is a preoccupation that ought to be left behind after our first year course in ethics. Similarly the distinction between living the good life and the moral life will not be as clear as we may hope and they are rather seen as interdependent. I give some relationships and frameworks for distinguishing the two when I give an account of the virtues and their relation to human flourishing. This is located in my section dealing with the constructive programme of virtue theory.

The second criticism, advocating a radical agent-based virtue ethics, is from Michael Stocker. In the above analysis of Stocker I took a more moderate conclusion than his, merely that character traits and motivations should form a part of any ethical theory. Stocker himself uses the criticism of utilitarianism and Kantianism and their implications for the good life, e.g. a world without friendship, as arguing that these theories are irredeemably deficient. He argues that the moral justifications of utilitarianism and Kantianism can only be incorporated as

motives in our actual lives at the sacrifice of the good life¹¹⁷. If we are a utilitarian or Kantian and act from the motivation of love or friendship instead of from the utilitarian or Kantian justification then there will enter a disharmony or ‘schizophrenia’ between our reasons and our justifications and between our motives and emotions. So if harmony is a human good, then modern moral theories make it impossible to live the good life. Even motive utilitarianism would not help. Your justification for acting from true friendship would be in disharmony with acting from true friendship, the justification being that it is a motive that is more likely to maximise utility, and your motivation being that you are truly friendly and caring. I now give reasons why I do not accept this stronger conclusion of rejecting utilitarian and Kantian moral reasons and justifications.

First, it is necessary to act with the reason of impartial beneficence in certain situations, e.g. as a person who has to decide how to distribute limited resources. Here you may decide to act on the principle of choosing the distribution that is most likely to maximise utility. This motive cannot be reduced to some character trait or virtue unless that virtue is to ‘act as a utilitarian’. Other reasons that are not merely virtue based are also relevant to the moral life, and morality sometimes requires impartial beneficence. I return to this when arguing why any radical virtue theory or agent-based theory will be incomplete. I argue that not all good reasons in favour of doing an action has a corresponding virtue that consists in the disposition to accept and act on that reason and thus attempts to reduce morality to virtues will be incomplete¹¹⁸.

Second, Stocker assumes that virtues must be in the interest of the virtuous individual and somehow tied to eudaimonia and constitutes a type of eudaimonism. Although there is a deficiency in friendship when a friend visits you in hospital it is not clear that having this virtue of friendliness or care will always and for everyone lead to living a better life. Sometimes caring will lead you to pursue an action that may cause harm to yourself. Examples here include heroism where someone risks their life to save a friend and dies in the process. Although a world without friendship would be a less good world it is not necessary to conclude that the virtues will always lead to living the best life. This touches on issues of moral luck that was dealt with in the previous chapter. Although the moral life is a constituent of the good life it should not be seen as sufficient to having a good life.

¹¹⁷ Crisp, R. and Slote, M. 1997: 7

¹¹⁸ Here I follow Rachels. 1999: 192

Third, the deficiency in the ‘friend’ who visits you in hospital from duty or some principle may not be a moral deficiency. They could just be less ethically admirable or excellent. Although the friend who acts from duty in a particular situation may just be less admirable other examples seem to show that this lack can also be a moral deficiency, especially if the lack is a sign of vicious character. In the case of a parent who only ever acts in caring or loving ways towards her child from a sense of duty shows herself to be morally deficient and this deficiency cannot be located in the actions she performs but in her motivations and character. She has a reprehensible moral character and motivations and her character can be morally blamed if she is indifferent to her children and only acts from duty. The ethical sphere is not completely divorced from the rest of our lives, as Murdoch argues;¹¹⁹ morality is not merely a set of contractual agreements but a whole mode of life. This position is reminiscent of Socrates for whom the primary question in moral philosophy is ‘How should one live?’¹²⁰ Being a true friend and not just a calculator of utility maximisation or a conscientious follower of duty is to lead a morally better life and not just a more admirable life. But requiring that more aspects, such as character, be included in the moral sphere does not require that we abandon utilitarian or Kantian reasoning as also being part of the moral sphere. What these examples of parents and friends show is that what we require is a broad range of reason-constituting properties to be included in what it is to live the moral life.

Fourth, if one embodies Stocker’s claim fully one will exclude the good of friendship as well. Just as someone who acts from duty rather than friendship precludes the good of friendship, someone who always acts from the sense that it is better to act from friendship than from duty will also show herself to be no good friend and thus exclude the good of friendship. It may be that ‘schizophrenia’ is an inevitable part of the human condition and should not be used to reject ethical theories because of their inability to close the gap between justifications and motivations. Accepting this still allows that character plays a role in the moral life, but shows that sometimes the gap between our justifications and motivations will be closed and at other times open. It will be closed when our justification for performing certain actions is just that they are virtuous actions. For example you may justify your action of not lying, not because it maximises utility or obeyed some duty, but only because it was honest. I argue that ‘schizophrenia’ is sometimes a good thing, that there should be a gap between our

¹¹⁹ Iris Murdoch, *The sovereignty of good over other concepts*, *Virtue Ethics*, 1997: p. 99-118

¹²⁰ Crisp, R. and Slote, M. 1997: 10

justifications and motivations, especially if we do not have the corresponding virtuous character trait or motivation. To make my point clear I discuss the moral saint and moral hero.

The moral saint for instance, is someone who does not even consider the possibility of other courses of action, but merely acts from a virtuous character. It is not clear though that we should all be ‘moral saints’ and when we fail there will be a gap between our motivations and justification. For example, when a mother no longer wants to care for her child she should not cease to look after the child but should act for a justification that will not be at that time her motivation. This ‘schizophrenia’ emerges in someone who is not a ‘moral saint’ but the ‘moral hero’ who has to sometimes fight against his or her own impulses and doing so is praiseworthy¹²¹. The moral saint is a result of nature or nurture and our admiration for them is akin to an aesthetic admiration of someone’s good health. So we should not accept this ‘schizophrenia’ as a rejection of utilitarianism or Kantianism. Impartial beneficence and duty can provide a reason to act when we have no corresponding motivation to act in that way, especially when there is no corresponding virtue that captures that moral reason, or when our character does not give us the motivations to act in the appropriate way. When the latter occurs we should not just cease to perform the required action but act from a reason that is our justification; although our motivations will be lacking we will do the right thing. A utilitarian or Kantian justification can provide such a reason for us acting in those situations where we have no corresponding motivation. And in those cases ‘schizophrenia’ is a sign of ‘moral heroism’¹²². Through habituation the ‘moral hero’ can develop certain cognitive and moral character traits that will diminish the gap between their motivations and justifications in those cases where such a gap is a shortcoming. In so developing their moral characters they are fulfilling their moral responsibility to have certain moral and cognitive character traits.

Having set out some of the critiques of modern normative theory that virtue theorists make I will now set out what the radical virtue theorists attempt to accomplish and why their project is untenable. I have argued why virtues need to play a role in the morally good life, and setting out why they are not sufficient for the good life will lead to my moderate position. We

¹²¹ Foot, P. discusses these two notions in her chapter “Virtues and Vices” in Crisp, R. and Slote, M. 1997 *Virtue ethics* Oxford: Oxford University Press. Unless otherwise noted, when I refer to Foot, P. I refer to this chapter and use page numbers only.

¹²² I use this gap again later as a source for utilitarian and Kantian reasons to justify acts and still allow that having a certain character can be independently justified in terms of its propensity to bring about the action without ‘schizophrenia’.

sometimes need to be impartially beneficent and sometimes we need to act from duty but in other situations this would be inappropriate and what is important is our character and motivations. In this section I set out a definition of virtues, the distinction between modern and ancient virtue theories and look at the criticism of radical virtue theory. This latter critique will lead into how virtue theory can be applied to actual situations. This is followed with an account of how virtue theory can be applied to corporations.

Virtue theory: the constructive programme

Radical or pure agent-based virtue ethics and moderate virtue theory have different challenges to meet. The former has to interpret moral experience and judgment without employing act and duty concepts or show how they can be derived from virtue terms, and the latter needs to show that utilitarianism and Kantianism are incomplete without talking about the virtues while not excluding utilitarian or Kantian reasoning. I hold the second view. Both of these views will need to define what a moral virtue is and justify why we should have the virtues. I start by examining the Aristotelian approach to virtue theory and then the modern conceptions, noting how both have differently dealt with fulfilling these requirements. I classify Aristotle as a radical virtue theorist and then deal with modern radical approaches and the problems they have before moving onto the moderate virtue theory position.

Aristotle: Ancient virtue theory

For Aristotle the question ‘how should we act?’ was not as important as ‘how should we live?’ He was not concerned with creating a system of rules or principles but rather examining what types of people with certain characters would be more likely to lead the most fulfilled, happy, worthwhile lives. Moral virtues enable us to choose and act well in order to live a full human life. His investigation begins by asking what it means for a human to flourish. This notion of human flourishing is captured in the ancient Greek concept of eudaimonia. To understand Aristotelian ethics we need to examine what Aristotle conceived to be the eudaimon life and what character traits he thought were necessary for attaining this eudaimon life.

Although most people agree that we ought to flourish there is disagreement about what this flourishing would consist of, Aristotle considers five possibilities: a) the life of pleasure, b) wealth, c) honour or public esteem, d) acting virtuously and e) the life of contemplation.

The life of wealth cannot be the eudaimon life, as eudaimonia is an ultimate good whereas wealth is a means to an end. Wealth may be necessary to attain the eudaimon life but cannot be the ultimate goal of life itself. Wealth on a desert island is only good for starting a fire. He dismisses the life of honour or public esteem as the eudaimon life. Honour is only worth having if a good judge gives it. I could attain the life of honour or public esteem by ensuring that I surround myself with people I know will honour me and hold me in high esteem. There are bad judges: Hitler achieving honour and public esteem within the Nazi party is not worthwhile unless the members of the Nazi party are good judges, which they were not.

He dismisses the life of pleasure as the eudaimon life as living the life of pleasure would ignore crucial elements of our human nature and would not distinguish human flourishing from the flourishing of a mere beast. This encapsulates an Aristotelian idea that what is good for a thing depends on the kind of thing that it is and its characteristic activity or telos. What makes a good knife, its sharpness and strength, is different from what makes a good elastic band, its ability to stretch and contract. When we ask what is good for a thing we need to ask what the nature of the thing is: its function or characteristic activity.

It is easier to make sense of artefacts or activities as having a characteristic activity or function; it is problematic with natural kinds and humans. Although a good swimmer is someone who swims well and what is good for a swimmer *qua* swimmer, is what enables him to swim well, it is thought that humans *qua* humans, lack any characteristic function or purpose.

Answering this Aristotle argues that natural kinds also have functions or purposes and in examining the changes that members of the natural kind undergo these can be discovered. There will be changes that good members of the kind undergo and changes that deficient members of the kind undergo. For example, if you buy a sapling at a nursery you expect that if you water, fertilise and expose the plant to sun it will exhibit the changes that a good member of its type usually does exhibit, that is, grow into an adult plant and propagate. Thus the sapling is a bundle of potentials: it could produce bigger roots or not, it could develop

leaves or not, it could grow or it might not. Of all these bundles of potentials there is a subset of potentials that a good member of that type actualises and those potentials are what make the entity the type of entity that it is.

Human nature is defined as the set of potentials that a good human manifests or actualises. Realising those potentials is to realise humanity's function or characteristic activity. For humans this potential is our potential for the fully rational life. By rational life Aristotle does not merely mean the life of intellectual prowess but as Chris Megone states:

The rational life takes in both practical and theoretical rationality. Desires and emotions are subject to rational development as well as beliefs. Thus a very complex set of potentials, including those for language, for imagination, for relationships with others, as well as for such things as drawing conclusions from evidence or from premises, all these and more are part of a fully rational life.

Aristotle has thus far shown a connection between the eudaimon life and the fully rational life, and now needs to draw a connection between the life of ethical virtue or contemplation and the fully rational life. This discussion has involved talk of human nature and telos, and is a characteristic feature of ancient virtue theory and is not a prominent feature of modern virtue theory. He now shows that living the virtuous life or the life of contemplation is at least a necessary requirement for living the rational life and thus the eudaimon life. To do this he examines what living the life of virtue entails and what the nature of virtue is.

According to Aristotle a virtue is a settled disposition of the agent's beliefs and desires. The beliefs involve knowledge gained through practice and thus include a fully rational conception of what is worth pursuing, and the desires are formed, through practising just acts, so as to pursue those things that one knows are worth pursuing. The motivations, preferential choices, and actions of such an agent will thus lie in a mean- a mean that reflects the agent's ability to form the appropriate judgements as to what is, all things considered, worth pursuing and the appropriate means to achieve that end.

I will use the example of courage to fully explain this definition. An agent who is courageous would be someone who you could predict would act courageously. She has a settled disposition to act in this way. It is settled because the agent has learnt, through practising courage, to desire acting courageously for its own good. She has certain beliefs and desires

that are appropriate with respect to fear that she has gained through practising courage towards fear. The courageous neither desires to flee fear too much (cowardice) nor too little (rashness), but rather have the appropriate attitude towards fear, i.e. courage. When the agent first acts courageously she may do it under instruction from an authority figure, but through practice she will gain knowledge, appropriate beliefs, and desires, that will enable her to choose courage for its own good.

Thus, habituation and practice is crucial for the development of virtue and thus implicitly they are not naturally occurring and we can also gain vices. The point is that as humans we all necessarily have the potential for the virtues and virtues reflecting appropriate beliefs and desires are thus intimately related to rationality. The ethically virtuous agent will be fully rational and the eudaimon life is the fully rational life. Thus, the ethically virtuous life is at least a constituent of the eudaimon life. If we are not ethically virtuous we will not actualise our characteristic potential for the fully rational life and will thus not be good members of our natural kind, namely humans. Human beings' characteristic activity is that we have the potential for the fully rational life and eudaimonia consists in actualising this potential. We can only actualise this potential through living the fully virtuous life, as it is a constituent of the fully rational life.

In summation, Aristotle's virtue theory intimately incorporates notions of telos for deciding what is a good artefact, practice, activity or natural kind. Human nature and our characteristic activity are thus essential to Aristotle's account of what is good for humans. This characteristic activity is our potential for the fully rational life and we can only actualise this potential if we have cultivated a settled disposition that reflects appropriate desires and beliefs, i.e. if one has and exercises the virtues. Exercising the virtues is part of this habituation and is thus constitutive of the virtues themselves. I reject the Aristotelian approach. Some of the reasons I give for rejecting radical virtue theory will be the same reasons I give for rejecting the Aristotelian approach. What I accept from Aristotle is that the moral life and the good life are interdependent and also that virtue is a settled disposition that reflects rationality and appropriate desires, beliefs, motivations and character traits. They are appropriate to situations, objects, people etc. I also accept that the virtues are developed through moral education and habituation. We are responsible for the development of our cognitive and moral characters.

Modern virtue theory

Modern virtue theory falls into two broad categories. Radical agent based virtue theory reduces all normative claims about how we should act to claims about how we should be. The only moral requirement on us is that we are virtuous and being virtuous is sufficient to fulfil all our moral obligations. We have no need for further reasons to act than that an act is either virtuous or vicious. Radical virtue theory faces numerous challenges, some of them I consider insurmountable and hence rather take a moderate view of the place of virtues in the moral life. Before setting out moderate theory I set out some of these challenges and why I reject a radical virtue ethics.

Challenges for radical virtue theory and,
how moderate virtue theory can overcome them.

Many modern virtue theorists (but not all) abandon talk about the human telos or nature and rather ground the virtues in terms of different kinds of human purposes or practices. So a person who is involved in the practice of chess will need to have certain virtues and a person involved in speaking a language will need others. It becomes difficult to judge certain practices as inherently wrong if the only standard for the virtues is whether they allow you to flourish within certain practices and purposes. It is difficult to move beyond those practices and purposes to claim that they are not mere local cultural products. This is a problem for modern virtue theories that abandon justifying the virtues in terms of a human telos and rather justifies them using certain contexts and practices. To flourish in the practice of the slave trade would not necessarily be to display moral virtues. Two ways of responding are that you may either deny that the person is actually flourishing or that the practice is inherently vicious. But both of these routes require some other way of grounding justifications of virtues besides merely in practices. This is not a problem for a moderate account of virtue theory. It does not aim to show that slavery is wrong because of some lack in virtue but may use a Kantian or utilitarian reasoning for why it is wrong and judge both the act of slavery and the character exhibited by a slave owner. It can judge those within the practice of slavery to the degree that they perform unethical actions and because they have vicious characters. Defining what character traits are virtuous will still be problematic but the burden of deciding whether a practice is moral or not will not be as great, as they will have recourse to more reason-

constituting features of morally good purposes and practices than just virtue concepts. To put it another way certain practices will have character traits internal to the practice that will aid one to flourish in those practices. We still need to justify whether those practices are good practices and whether the traits that one needs to flourish in those practices are justifiably called virtues.

I maintain that a virtue account needs to be able to account for our human condition it also needs to be able to judge whether the particular human condition needs improvement, that is, when the human condition itself represents a corrupt condition. Although we are in a certain social, economic, cultural or political system or human condition that requires certain character traits to succeed this should not necessarily mean that these are the character traits we should attempt to develop. Certain human conditions are not ideal for the development of the eudaimon life. A person who is starving and needs to steal will need different character traits to live the best life they can live. This is not the best human condition for someone to be in, and certain human conditions do not allow for living the best moral life. We need some objective definition of the good for human life and this may require transcending the particular cultural practices and purposes and our current human condition¹²³, while maintaining sensitivity to our actual human condition.

This problem is a problem for justifying the virtues, and is the problem of validating those character traits defined as virtuous. This is especially problematic for radical virtue theory as they rule out the option of appealing to the value of the acts and/or consequences that the virtues tend to encourage. This is not a problem for moderate virtue theory that can refer to the goodness of the act for justifying the virtue in terms of its ability to bring about that act. A person who is courageous will bring about courageous acts and that these acts are good can justify having those virtues. Being loyal is the way to have friendships and friendship being good can justify having the virtue of loyalty, likewise for honesty. The reason that the act is good may be for utilitarian, Kantian or other reasons such as the act is required for the eudaimon life given our human condition.

¹²³ I think this adds an extra insight into why Plato considered the perfect *polis* before thinking of the individuals within it. I think this shows a deep insight in Plato's account of the human condition and how much it is influenced by socio-economic and cultural factors. There may be as Plato argues, an ideal human situation and condition filled with ideal practices and purposes that need to be developed before an account of the virtues can occur.

Acting from utilitarian or Kantian reasoning will sometimes show a moral deficiency (as Stocker has shown) and we should rather act from the virtues that have a propensity to bring about those actions, and act from those virtues not for utilitarian or Kantian reasons but because they are virtuous. That is, we have and exercise the virtues and are virtuous agents. This reiterates the distinction between moral saints and moral heroes. A virtuous person will have the virtues and act from those and not display Stocker's 'schizophrenia'. The reason that justifies the virtues, (and not necessarily the reason that should motivate us to act) can be given in terms of their ability to bring about the desired act. My account incorporates utilitarianism and Kantianism as my position allows for more reasons and descriptions to inform our proscriptive duties. And moderate virtue theory can justify the virtues in terms of their propensity to bring about those acts that are good acts. The option of providing other reasons for an act or character being good is open to me, as my position allows many reason-constituting features to play a role in the moral life.

My account is not reducible to utilitarianism or Kantianism, as I also allow an irreducible proscriptive duty to be virtuous. We can justify requiring the virtue of friendliness because it is constitutive of the good act of friendship. We can then justify friendship either because it is more likely to bring about utility maximisation or because it is a duty or because a world without friendship will not allow for the eudaimon life. Then when asking why the friend should act from friendliness when visiting his friend the reason should be that he is her friend and thus, capable of having friendship. When the parent shows love to her children, love for her children will be justified by some other reasons but the reason that the mother should love her children is because she should be a loving parent. The reason why honesty is good will be given in terms of the consequences of lying or the duty not to lie but the reason we should not lie (be honest), is because we are honest. Actions may justify having a virtue, but the justification for the action should not always be our justification for acting in that way. Having certain virtues and motivations will need to justify why we act in certain ways to avoid being morally deficient, as the uncaring parent would be. This requires developing our moral and cognitive characters.

We should be virtuous and this does not exclude the possibility that in certain circumstances our character will let us down and we will need to act for reasons other than our own virtuous character. This is when we can act for the reasons that justify the virtue itself, and these reasons can be impartial beneficence, duty, eudaimonia etc. However, there still remains a

proscriptive duty on us to develop our characters so that we are honest, loving, caring and generous, that is, virtuous. The broadening of our proscriptive responsibilities to include our character is a strength of virtue theory over other normative theories and it does not require a radical reduction of all moral reasons to virtue concepts.

The first challenge related to justifying the virtues. The second challenge is defining the virtues. Here there are problems of defining which character traits are virtuous and why? It will also be necessary to distinguish moral virtues such as honesty from non-moral virtues such as attractiveness. Virtue ethics will need to show how virtues relate to actions, reasons, beliefs, principles, rules, desires and emotions. A radical virtue approach will have to reduce moral reasons to virtue concepts whereas a moderate view will only need to show how virtues play an indispensable role in the moral life. The moderate virtue theory will not need to show how rules, actions, principles etc. are reducible to virtues but will only need to show that rules, principles and theories of action etc. will not exhaust what is needed for the moral life. There is a non-reducible virtue element to the moral life but not all aspects of the moral life are reducible to virtues. This is my position, the moderate virtue theory position.

This position has the burden of giving an account of when virtues are essential to the moral life and when principles or rules are. It may seem that there will need to be a principle for deciding which of the broad range of reason-constituting features of the moral life should be used in a particular situation. We will also need to be able not only to know when rules, principles or virtues are relevant to the particular issue but also what the relationship is between virtues, rules and principles. This is a huge burden and a primary question that is not dealt with extensively in the literature. I set out what I take to be the method for deciding what reasons are applicable to a situation and the relationships between the virtues and other reason-constituting features of the moral life in the section entitled 'The moderate virtue position' below. This method will not replace the requirement of being virtuous. Part of this requirement is the essential feature that being virtuous entails the cultivation of moral wisdom. This moral wisdom is the sensitivity that moral exemplars, such as Gandhi, show in their ability not just to apply rules or principles but also to be sensitive to the nuances of the actual situation. My method sets out some necessary requirements for having an appropriate set of beliefs, desires, motivations, actions and character traits in an actual situation. Some of these requirements will be responsible information gathering, respect for those impacted by our actions, critical assessment of goals and purposes, and other requirements that will enable

one to have an appropriate attitude towards situations. These necessary conditions will not be sufficient, as there is an indispensable role to be played by moral sensitivity and wisdom. As Robert Louden states:

No moral theory worth taking seriously aims to produce such a simplistic “package deal” or total algorithm for life. All traditional schools of moral theory recognise that informed judgement and practical wisdom are needed to apply rules and principles correctly, and that such rules and principles cannot be applied efficaciously in difficult or novel situations by people who lack moral experience, insight, and imagination.¹²⁴

The third challenge is setting out the relationships between all the virtues and not just the relationship between virtue, reason, impartial beneficence reasons and Kantian categorical imperative reasons. According to Aristotle, all the virtues are unified and to have one virtue is to have them all. A person cannot be fully courageous if they are not also fully honest.

I have deep philosophical problems with radical virtue ethics approaches but will attempt to set out the best responses a radical virtue theory could make to these problems. The position that comes closest to answering many of my problems is Rosalind Hursthouse’s position. Yet I still argue it is not sufficient and that the programme of reducing all moral reasoning to virtue terms will fail.

Problems for Radical Agent-Based Virtue Theory

There are three major problems for radical virtue theory: the ‘cultural relativist problem’, the ‘incompleteness problem’ and the ‘application problem’. I first set out Rosalind Hursthouse’s attempts to deal with some objections levelled at virtue ethics. She gives nine of them the last one being my ‘cultural relativist problem’. She deals adequately with the first eight but the last one requires more reasons merely than just virtues to inform what the moral life consists of.

The first objection states that virtue theory employs eudemonia as its criterion, but this concept is too obscure and vague to feature in a theory of right action. Hursthouse responds to this criticism by pointing out that although eudemonia is a complex and difficult concept it is

¹²⁴ Louden, R. 494

no more so than the concepts of rationality and happiness that the other two normative ethical theories employ. The other two theories do make use of vague terms such as rationality in Kant, and subjective psychological states in utilitarianism such as pleasure or preference satisfaction. We do not need a clear definition of rationality or happiness for moral theorising; we have a grasp of these concepts and our intuitions are well informed to fill in the content of these concepts.

The second objection states that the theory is trivially circular. According to this objection virtue ethics defines a virtuous person as someone who does the right thing, and doing the right thing is defined in terms of what the virtuous person would do. This circularity gives no content to either the notion of a virtuous agent or right action. Hursthouse points out that this objection is generated by a failure to realise that the theory does give a substantive content to both the notions of a virtuous agent and right action that does not merely rely on each other. A virtuous person is one who has and exercises the virtues and a virtue is in turn defined in terms of character traits required for eudemonia. I agree with this response. The circularity evaporates when virtue is independently defined using the concept of eudemonia.

The third objection Hursthouse examines states that virtue ethics is only concerned with what sort of person one should be and gives no answer to the question “what should I do?” This objection in short states that the theory is only concerned with being and not doing. The theory does answer the question “what should I do?” This claim is substantiated by her application of virtue ethics to the ethical issue of abortion but may also be noted from the general structure of the theory that draws a link between **right action**, the virtuous agent, the virtues and ultimately eudemonia.

The fourth objection claims that virtue ethics provides no rules or principles on which to act. Her response is that each of the virtues generate a positive instruction e.g. act justly and every vice generates a prohibition e.g. do not act unjustly. It is not just that virtue theory requires us to pick some role model such as Socrates and then ask what that person would do in a particular situation. It will require moral wisdom for a person to know what would be virtuous in a certain situation.

The fifth objection that Hursthouse examines is the claim that virtue theory is reductionist; it does not incorporate significant moral concepts such as good or bad. This is false according to

Hursthouse: for the notion of benevolence to make sense we need to employ many moral concepts such as good, evil, harm, worthwhile, advantageous and pleasant.

The sixth objection is that we are not in complete agreement about what the virtues are. Whereas one person or culture may see honesty as a virtue another may not. Virtue ethics appears to be open to the charge of moral scepticism, pluralism or cultural relativism. However, this is not a problem peculiar to virtue theory. Normative ethics requires that certain actions be taken as immoral. It is only once we have certain moral intuitions that we can construct a theory that incorporates them. These moral intuitions are then used to judge the scope of the theory, how many of our intuitions it is able to incorporate, and also to criticise the theory and how many moral intuitions it offends. Kantianism starts by assuming that it is immoral to lie, steal and murder and looks for a unifying moral theory that prohibits these acts. When we say that utilitarianism is a good theory we say that it is good in giving reasons why lying and killing are wrong that appeal to our moral intuitions. However, it is also criticised for allowing certain actions that we find morally incorrect such as the killing of an innocent person to satisfy the desires of an unruly mob. This feature of normative ethics is also a feature of virtue ethics and the foundation for the theory is at present the moral intuition that certain virtues- courage, honesty, sincerity- are taken to be bedrock and the theory is built around them.

The seventh objection is that the virtues may conflict so as to make it impossible to act according to one virtue without committing some vice. An example here is when it would be honest and loyal to tell a friend that his wife was cheating on him but unkind to do so. The response again that Hursthouse has to this problem is to say that although such cases may arise it is not a problem that is peculiar to virtue theory rather deontology is a theory that notoriously suffers from the same sort of counter examples. I am not satisfied with this response. Although this is a weakness for deontology it does not lessen the weakness that it poses for virtue theory. A normative ethical theory should be able to give an answer that is not contradictory. Her response to this problem does not further the debate. A moderate virtue theory can settle a conflict of virtues with examining other elements of the act such as its consequences and its ability to be universalised.

Having explored two criticisms that are in fact problems for virtue ethics, but ones that she argues are not peculiar to virtue ethics, she continues by setting out what she considers to be

the major criticism levelled at virtue theory. This criticism is that virtue ethics does not give clear guidance and practical conclusions that are capable of guiding our actions and moving beyond the status quo and conventional wisdom. This objection she divides into two parts and I set out both.

The first part of this objection is that the employment of virtue terms is vague and does not provide clear guidance. The point is that there is a **condition of adequacy** that any normative ethical theory must meet, namely that it should provide easy and clear guidance. That virtue theory is not able to give a simple answer to ethical issues according to this condition makes it an inadequate theory. Her response is that this is to misunderstand the nature of ethical decisions. Ethical decisions are difficult and do require much moral wisdom- we should not expect simple answers to ethical issues. I agree with this response and it is a strength of virtue theory that it is capable of reflecting the complexities and nuances of actual situations and requiring the development of moral wisdom and sensitivity in the lives of moral agents.

‘The cultural relativist problem’

The second part of this major criticism is according to Hursthouse that: “Any good normative theory should provide answers to questions about real life moral issues whose truth is in no way determined by truths about what is worthwhile, or what really matters in human life.” This may seem a strange condition of adequacy for a normative theory. Her response considers the possibility of a person able to tell what the most moral thing to do in a situation is but unable to tell whether it is a worthwhile action, this inability deriving from an ignorance of what is worthwhile. It is wrong to think that this ignorance would add to the ability to discern the best course of action. Hursthouse thus rejects the condition of adequacy that requires moral theories to eliminate talk about what is worthwhile. Her claim is that what is worthwhile is highly important to ethical reasoning.

My response is that she misses the real issue. Our conceptions of what is worthwhile are easily affected by ideology, socialisation, Zeitgeist etc. In short, her response ignores facts about human nature and our history of oppression, racism, fanaticism etc. It is true that someone with complete ignorance of the good life or what is worthwhile is morally inferior and not as good at giving moral advice than someone who does know what is worthwhile. Theories about what is worthwhile must be included in a theory of right action but not without

problem. They have been historically tied to ideologies and vary from communism to capitalism, patriarchy to feminism. A theory of what is worthwhile needs to be able to move beyond ideology, fashion, or what is currently the assumed order of things (such as capitalism at present). Practices and purposes themselves need to be judged. What Nazi's thought was worthwhile and what Amnesty international today finds worthwhile varies considerably. If we unquestioningly include our conceptions of what is worthwhile into our ethical theories it does not allow us to move beyond the status quo or to make moral progress. This I think is the real impetus of the major objection and what I consider to be a weakness of radical virtue ethics that does not have recourse to the goodness of acts to justify virtues independent of particular practices, purposes and culture. In summary, moral theories need to incorporate what is worthwhile such as friendships, love, caring and parenthood, but it needs some method to critically assess whether what we find worthwhile is not just a current cultural phenomenon.

'The application problem'

Radical virtue theories that either reduce or eliminate act-evaluation concepts in favour of agent-, motive-, or trait-evaluation concepts will be the sole target of this criticism. On this view, the moral value of the inner motives of an agent determines whether they are good people and right actions are defined in terms of what a good person would do. But, good people sometimes do bad things and bad people sometimes do good things. We thus need to be able to assess the morality of certain actions in an agent-independent manner. In certain cases we need to assess whether an act is morally permissible or not and we cannot determine whether it is or not by asking whether a virtuous agent would perform the act.

It is often more important for society to decide whether we should morally censure the particular acts of abortion, euthanasia or suicide. What is relevant in these decisions is not whether these acts are ones a virtuous person would do or whether performing them affects our characters in a negative way. Sometimes what is most relevant to deciding the morality of an act is not the character that is usually associated with those acts but the consequences of the acts or the rights involved. Furthermore, virtue ethics will take a long-term perspective of an agent and assess their character but in certain applied ethics cases what is most relevant is what a person should do in a particular situation and if they do not have the necessary character they need some other guidance besides the requirement to develop their characters.

Furthermore, just people will not always act in accordance with their character. In morally perplexing situations it is not clear how a virtuous person will perform; they may either act in character or out of character. In addition to this, virtuous agents may act differently in the same situation. The requirement to be virtuous will not be able to settle such disputes¹²⁵.

‘The incompleteness problem’

This application problem is a problem for radical virtue theory and not moderate virtue theory. It is a problem for radical virtue theory because it excludes the possibility of supplementing their account of virtuous character traits with a theory of right action. Every reason for this theory must be related to some virtue. This restriction on what reasons play a role in the moral life requires that any good reason that can be given for doing an action must have a corresponding virtue that consists in the disposition to accept and act on that reason. First, there are cases when there will be reasons for acting in certain ways that cannot be reduced to a virtue. An executive in a business who is deciding on the best distribution of limited resources must either do some action X or some other action Y. Both X and Y are worthy projects. The decision the executive reaches is based on the reason that a certain distribution will produce the greatest overall maximisation in utility. The radical virtue theorist will have to reduce this reason to some corresponding virtue, but what could this virtue be? The virtue of ‘thinking like a utilitarian¹²⁶’? Rather than attempting to reduce this reason to a virtue, radical virtue theory should realise that its programme is incomplete without talk of other reasons as constituting the moral life. If we postulate such “virtues” merely to make all moral decisions fit into the preferred framework of virtue ethics then we lose the intuitive appeal that virtue theory begins with, that virtuous characters are essential to the moral life¹²⁷. It is for the inability of virtue theorists to answer these worries and because they limit the scope of genuine moral reasons by insisting on reducing all moral reasoning to virtue terms that I rather take the moderate virtue theory approach. I now set out this approach.

¹²⁵ Louden, R.: 495-496

¹²⁶ Rachels 1999

¹²⁷ Rachels 1999: 191-193

Moderate Virtue theory

The moderate virtue approach operates by identifying reasons that function in the morally good life. These reasons will include impartial beneficence, rights, duties and moral character. It also allows for more descriptions of us as moral agents for which proscriptive responsibilities attach themselves. It is context sensitive in that what moral reasoning should be applied in a particular case will be situation specific. The theory will thus need to provide some guidelines for when different reasons should apply in particular situations. Moral character plays an essential part in living the moral life. Part of this moral character will be moral wisdom to know when different rules apply. Giving principles and guidelines that reflect moral wisdom is a difficult task. To complete this project is beyond the scope of this thesis, but I give some principles and guidelines for how this programme can be developed. I accept the definition of a virtue given above in terms of eudaimonia, and define eudaimonia in terms of human flourishing that is derived from our human condition. This human condition can be assessed using other means such as utilitarianism and Kantianism and can be assessed whether it can itself be improved or altered. For instance we need friendship as humans in our condition of having certain emotional, psychological and social facts about us. A person who has a character that is able to have friendships will be more likely to fulfil these emotional, psychological and social needs. Developing a moral and cognitive character will lead to a more flourishing human life. Flourishing is defined using facts about human beings and the context (itself open to scrutiny) we find ourselves in.

I set out three paradigmatic cases where different moral reasoning is essential to the moral life. The first is a case where what is most relevant is moral character, the second where what is most relevant is impartial beneficence and the third where what is most relevant is our moral duties. Even in these cases the other reasons may play a role.

Virtues are more clearly important in cases of interpersonal relations, when what is relevant is a description of us as friends, parents, caregivers and lovers. In these cases we can ask what the motivations and character of the person are as these motivations and character traits are constitutive of being a person described as a friend, parent, caregiver and lover. However, as a friend for instance, we are sometimes obliged to act for other reasons. Cases that exhibit where we are required not to act for reasons of friendship are employment. To hire a friend or family member for the reason that they are your friend or family member is nepotism. These

cases call for impartiality. Cases calling for impartiality are better analysed using utilitarian and Kantian reasoning. But even in impartial situations, one can be cruel or callous in enforcing certain impartially beneficent acts or rights. Charity, for instance, requires that you do not enforce a property right. Kantianism is well suited to policy decisions, deciding what is fair based on a principle of universalising. However, it is not well suited to interpersonal relations that need to reflect certain motivations. When the situation requires an assessment of persons' motivations, desires, beliefs etc. virtue theory will be useful and when a situation requires impartial beneficence utilitarianism will be useful. When what is required is the creation of universal fair rules such as legal and human rights, Kantianism or rule-utilitarianism will be useful. Deciding which situations will best be suited to applying these different theories will be deeply grounded in the actual situation. Interpersonal situations usually require virtues, policy decisions usually require universal rules and distributive justice cases usually require impartial beneficence. This is not as clear as one would like a theory to be; what is required is moral wisdom and the project of refining when different reasons are applicable can be furthered. In my application of virtue theory to patents, pills, poverty and pandemic I show how the different reasons all play a role and how they all point to a similar conclusion. My application will further aid in clarifying this complex and difficult issue. Furthermore, the reasons do not need to conflict. Utilitarian reasons can justify an action and virtue theory can justify the motivations and character traits an individual acts from. Kantianism can establish what rights are involved and virtue theory can decide whether a virtuous person would enforce those rights. I argue rights are indispensable,¹²⁸ impartial beneficence is indispensable and likewise a virtuous character. Having set out moderate virtue theory and why I do not accept a radical virtue ethics approach I will now set out how it applies to corporations and especially pharmaceutical corporations.

Virtue theory and corporations

The first task of virtue theory will be the development of an appropriate attitude towards business and corporations. The distinction between business and a corporation is that the former is an activity whereas the latter is a moral agent that can be thought of as having a characteristic activity. So the former is like swimming and the latter a swimmer. This requires an examination of the practice of corporations and its role in the eudaimon life. In chapter one

¹²⁸ See Gewirth, A. 'Why Rights are Indispensable' in *Mind*, vol. XCV, no. 379, July 1986 for a good argument for this position.

I argued for a moral projection grounded in the moral agency of corporations, *qua* corporations. It will now be important to decide what virtues corporations should exhibit in their CID structures. This will first require examining the function and purpose of business. In chapter one we already noted that the corporation's sole aim cannot be the maximisation of profit and that moral considerations should be evident in the reasoning structures of the corporation as set out in the CID structure. I now set out what virtues a corporation should exhibit.

A good person can sometimes do bad things and a bad person good things. Thus we will always be uncertain whether a person really is virtuous or only appears to be virtuous. This is an extension of the other minds problem, the problem whereby we are not certain what the contents of other people's minds are. This is a fundamental problem for virtue ethics that cannot assess agent-independent actions and can only judge an action insofar as a virtuous person would perform the action. Moderate virtue theory need not define good action in terms of virtue concepts.

We do not have privileged access to the motivations, desires and character traits of others but we can examine their actions independently and view them as indicators of a person's character. This same method can be used with corporations, although we have the added benefit of analysing the CID structure itself for whether it structurally incorporates the virtues. For example we can project either caring or not caring onto two different corporation's CID structures; for instance if they either show that they take the welfare of their staff and the community into consideration or not. It is also important to decide whether business itself is inherently a bad practice. If its purposes, aims and goals essentially require bad motivations, desires and character traits then it is essentially a bad practice and also if the practice requires the performance of immoral actions. To answer these questions I set out what I consider to be the appropriate attitude towards business, the practice it is and its relation to eudaimonia.

This task attempts to gain a perspective of our entire lives and the practice of business is not seen as an isolated activity but as part of our human lives and condition. I incorporate two virtue theory approaches to business, those of Chris Megone and Robert Solomon, into my account of how virtue theory will apply to corporations.

Business ethics is simply a branch of virtue theory as a whole and as such we need to know the purpose of the activity, and its purpose must fit into the ultimate purpose of living the eudaimon life. As Megone states, “Since eudaimonia is the ultimate goal of human life, whatever goal business has which distinguishes it from other activities the pursuit of that goal must be consistent with the pursuit of eudaimonia¹²⁹.”

The virtuous person is someone who has the right attitude towards things and can see the point of activities. Their desires are proportional to the worth of the activity. Thus, the virtuous person is one who has the rationality to see things correctly and the right desires: desires to do what is worthwhile. Hence corporations should exhibit the appropriate attitudes to situations. This requires that part of a corporation’s CID structure needs to be an information gathering aspect and assessments of best courses of action. The corporation’s CID structure should then require that the appropriate course of action be followed. If this is the case it makes sense to say that the corporation has appropriate desires and attitudes.

I have already argued why Aristotle considered the rational life the eudaimon life and why the pursuit of wealth is a mere means to an end. I now examine the activity of business and the role it should play in the virtuous agent’s life before considering the virtues of a corporation *qua* corporation.

Material goods are necessary to live a eudaimon life. We need them physically to survive and we need them to be freed so that we can live the fully virtuous life. In the modern world, as opposed to the slave driven world of ancient Greece, we need commercial activity. Aristotle mentions two types of commercial activity; the first is household management: the purchasing of goods for the household. This he sees as a worthwhile pursuit and it has a built in limit, namely that there is a limit to how much goods a household needs. If the goal of the activity is purchasing goods in order to live and be freed to live the fully virtuous life, then this has a limit and is considered by Aristotle to be good. The other type of commercial activity is retail trade with the purpose of maximising wealth without limit. This activity Aristotle perceives as contrary to what is needed to live the virtuous life. Rather than taking Aristotle’s view that business is essentially contrary to the moral life we should rather realise that “The internal

¹²⁹ Megone, C.: 46

aim or goal of business should be to seek to produce sufficient value for those engaged in the activity, by selling goods and services, to enable those people to lead a virtuous life¹³⁰.”

Wealth is only valuable to the extent it is necessary for the ends constitutive of eudaimonia. One can thus attain sufficient wealth, the wealth necessary for eudaimonia. Pursuing the goal of maximising wealth threatens the virtuous life, as it is likely that one will become unable to recognise that wealth is only a means to eudaimonia and not an end in itself. Furthermore, certain virtues may be threatened by too much wealth, such as temperance and generosity. Finally a person who pursues the goal of maximising wealth may devote undue time to the enterprise and as such not live a eudaimon life. According to this picture of business ethics the goal is not to maximise long-term owner value but merely to create sufficient owner value for all concerned to live a virtuous life. In this approach to business ethics there is already a move away from viewing business as merely a profit seeking enterprise and has situated business within the ultimate goal of living a eudaimon life. Business is again related to humans and it is again seen as a characteristically human activity and not an isolated activity of merely pursuing abstract profit. This is the appropriate view a rational individual will take of the place of business.

Solomon also debunks the popular view of business as merely a profit seeking activity. He begins his chapter: *Business as a Practice*, with a quote that I think bears repeating. Naipaul, V.S.writes¹³¹:

Not essentials, not luxuries, but things that made ordinary life easier. . . To people looking for a large vessel that wouldn't taint water or food, and wouldn't leak, imagine what a blessing an enamel basin was.

I have argued that the telos of business cannot be only profit. I now give a positive account of how business fits into the good life. When business is viewed, abstracted from human life, merely as the pursuit of profits, this removes the real focus of business, which is to produce goods and services that aid in living what we consider a good life. To view business merely as the pursuit of profit is to misunderstand human nature, community and the purpose of business. The pure profit motive cannot be what business is about. First, very few people

¹³⁰ Megone: 50

¹³¹ Quoted in Solomon, R. C. 1992: 118 from Naipaul's book: "A bend in the river".

actually receive profits. Most people who work in business receive salaries and not profits and thus on a purely empirical level most people “in business” are not trying to make a profit.

For those who do receive profits this should not be their primary goal. Money that can never be spent has no value. Rather the underlying reason for desiring profit is more likely to be prestige, affluence, and in general living the good life. The abstract notion of profit should not be sought as an ultimate end; those who do are not living the fully virtuous life and will not attain eudaimonia. They have not realised that wealth is a means only. There is no value apart from the relation of the thing valued to the increasing of some person’s quality of life. Solomon states that business is better understood as a human activity that is situated in a community and is done in order to achieve a better life. It is intimately tied to the concept of eudemonia and a business should be seen as part of this overall project.

What is a corporation? It is a moral agent that is constituted by persons who are situated and constituted by communities. A corporation’s characteristic activity is business and business’ ultimate goal is tied to eudaimonia. A corporation that does not provide a service or does not interact with a community (if that is even possible) will not continue to be a corporation. To abstract the activity of business from the persons who comprise it is thus impossible. The production of goods that add to the value of the consumer’s life (or what the consumer thinks will add value to their life) is the ultimate purpose of business and to not do so will result in the corporation failing.

The virtues of corporations then are those characteristics of a corporation that make the business better and more effective at fulfilling its role of adding to the eudemonia of the community such as efficiency, respectfulness, caring, diligence etc. A company that is honest for instance will be more likely to succeed in that it will gain the trust of the consumers¹³². A corporation that is renowned for not delivering goods that they have received payment for is a corporation that will not succeed. Consumers, producers, employees and employers are all human and members of a community that are all trying to attain eudemonia. This will be achieved by being virtuous- by maintaining the virtues without which the purpose of the organisation becomes redundant. Furthermore, moderate virtue theory can judge the actions of the corporations, *qua* corporations, according to utilitarian or Kantian reasons, and their

¹³² Although this honesty would not make a senior executive tell all company secrets to journalists

desires, motivations and CID characteristics according to whether they show honesty, cruelty, callousness etc.

I use the example of Nestlé marketing milk formula to mothers in Indian hospitals. We can judge the actions of the corporation to be morally reprehensible as it results in the deaths of thousands of babies and is a form of murder. We can also judge the motivations of the corporation *qua* corporation, and say that it shows itself to be callous, negligent, light-minded and cruel. We can also, because of the referential opacity with regards other descriptions of corporate acts, hold individuals within that corporation responsible for their acts and their characters. The preceding argument has defined the virtues of corporations *qua* corporations in terms of their characteristic activities and their CID structure's propensity to bring about certain acts. An appropriate view to take towards business is to view its role as maintaining sufficient value to contribute enough resources so that all involved in the corporation can attain eudaimonia. Its activities as well can be seen as part of the overall project of attaining eudaimonia

To apply this type of thinking to a pharmaceutical company we would have to first examine its purpose (telos) and its role in the community. The purpose of a pharmaceutical company is to produce high quality medication for the treatment of ill health, pain etc. Above and beyond this is the purpose of all businesses, which is to produce enough value for all involved in the activity to have sufficient wealth in order to live the fully virtuous life. Their role in the community is to research and market pharmaceuticals that improve the quality of human life. Their blessing to the community is not an enamel basin but life saving medication. They have thus got a responsibility to produce profits for their stockholders but their primary responsibility is to produce quality pharmaceuticals and to have them used in treating human beings. It is absurd to think that a pharmaceutical company is merely a profit making enterprise. To view it as such is to unjustifiably divorce it from the community of which it is a part. It is conceptually impossible to think that a pharmaceutical company could still make money without producing pharmaceuticals or that profits are an end in itself. It is nonsense to think that a pharmaceutical company would exist if it did not sell pharmaceuticals that increased the health and well being of the persons who took the pharmaceuticals. Profits made from this cannot be buried and still have value. When someone states they are seeking profits they actually mean the goods that profits can provide: honour, public esteem, pleasure, food, cars, aeroplanes and other desired or needed goods. It would also cease to be a pharmaceutical

company if it failed to produce sufficient value to continue being a pharmaceutical company and create enough wealth for all concerned to live a fully virtuous life. A pharmaceutical corporation is thus involved in business that operates within the community to add to eudemonia by producing quality medication. Business is a social activity, specifically the exchanging of money, goods and services. The pharmaceutical company exchanges pharmaceuticals for money and in so doing is meant to add to the value of people's lives.

In summary what makes a good corporation is related to its characteristic activity namely business. This activity is related to eudaimonia and corporations play a role in producing sufficient value for the freedom to pursue eudaimonia. Those traits that enable the corporation to fulfil this function will include honesty, efficiency, courage, etc. Virtue theory can also examine the acts of the corporation and decide whether vicious or virtuous persons usually do those acts. And we can decide whether the act reveals the corporation to be callous, light-minded, cruel etc. Other reasons also factor into the morality of the corporation's actions and looking at their consequences and whether they respect certain rights and obey certain rules can also be used to assess the corporation's moral responsibility.

I have argued in chapter one that it makes sense to say that corporations have motivations, desires and goals. Some may object that the notion of character is more robust and requires a further mental element that corporations do not have. It is true that character is a long-term concept and requires that we examine an agent over a long period of time to discover whether they have a particular character and even then we are not certain. This long-term view is a result of a virtue being defined as a settled disposition of an agent gained through habituation to act in a way that reflects appropriate beliefs, desires, motivations etc. Some will argue that a corporation cannot have a settled disposition to act. My response to this criticism is that we can make sense of a corporation having a settled disposition to act in terms of a corporation's CID structure and corporate culture¹³³. This criticism only requires that we do not merely look at particular acts but also long-term performance. Thus, we need to incorporate case studies into a virtue theory approach to business ethics; the history of how corporations have acted in the past is constitutive of its corporate culture and character.

¹³³If none exist then the corporation is not a moral agent and moral responsibility is directly applicable to the individuals within the corporation.

A further criticism could be that the notion of the CID structure reflecting a corporation's character is vague and a method of structural analysis needs to be added to this account to develop an objective method for deciding which structures reflect which virtues. What does a corporate CID structure look like if it is courageous? As a virtue theorist I am able to answer this question with reference to the actions that the CID structure has a disposition (or design) to produce. Certain CID structures require environmental assessment studies to be done before developing a site; this is a CID structure that reflects care in how it affects other people. Furthermore, if an action is a result of following a corporation's CID structures and this action is a callous, cruel or unjust act we can conclude that the CID structure is one that reflects the character traits of callousness, cruelty and unjustness. By allowing such acts the CID structure shows that its structure allows for certain vicious acts. This will not reduce virtues to acts but will include another reason why an act may be morally deficient. If an act is within someone's rights and may be impartially beneficent it can still reflect a moral weakness by being a vicious act. I have set out why a corporation *qua* corporation is the right sort of thing to be held morally responsible and I have argued for a virtue theory approach to normative ethics and hence that for which we can be prospectively and retrospectively responsible. I now set out a specific situation and ask three questions: First, can a pharmaceutical company that patents medication during a state of pandemic in poor countries give moral reasons to justify their actions; second, what motivations, desires, beliefs and character traits does a pharmaceutical company show when they patent pharmaceuticals during a state of pandemic in poor countries; and, are those character traits morally praiseworthy or blameworthy. In the next chapter I set out all the relevant facts about the HIV/AIDS pandemic in South Africa, what patent rights are, how they have been enforced by pharmaceutical corporations, the extent of poverty in South Africa and how this affects the ability of poor people in South Africa to buy HIV/Aids medication.

Chapter 3: The facts

In this chapter I set out the context of the ethical problem this thesis deals with. To reiterate, the question that I ask in this thesis is whether a pharmaceutical corporation is morally responsible for maintaining its patent rights on medication used to treat a pandemic in poor countries. More specifically, I look at the particular situation of pharmaceutical corporations patenting medication used to treat HIV/AIDS in South Africa. The question is a highly specified one with a clear context. It incorporates the terms ‘patent rights’, ‘pharmaceutical companies’, ‘responsibility’, ‘poor countries’ and ‘pandemic’. In this chapter I set out what I mean by each of these terms. I set out what HIV/AIDS is and what I mean by a pandemic. I give statistics of the incidence and prevalence of HIV/AIDS in South Africa that justifies HIV/AIDS in South Africa being classified a pandemic. I examine the medication used to treat this pandemic and the pricing of it. I compare the pricing of generic medication with patented medication. I define what a patent is and set out a few of the many philosophical issues surrounding patents. My focus is on whether it is ethical to patent medication used to treat a pandemic in a poor country, and I do not argue that the subject of this thesis is the only or even the primary ethical or philosophical problem for patents. I also set out some of the impacts that the HIV/AIDS pandemic will have on South Africa if medication is not made available. This chapter shows why patenting is one of the reasons, but not the only reason, why access to medication is limited. There are other ethical issues surrounding HIV/AIDS and medication but my focus is on the ethics of patenting medication and I do not need to argue that it is the only, or even primary, ethical question related to either patent rights or the treatment of the HIV/AIDS pandemic. This is not primarily a philosophical chapter but rather a brief overview of the relevant facts relating to my philosophical enquiry.

What is HIV/AIDS?

Quoting from “A Dictionary of Medicines”. Oxford University Press, 2000. Oxford Reference Online. Oxford University Press. 7 January 2003:

HIV is the human immunodeficiency virus. It destroys a subgroup of white blood cells (the helper T-cells, or CD4 lymphocytes) and results in suppression of the body's immune response. HIV infection is essentially sexually transmitted; the two other main routes through which it is spread are via infected blood or blood products and from an infected woman to her foetus (it may also be acquired from maternal

blood during childbirth or be transmitted in breast milk). Acute infection following exposure to the virus results in the production of antibodies, their presence indicating that infection has taken place. Some people who are HIV-positive progress to chronic infection and this can include the AIDS-related complex, which is a persistent generalized involvement of the lymph nodes marked by intermittent fever, weight loss, diarrhoea, fatigue, and night sweats; and AIDS (acquired immune deficiency syndrome) itself, in which the individual is susceptible to opportunistic infections, especially pneumonia...²⁰⁵

What are the HIV statistics for South Africa?

According to the Global Surveillance of HIV/AIDS and sexually transmitted infections²⁰⁶ (STI's), a joint effort of the World Health Organisation (WHO) and UNAIDS, the total number of adults living with HIV in South Africa is 5, 000, 000. These statistics were gathered at the end of 2001 and during the first quarter of 2002. The UNAIDS/WHO working group on global HIV/AIDS was founded in November 1996 and guides research initiatives that work closely with national governments and research institutes to calculate current estimates of people living with HIV/AIDS. Their methodology is developed in collaboration with an international group of experts and used to calculate new estimates of prevalence and incidence of HIV and AIDS deaths, as well as the number of children infected through mother-to-child infection of HIV, based on previous published estimates for 1997 and 1999. The statistics do not intend to represent an exact count of infections but rather use a methodology that has proved useful in indicating the magnitude of the pandemic within individual countries.

Their findings show that, in 2001, of the five million people living with HIV in South Africa, 4.7 million are aged between fifteen and forty nine; of those adults aged fifteen to forty nine, 2.7 million are women; and in addition 250 000 children are living with HIV. According to UNPOP South Africa has a total population of 43 792 000, and these figures mean that 20.1% of adults aged fifteen to forty nine are HIV positive in South Africa and over 10% of the entire population is HIV positive.

²⁰⁵ "HIV" *A Dictionary of Medicines*. Oxford University Press, 2000. *Oxford Reference Online*. Oxford University Press. 7 January 2003
<<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t61.001847>>

²⁰⁶ UNAIDS/WHO Epidemiological Fact Sheets by Country for the year 2002 (updated)
<http://www.who.int/emc-hiv/fact_sheets/pdfs/Southafrica_EN.pdf> 3 January 2003

During 2001 an estimated 360 000 adults and children died of AIDS. At the end of 2001, 660 000 children under the age of fifteen, who were still alive, had lost either their mother or father or both parents to AIDS.

Surveillance surveys conducted at antenatal clinics in South Africa since 1990 show that antenatal HIV prevalence has increased rapidly from 0.7% in 1990 to 10.5% in 1995 and to 22.8% in 1998. Antenatal HIV prevalence was 22.4% and 24.5% in 1999 and 2000 respectively. In the Kwazulu-Natal, Mpumalanga and Gauteng provinces, HIV prevalence is still exhibiting an upward trend; HIV prevalence rose rapidly from 7.1% in 1990 to 36.5% in 2000. In other provinces the HIV prevalence rate seems to have stabilised at high rates, varying from 11.2% to 27.9%. The life expectancy for a person born in South Africa is now 57 years old²⁰⁷.

What impact will HIV/AIDS have on South Africa without treatment?

A study by Abt Associates, a Johannesburg consulting firm, forecasts the number of deaths attributable to AIDS in South Africa to range from 354,000-383,000 by 2005 and to rise to 545,000- 635,000 in 2010. Average life expectancy is set to fall from 60 years to 40 by 2008. The United Nations expects the pandemic to knock 0.3 to four percent off the growth rate each year, making South Africa's GDP in 2010, 17 percent (or \$US22 billion in today's prices) lower than it would otherwise have been²⁰⁸. When the 20.1% of the adult population becomes sick these people lose productivity. HIV/AIDS affects teachers, bankers, doctors, lawyers, farm labourers, military personell and every other conceivable vocation. Therefore, it affects a countries food security, national security, education programmes, health care, finance sectors and all spheres of the country where labour is lost. The loss in productivity is also added to a rise in government health spending, thus those able to work have an increased tax burden. When breadwinners are lost or both parents, younger children have to take care of the household. Large amounts of AIDS orphans will mean an increase in children who need to be supported by institutions or other family members. In short, HIV/AIDS has a crippling effect on the economy, family structures, food supply and personal wealth

²⁰⁷ UNAIDS/WHO Epidemiological Fact Sheets by Country for the year 2002 (updated)
<http://www.who.int/emc-hiv/fact_sheets/pdfs/Southafrica_EN.pdf> 3 January 2003

²⁰⁸ Written by CountryWatch.com. Sources: CountryWire; Financial Times online (www.ft.com); Daily Mail & Guardian (www.mg.co.za); Daily Dispatch (www.dispatch.co.za); United Nations.
<<http://biz.yahoo.com/ifc/za/>>

What treatment/prevention is available for HIV/AIDS and how much does it cost?

Quoting from the "A Dictionary of Medicines". Oxford University Press, 2000. Oxford Reference Online. Oxford University Press. 7 January:

Antiretroviral drugs are used to treat infections caused by viruses such as HIV/AIDS. Because viruses can only function within the cells of their hosts, it has been difficult to produce drugs that act specifically against viruses without damaging their host cells. The effectiveness of antiviral drugs is therefore limited: frequently they will contain an outbreak of viral activity but are not capable of totally eradicating the infection, which can recur (as with cold sores). Fortunately, the majority of viral infections resolve spontaneously in most people and do not require specific medication. However, in immunocompromised individuals, whose ability to fight infection is impaired because of drug therapy (e.g. immunosuppressants) or disease (e.g. AIDS), antiviral treatment may be life saving.

The reverse transcriptase inhibitors are antiviral drugs that act specifically against a particular group of viruses, the retroviruses, the best known of which is the human immunodeficiency virus (HIV), which causes AIDS. Retroviruses contain RNA (rather than DNA) as their genetic material; this is converted to DNA by the virus inside its host cell by means of the enzyme reverse transcriptase. The nucleoside analogue reverse transcriptase inhibitors prevent retroviral replication by becoming incorporated into the growing strand of viral DNA. Non-nucleoside reverse transcriptase inhibitors (e.g. Nevirapine) bind directly to the enzyme to prevent its action. The protease inhibitors act by preventing the action of a protease, a protein-cleaving enzyme that is needed by the virus to produce mature virus particles. These drugs are used in combination with other antiviral drugs in the treatment of HIV infection. However they also inhibit an enzyme system in the liver that is involved in metabolising many drugs; there is therefore a potential for drug interactions in people taking protease inhibitors²⁰⁹.

These drugs are life saving but will not completely cure the individual and also have many negative side effects. Furthermore, HIV is highly mutable: on average there is one genetic mutation per replication and an average infected person has 100 billion virus particles. It is for this reason that HAART (highly-active antiretroviral therapy) is necessary to treat those infected with HIV. HAART attacks the HIV virus at the first two parts of HIV's viral life cycle and the enzymes associated with those life cycles: protease (prepares viral protein for action) and reverse transcriptase (converts virus's genes into a form readable by host cell).

²⁰⁹ "antiviral drugs" *A Dictionary of Medicines*. Oxford University Press, 2000. *Oxford Reference Online*. Oxford University Press. 7 January 2003 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t61.000278>>

Integrase (stitches HIV's genes into host cell), the final part of the virus's life cycle, has not yet been successfully inhibited. Vaccines are being developed that work by presenting the immune systems with large quantities of an enzyme, gp120, in order for the immune system to recognise the virus and protect itself²¹⁰.

Infrastructure of poor countries puts a ceiling on how much funding can actually be spent during a given year in the fight against HIV/AIDS. Mathematical models from 2001 developed by Bernhard Schwartlander put this figure at \$9 billion (\$4.8 billion- prevention/ \$4.2 billion- treatment). Present figures put the amount spent on prevention at \$1.2 billion.

Increased prevention spending of \$4.8 billion (John Stover) could prevent 29m infections. Some of the strategies tabled at the Durban (2000) conference on HIV/AIDS are: the use of condoms; reducing mother-child transmission with one shot drugs like nevirapine; empowering women to make sex decisions; educating people about risks; and instituting treatment for all with HIV/AIDS²¹¹.

Why is HAART not being used in South Africa? The reasons are three-fold: the cost of the drugs; the resistance to the drugs that can develop if they are not taken correctly; and the lack of infrastructure. The cost of drugs is the major hurdle for South Africa. The gross national income per capita in South Africa in 1999 was \$3,170 and this was falling by 0.4% per annum.

The controversy over drugs to treat HIV, patents on them, and much cheaper generic alternatives is a difficult one. The South African government has drafted laws that give it more flexibility in procuring medicines, whether from homegrown sources or from cheaper foreign exporters. In 2000 five global pharmaceutical companies offered certain African countries, including South Africa, discounts of 70-90 percent on several drugs to treat the HIV virus resulting in a price war. However, even with the discounts the drugs are still too expensive for the average South African. In South Africa the per capita expenditure on health per year is US\$5, and it is thus extremely difficult for an average person to afford these drugs. There have been talks to reduce the drugs from US\$10,000 or US\$15,000 a year to around

²¹⁰ The Economist July 13th 2002)

²¹¹ The Economist July 13th 2002)

US\$600 a year, but this is still a great deal more than what an average South African spends on health²¹².

Pharmaceutical corporations quote the figure of US\$500 million to produce a new drug. The majority of the cost of developing a new drug is in the pre-clinical development stage and the US government funded a significant proportion of the pre-clinical development of 14 antiretrovirals²¹³. According to the April 2000 edition of Fortune magazine, of the 'Fortune 500' the pharmaceutical industry ranked number one in 1999 for all measures of profitability²¹⁴. When Brazil began manufacturing its own generic antiretrovirals the cost of the medication dropped 79%²¹⁵. India, which is also producing generics is currently able to produce triple therapy drugs for less than US\$100 a month. According to the UNAIDS and the Brazilian department of health, the price stability of drugs when a patent monopoly is enforced is 9% on average²¹⁶. Prices drastically dropped when competing with cheaper generics²¹⁷. The variation in prices from patented US prices to the cheaper generics is as high as 98%²¹⁸.

What is poverty and is poverty relevant to HIV/AIDS in South Africa?

Quoting from "A Dictionary of Sociology". Ed. Gordon Marshall. Oxford University Press, 1998. Oxford Reference Online. Oxford University Press. 7 January:

Poverty is a state in which resources, usually material but sometimes cultural, are lacking. It is common to distinguish between absolute and relative definitions of poverty. Poverty defined in absolute terms refers to a state in which the individual lacks the resources necessary for subsistence. Relative definitions, frequently favoured by sociologists (especially when studying poverty in advanced industrial societies), refer to the individual's or group's lack of resources when compared with that of other members of the society—in other words their relative standard of living. Since relative poverty is a matter of differences in levels of material resources—that is, of inequalities in their distribution across a society—measures of relative poverty are potentially no less objective than those of absolute poverty. They are not simply a

²¹²Written by CountryWatch.com. Sources: CountryWire; Financial Times online (www.ft.com); Daily Mail & Guardian (www.mg.co.za); Johannesburg Daily Dispatch (www.dispatch.co.za); United Nations. <<http://biz.yahoo.com/ifc/za/>>

²¹³http://www.phrusa.org/campaigns/power_point/hiv_slides_3/sld014.htm (Development gateway)

²¹⁴http://www.phrusa.org/campaigns/power_point/hiv_slides_3/sld015.htm (Development gateway)

²¹⁵http://www.phrusa.org/campaigns/power_point/hiv_slides_3/sld016.htm (Development gateway)

²¹⁶http://www.phrusa.org/campaigns/power_point/hiv_slides_3/sld018.htm (Development gateway)

²¹⁷http://www.phrusa.org/campaigns/power_point/hiv_slides_3/sld019.htm (Development gateway)

²¹⁸http://www.phrusa.org/campaigns/power_point/hiv_slides_3/sld020.htm (Development Gateway)

matter of subjective feelings of poverty, though such feelings may be of importance when analysing the consequences of poverty.

Subsistence definitions of poverty are of considerable value in examining Third World poverty, and international studies show that the overall level of poverty measured in subsistence terms is very high, with some studies suggesting that almost half of those in low-income countries live in absolute poverty. The very high level of poverty is unquestionable even though very precise measures of poverty are hard to obtain in societies where income gives only an imprecise indication of access to the means of subsistence.

The immediate causes of poverty vary over time and over the life-cycle of a person. Booth and Rowntree found low and irregular earnings were a major cause. (Rowntree showed that at least half of primary poverty in 1897–98 was due to low wages and over a fifth to large families.) However, Rowntree's 1936 study suggested that unemployment and old age were more significant causes than formerly thought. By the time of Townsend's study, the main immediate causes were low pay, loss of the breadwinner, ill-health, unemployment, and old-age, with the key groups in poverty being the elderly, single parents, the long-term sick and disabled, the low-paid, and the unemployed. Women are over-represented amongst the poor—a finding that has led some writers to talk of a feminization of poverty.

This mapping of change in the immediate causes of poverty indicates that it is economic and structural factors and social misfortune, not individual weakness in the form of idleness or imprudence, that are the major causes of poverty. Indeed, in order fully to understand poverty, it is necessary to examine the general distribution of wealth and of social inequality in society.²¹⁹

The majority of South Africans live in absolute poverty even more so when subsistence (as it should) includes buying life saving medication. According to the CIA fact book²²⁰, the population below the poverty line, as estimated for 2000, is 50% and unemployment, estimated for 2001 was 37%. For those falling below the poverty line, reliance on government spending on health is essential. The South African government budget includes, US\$ 22.6 billion revenues and US\$ 24.7 billion expenditure including asset expenditure²²¹, 11.6% of this being spent on health²²². To treat all persons suffering from HIV in South Africa with the patented drugs offered at the pharmaceutical corporation's price of \$600

²¹⁹ "poverty" *A Dictionary of Sociology*. Ed. Gordon Marshall. Oxford University Press, 1998. *Oxford Reference Online*. Oxford University Press. 7 January 2003 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t88.001757>>

²²⁰ <http://www.cia.gov/cia/publications/factbook/geos/sf.html> (CIA fact book of South Africa)

²²¹ CIA Fact book: < <http://www.cia.gov/cia/publications/factbook/geos/sf.html> >

²²² UNAIDS and WHO AIDS surveillance report update 2002

would mean an expenditure of US\$ 3 billion without establishing clinics to distribute, or medical support to ensure correct usage of the drugs, treatment for drug complications and testing to discover who needs the medication. Already the US\$ 3 billion is equivalent to 104% of the total health budget, without factoring in the other expenses involved and the maintenance of hospitals, food, salaries, transport, water and electricity, ambulances etc. that goes into having a public health system that is designed not only to treat HIV/AIDS but to deliver babies, perform heart surgery etc. Thus, poverty is relevant to the South African HIV/AIDS pandemic.

What other ethical issues surround HIV/AIDS?

There are many other ethical issues that surround HIV and AIDS, such as whether there is a right to keep a persons status private or whether they should be obligated to reveal their status. Do we have an obligation to inform a spouse, lover or sexual partner about our HIV status or not? Do we have an obligation to be tested for HIV and if we are not can we be held accountable for not doing so? Is transmitting HIV manslaughter? Should a mother who is HIV positive and has no access to medication have an abortion? How does HIV affect the duty of doctors to maintain confidentiality? What ethical practices should the media employ in the reporting of AIDS and AIDS deaths? What is discrimination with respect to employment practices in light of the HIV pandemic? What personal responsibilities do persons living with HIV have to their families, friends and society? Are their responsibilities different to an HIV negative person? Many more ethical issues than these can be studied but my focus is on pharmaceutical companies and their practice of patenting HIV/AIDS medication in poor countries during a state of pandemic²²³.

What is a patent?

A patent is an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem. What does a patent do? A patent provides protection for the invention to the owner of the patent. The protection is granted for a limited period, generally 20 years.²²⁴ The U.S.

²²³ A good book for more ethical issues surrounding HIV/AIDS is Brenda Almond's book, AIDS: a moral issue.

²²⁴ (http://www.wipo.org/about-ip/en/index.html?wipo_content_frame=/about-ip/en/patents.html)

Constitution allows Congress to grant patent protection in Article I, Section 8: "The Congress shall have power... to promote the progress of science and useful arts, by securing for limited times to... inventors the exclusive right to their discoveries." ²²⁵ Translated into today's legalese, patents are a form of personal property that provide the owner with the right to exclude others from making, using, selling, offering for sale, or importing the invention described in the patent claims, for a period of 20 years from the date of filing. Although patents have been differently instituted under different governments there is a new synthesis of the various laws under single international laws and treaties, under the leadership of the World International Patents Organisation and the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement of the World Trade Organisation (WTO).

What are some of the ethical and philosophical issues surrounding patents generally?

Patents are a form of property and besides all the ethical issues that surround property generally, their ontology, utility, the rights people have to them etc., patent rights have specific problems. First, the criterion for patenting something requires novelty, utility and non-obviousness. These requirements involve many philosophical problems of definition and exegesis. Furthermore, the ontology of intellectual property is dubious. Whereas physical property is a limited resource and tangible, intellectual property is able to be used by a large portion of persons without excluding others and is non-tangible. There is also the issue of whether patents more generally are justifiable and socially beneficial. Issues that surround recent patent debates are the patenting of the human genome, traditional knowledge, computer software and mathematical algorithms. My issue is not primarily with the ethicality of patents more generally understood but with the specific practice of patenting pharmaceuticals during a state of pandemic in poor countries. In the next chapter I discuss what pharmaceutical corporations have an ethical obligation to do in this situation and what they may be held morally responsible for, as defined in this thesis. Before getting into the main application I will set out the actual response of pharmaceutical companies to the HIV/AIDS pandemic. I will also set out some of their arguments against lifting patents on pharmaceuticals.

²²⁵ (<http://www.bountyquest.com/patent/whatisapatent.htm>)

What are the pharmaceutical corporations position on patent rights and access to AIDS medication in poor countries?

The position of the pharmaceutical companies on HIV/AIDS and access to AIDS treatment, fighting the AIDS pandemic in Africa, disputes with South African law and its settlement, the industry's efforts to fight the spread HIV/AIDS, intellectual property protection, their contribution to making AIDS medication accessible, their response to national emergencies and intellectual property rights, what they perceive to be the impact of the patent system on research investment for developing countries, and why they see the patent system as playing an important role for innovation and access to drugs and vaccines, can all be found at the web sight of the International Federation of Pharmaceutical Manufacturers Association (IFPMA)²²⁶. The IFPMA is a non-profit, non-governmental organization (NGO) representing 59 national industry organisations from both developed and developing countries. These include Abbott Laboratories, Bayer, Boehringer Ingelheim GmbH, Bristol-Myers Squibb Company, GlaxoSmithKline (GSK), Johnson & Johnson, Merck & Co., Inc., and Roche/ F. Hoffman- La Roche Ltd., to name a few²²⁷.

The pharmaceutical industry is research-based and highly dependent on intellectual property (IP), especially patent protection. Without patent protection, pharmaceutical companies argue, there would be no innovation in medicines. These innovations save countless lives and have extended life expectancy over the past decades. The limited period of market exclusivity provided by effective IP protection allows companies to sustain the vast research and development investment necessary to invent new medicines and therapies.

Lack of patent protection, they argue, stifles local creativity. According to this argument local inventors have no incentive to invest in research if their products will be copied. Industry has welcomed the two major international agreements: the intellectual property chapter of the Uruguay Round Agreement (GATT), the "Trade-Related Aspects of Intellectual Property Rights" (TRIPs) and the North American Free Trade Agreement (NAFTA) that require that all technologies, including pharmaceuticals be protected. IFPMA believes that

²²⁶ <http://www.ifpma.org> (International Federation of Pharmaceutical Manufacturers Association)

²²⁷ <http://www.ifpma.org/> (International Federation of Pharmaceutical Manufacturers Association)

countries should accelerate their implementation of TRIPs and that NAFTA should serve as the model for any future regional trade agreements.

One of the disadvantages of removing patents is that, although the cost and time of getting a new drug to market has escalated in recent years for pharmaceutical companies, imitators - in the absence of effective patent systems - will continue to be able to produce and market copies of the drug quickly and in sufficient quantities to undercut the commercial viability of the legitimate producers.

Patent protection for pharmaceuticals provides a broad range of benefits both to patients and to the economy. Patent protection for pharmaceuticals increases the availability of vitally needed drugs, provides patients with wider choices among a broad range of therapeutic drug classes at lower prices, fosters innovation leading to medical advancement, and provides an important policy base for the encouragement of productive investment and employment in the pharmaceutical sector. Furthermore, generics may not meet safety standards that patented medication meets; imitators are liable to pose a health risk.

If compulsory licensing is forced on pharmaceutical corporations that develop medication that treats HIV/AIDS then research and development into this infection will decrease. According to the IFPMA the trend in the total anti-infectives in the research development phase shows a 30% increase from 1997 to 2001. By contrast, the trend in research and development into HIV/AIDS medication shows that fewer compounds are being researched. Although 150 compounds are in the research phase the overall trend is that less compounds are being researched. This decline cannot be accounted for because there is a decrease in the need for new compounds to be developed as HIV/AIDS compounds become ineffective due to resistant strains of the highly mutable HIV virus. The reasons for this decline are not certain and it is not clear whether it reflects the attacks on the patenting of these medications. In summary, while total anti-infective and other viral R&D continues to expand, HIV medicines research has not expanded at the same rate despite the need and the scientific opportunities. It may be more than coincidence that this has occurred since the advent of hostile attacks on patents and TRIPs focused particularly on the HIV/AIDS sector.

Pharmaceutical corporations have responded to the HIV/AIDS pandemic by reducing prices in Africa and offering certain patented medication at a lower price or even for free in some

circumstances. The lawsuit brought by the South African government against the pharmaceutical corporations questioned the exclusive patent rights of pharmaceutical companies and both parties reached an agreement that was entered into by the South African government and the pharmaceutical industry resulting in a partnership between the two. This partnership is meant to respect intellectual property (IP) and the need of patients for medication.

In summary the position of the pharmaceutical industry is that IP needs to be protected and that it is essential for research and development of new medication. They also respect the need for medication and want a method to enhance access to medication that also allows for patent protection.

Chapter 4: Application

In this chapter I apply moderate virtue theory to pharmaceutical corporations and argue that a pharmaceutical corporation's activity is unethical when patenting medication that treats a pandemic afflicting poor countries. I argue that this act cannot be ethically justified and that their motivations, intentions and character traits are unethical when they do patent these medications. My analysis is based both on the actual act and the degree to which it is in accordance with impartial beneficence and accords with our duties defined in terms of universal rationality, rights and imperatives. It also examines the motivations, intentions and character traits exhibited by the corporation in its CID structure. That is, this chapter applies moderate virtue theory as set out in chapter two that incorporates a broad range of reasons as relevant to deciding whether a particular act is ethical or not. Deciding whether the act and the character reflected by the act is an ethical one or not will depend to a large degree on what the specific act is. In the previous chapter I set out the reasoning and actions taken by pharmaceutical companies. Moral agents, as such, must be capable of justifying with reasons their actions. We saw in chapter one that the ability to be a part of the reason giving and asking game is a necessary condition for being a moral agent. It is these reasons that either justifies an act or fails to justify a specific act. In this chapter I set out various possible actions by corporations in addition to those they are actually performing. This allows me to clarify which possible courses of action would be unethical. Investigating possible cases allows for distinguishing between corporate actions, intentions, motivations or character traits that are unethical and those that are ethical. In looking at hypothetical courses of action and moving beyond the actual case we get a better idea of what is morally relevant in the particular hypothetical case that makes the act either ethical or not. In looking at hypothetical situations I will be able to isolate what distinguishing features of those hypothetical situations justifies inferring unethical motivations, intentions, character traits and actions. What is learnt through the hypothetical cases will then be applied to the actual situation with regards pharmaceutical corporations and how they are enforcing patent rights on medication used to treat persons suffering from HIV/AIDS in South Africa. When setting out these hypothetical situations it will be necessary to assess the possible justifications a pharmaceutical corporation could give in each situation and whether that justification accords with their prospective duties so that we cannot hold them retrospectively responsible. By analysing which courses of action in the hypothetical cases are unethical (i.e. no reasons could justify the action) and what motivations, intention and character traits are reflected by corporations performing those

hypothetical courses of action I am able to answer whether pharmaceutical corporations are ethically justified in patenting pharmaceuticals in South Africa during a HIV/AIDS pandemic.

There are broadly two types of justifications given for patenting medication generally and also specifically in the context of the HIV/AIDS pandemic. The first is in terms of the consequences and is broadly utilitarian. The consequences that are seen as morally relevant are: the possible impact on research and development of new medication; health impacts for those taking unsafe counterfeit medication; and the impact for economic investment into a country disregarding international patent rights. These justifications are given by the IFPMA (International Federation of Pharmaceutical Manufacturers Association) and reflect the belief that the consequences of removing patents are sufficiently bad to ethically justify retaining the patent rights. I investigate its reasoning and the motivations reflected by this reasoning and argue that the reasoning is unpersuasive and the motivations behind the arguments are bad. I argue that consequentialist reasoning shows that it is unethical to retain patent rights in this situation.

The IFPMA uses consequences to support their decision to retain patent rights. They claim that the benefits gained for society by the lifting of patent rights can be measured against the loss of benefits such an action will result in and they claim that for this reason that the action would be unethical. This is clearly a form of utilitarian reasoning where the act in question is decided to be ethical or not to the degree it maximises utility, however defined. What the IFPMA argues is that patents offer an incentive in that they protect the ability of the pharmaceutical company to recoup profits, and in so doing maximise social utility by promoting science. Patents are a good in that they allow the company to make a profit from their research and this profit can be used for further research. If a company were not to have patents then any company that did a chemical analysis of the drug produced after the extensive research would be able to produce the generic easily. This would then promote a situation in which companies are not willing to invest the vast amount of money and skills into researching pharmaceuticals, as this would be a profitless enterprise and would ultimately lead to them going bankrupt. The pharmaceuticals produced through this research method would have to be sold more expensively than the generics. And thus the consumers would always opt for the cheaper generics. This system of removing patents in general would seem to have the overall consequence of not having any research done on new medication. So although the lifting of patents during a state of pandemic in poorer countries would have the

immediate benefit of aiding those afflicted with the disease it would have the ultimate consequence of stopping all research into diseases that afflict the poorer countries in pandemic proportions. Thus, if a future pandemic loomed, there would be no research into it if it were predominantly in the poorer countries.

Here is the argument in perspicuous form:

P 1: Pharmaceutical companies would not research drugs if they knew they could not make a profit.

P 2: Removing patents for drugs that are life saving during a state of pandemic in poorer countries would reduce the profit the pharmaceutical companies could make from that drug.

P 3: Research into medication promotes the social utility of the furtherance of science and health.

P 4: The furtherance of health and science is a good that should be maximised.

Therefore;

C 1: Removing patents on pharmaceuticals that are life saving for a poor country stricken by a pandemic would have the negative consequence of making pharmaceutical companies not want to research any treatments for diseases in the future that reach pandemic proportions in poorer countries.

C 2: This would reduce the future development of science and health.

The first premise that pharmaceutical companies only do research on drugs that they can profit from can itself be questioned. There is a lot of prestige attached to finding a cure, treatment or vaccine for a disease. The *Mail and Guardian* refers to the finding of a vaccine for the HIV/AIDS pandemic as “medicines holy grail”²²⁸ Pharmaceutical companies may be driven by many more incentives than mere profit making. Brand leadership, humanitarianism, market infiltration and generally caring about health can all be motivations to engage in research and development of new drugs.

Furthermore, the guiding principle for pharmaceutical corporations cannot merely be profit seeking as has been argued for in the preceding chapter. This is even clearer with a

²²⁸ Mail & Guardian July 19 to 25 2002

pharmaceutical company. If there were no other ethical obligations on a pharmaceutical corporation but to seek profits or research medication that was the most profitable then highly questionable practices follow. For instance, finding an inexpensive cure for a disease would not be profitable for a corporation. Finding such a cure would be less profitable than having a life-long treatment program. The former in effect removes the market for the treatment by curing people whereas the latter creates a dependent market that will always require the product (treatment) that can be continuously sold at a profit. Producing treatments that have side effects that require more treatment for the side effects would also be highly profitable. Not researching and developing treatment for diseases that generally afflict the poor but rather focusing research into cosmetics for the rich would also be more profitable. What removes these courses of action from being ethical is not that they are less profitable or that they will not allow for greater resources for further research and development, but that a pharmaceutical corporation's primary concern is not with seeking to maximise profits. The first premise is false, as it focuses on profits and not on health concerns. Profit seeking for pharmaceutical corporations is a derivative good based on the higher good of being a member of the community that produces medication that adds to the health of the community.

However, even assuming that pharmaceutical companies are justified in only being driven by the desire for profit (and they are not) this argument still does not go through as the second premise cannot be supported.

There is an inherent confusion lurking in the idea that because the patents would be lifted in poor countries that pharmaceutical companies would lose profit. Given our definition of poor countries these would be exactly those countries the pharmaceutical companies should have known would not have been able to make them any profits. In a sense these are "lost markets", markets in which no profit could have been foreseen. The only consequence, it seems, of not allowing cheaper generics to be made in these countries would be the death of the people afflicted by the pandemic, as they and their governments are unable to purchase the drugs for treatment. For this reason the second premise seems to be weak at best. The pharmaceutical companies either did not expect to receive a profit or expected the profit to come from another source besides the third world countries. The incentive for the pharmaceutical corporations not lifting the patents in poor countries, given that they could not have ever expected a profit to be made directly from the poor countries themselves, could be that the lifting of patents in these "lost markets" is expected to result in the cheaper generics

entering the other markets where they are able to make a profit from the drugs. The other reason could be that they may have assumed in the market research that funding the research into the treatment of HIV/AIDS drugs would be profitable because the richer first world governments would pay the bill for the treatment of those afflicted in third world governments. In this latter case it would mean that pharmaceutical companies enforce patent rights in third world countries in order to be the exclusive profit gainers of foreign aid to those third world governments. In the former case they are willing to sacrifice the lives of the poor in order to retain their ability to make a profit from the rich.

These arguments attempt to show that the second premise is acceptable by arguing that profits would be jeopardised if patents were lifted in third world countries. These arguments accept that the developing countries cannot directly add to their profits but rather that profits would be indirectly jeopardised. Producing generics in poor countries would reduce the possible profits that could be made in the richer countries or would reduce the profits they could gain through aid to the poorer countries. If profits decrease then they argue they have no incentive to research and develop new drugs for these poor markets.

The progress of science is only a derivative utility, though, one that gains its utility from the maximisation of the ultimate utility of person's preferences. To hazard a possible line of reasoning here: the utility of the progress of science upon which patent rights are justified is without substance when it results in the death of millions of people. The progress of science cannot be justified without it being in some way linked to the preferences of persons. It may be necessary for scientific progress to implode the sun but that would result in the extinction of persons, without which science has no utility. This point is even more powerful when relating to the pursuit of the health sciences where it would be pointless to develop that science by requiring that millions of people are unhealthy or die. Patents for pharmaceuticals are there to promote the treatment of sick persons; if persons cannot be treated because of the patents then the justification for them vanishes. This is especially true during a pandemic in poor countries, where vast numbers of persons would die from the disease without treatment. When the reason for this large-scale sickness and death is the retaining of patents then patents can no longer be justified in because they are meant to further the health sciences. So in summary, patents are justified as they have the consequence of increasing the number of healthy people, but in a state of pandemic afflicting poorer countries patents have the consequence of resulting in more sick persons. Thus, patents should be lifted in poor countries

afflicted by a pandemic. This analysis does not exhaust what the moderate virtue theory account of this thesis is able to say about the pharmaceutical corporation's activity, there is also the question of what motivations, intentions and character traits the corporations exhibit in the above reasoning.

Implicit in my above argument is the assumption that patents are only bad when they result in the reduction in the amount of people who can be treated. I have given facts that support this claim in chapter three. However if we lived in some fantastical world where generics were more expensive than patented medication my argument would fail. This chapter is based on the assumption that patents will decrease access to treatment. What this hypothetical case shows is that what is relevant to the debate is whether the consequences of either patenting or not patenting live-saving medication in poor countries during a state of pandemic actually results in better or worse access to health care.

To investigate the motivations, intentions and character traits exhibited by the corporation it is necessary to revert to hypothetical situations and courses of action. What is morally relevant in these cases is the extent to which the corporation exhibits callousness, cruelty, compassion or selfishness. These notions will be tied to the consequences of the action and the situation the corporation is in. What is relevant here is both their ability to aid in the treatment of the pandemic and their intentions to do so. I consider two hypothetical corporations: both have developed a treatment for HIV/AIDS and argue that their financial position is able to decide whether they are acting selfishly, cruelly or compassionately. I argue that the specific situation of poor countries and the hypothetical "lost markets" removes the excuse that because they lack financial resources they are unable to lift patents in poor countries. The reason is that retaining the patents in these "lost markets" will not increase profits; it can only justify retaining patents in wealthy countries where the medication can be bought. So what motivations, intentions and character traits are exhibited by a pharmaceutical corporation when giving justifications for their policy of retaining patent rights in poor countries during a state of pandemic?

I consider two corporations: a lucrative pharmaceutical corporation and a struggling pharmaceutical corporation. For the sake of the argument, I will stipulate that what I mean by the latter corporation is one that is not able to invest money into research and development of a product that they are not certain will produce a large increase in their profit margin. Their

finances are such that a decision to invest their limited resources into research and development of a product that will not have large profit returns would be self-sacrificial and would result in them going bankrupt. By the lucrative pharmaceutical corporation I mean a corporation that is able to research products other reasons other than pure profit making, they are financially stable enough to seek treatment and cures for diseases for other reasons than pure profit. An analogy might be useful: if a beggar were to ask someone for money, the latter would be a rich man with enough money in their wallet to help the beggar without harming themselves financially and the latter would be someone who could only help by financially harming themselves. This analogy is not intended to create more confusion about what I mean by lucrative and non-lucrative. Intuitively the distinction is between rich and poor, and I am not trying to create an exact definition here. I do not need an exact definition of the distinction between lucrative and non-lucrative pharmaceutical corporations to make my point.

When the lucrative corporation uses as its reason for not removing patent rights in poor countries during a state of pandemic that it does so because it will no longer research medication that can treat poor people suffering from a pandemic it is being cruel, callous, selfish and inconsiderate. Its reason for not being willing to perform further research and development into treatment for a pandemic affecting poor countries in pandemic proportions cannot be that its profits will be decreased given the “lost markets” argument or that it will suffer so badly as to make it impossible for it to perform any further research, given the definition of lucrative. Furthermore, it cannot be arguing that it will lose possible profits. What it is saying is that they will maintain its patent rights in spite of the consequences to health in that country and this is to show cruelty, callousness and to be selfish. In so arguing it shows an inappropriate set of desires, intentions and motivations given the dire need for treatment of the poor suffering from a pandemic. It has an incorrect view of its role in society and has shifted away from the goal of maximising health and is focused merely on profits. It shows itself insensitive to the suffering of millions of people. It is in a unique position to either allow the production of cheaper generics by another company or to sell them less expensively itself. Not doing so, and having many die as a direct consequence of its acts or omissions makes it morally responsible for those deaths. Not allowing prices to decrease by either maintaining patents or high prices shows a moral weakness in the corporation’s CID structure that allows for acts that are cruel, callous, selfish or in some other way deficient. What I have argued in the above section is that if a corporation is lucrative and the result of not lifting its patents is the reduction in health of poor people in a pandemic then both their

actions and intention or motivations are unethical. Whether in the actual case pharmaceutical corporations are lucrative, are able to remove patents and whether the effects of their either retaining or not retaining patents will in actuality increase access to health care will be dealt with when examining the actual case of the HIV/AIDS pandemic in South Africa. One last point to note: a pharmaceutical corporation that would not research and develop a drug to treat a future pandemic if it were predominantly in the poorer countries because it knew that it would have no patent protection shows itself to be lacking the intentions, motivation and character traits of compassion, care, sympathy and other mental states of those who are not cruel or callous. This is true given that it does not mean by the “there **would** be no research...”, that there “**could** be no research”. It is this distinction that I am trying to capture by the use of the terms lucrative and non-lucrative. The former would be able to and the latter would be unable to research and develop a treatment because in a sense their “fiscal health” depends on them not investing in any non-profit making enterprises. We cannot be morally obligated to do what is impossible and furthermore moral obligations do not generally require great self-sacrifice. What I have argued in the “lost market” argument is that there will not be a great self-sacrifice involved in lifting patents in poor countries. Allowing those countries to produce their own cheaper generics that will not infiltrate the first world market will not reduce profits to the pharmaceutical corporations. If they are sacrificing the lives of poor people to be the sole beneficiaries of first world aid then they show themselves morally deficient in both their actions and motivations, character traits and intentions.

If they are unwilling to research and develop medication for a hypothetical disease that would kill millions of people who by some strange reason only affected poor people, then they show that they have prioritised profit over health. They have a proscriptive responsibility to research and develop treatment for this disease and they are retrospectively responsible if they do not.

Some argue that this is to take the question the wrong way. The question is about a patent **right**, and rights cannot be removed merely due to considerations of consequences. This touches on a difficulty often cited with consequentialist reasoning, namely that it is not able to take account of certain rights that may never be violated irrespective of the better consequences that may be derived from their removal. If I have property and others want it, and I could share my property equally to satisfy everyone maximally, this would not seem to be good enough reason to remove the right to own the property. Whether other persons are

made happy or not by my right to privacy does not justify them setting up a voyeur camera in my bathroom. After years of research, millions of dollars and a great deal of skill injection it is argued that the ownership of the product produced should not be forfeited for any reason. To do so is unethical regardless of how many people desire or need the removal of my property.

Arguments from rights express a Kantian form of reasoning: that for a civil society to exist there must be property. Kant, starting from the common ownership of the earth, argues that there must be a division of the earth into property by some contingent means. This division is required for civil society. The division may be by force and Kant's ideas on property state that this process should be one that is ultimately an expression of the universal will of man. Thus there is a tension in Kant's reasoning between the need for a common decision by the people for property rights to exist whereas the coercion that is necessary to instantiate the civil society implies that all persons were not happy with the distribution of land. Thus Kant's philosophy, rather than being contradictory, allows for the fact that the current distribution of property may be flawed. Kant argues that property rights are a special form of contract and that property is not an empirical matter that can be garnered from the object by observation like the fact that the object is green.²²⁹ This fact makes it the case that property is a noumenal and not a phenomenal object and thus the investigation of it is open to reason and not empirical observation.

There is a difference between how Kant and Locke viewed property and it will be important to lay out these differences before relating them to this issue. Howard expresses Kant's view:

...property is not an object but an institution which depends for its functioning on the observance of certain rules. An individual cannot of himself establish a right to a thing, because a right consists of the public recognition of an existing or desired future state of affairs. Rights, and in particular property rights, must hold for others as well as oneself, or else they are not rights.²³⁰

Property rights are a natural right, but what Kant means by a natural right is an acquired right. "The natural right to private property is only made certain and unchangeable through a social

²²⁹ Howard, W. Kant's Concept of Property, *Philosophical Quarterly*, Vol. 27, No. 106 (Jan., 1977), pp. 32-40.

²³⁰ Howard, W. 1977: 34

contract uniting all wills.²³¹ This contract is founded on the common possession of the earth's surface and the consent of all has to be obtained.

For Locke the prior consent of all in a social contract is not required for private property. According to Locke the earth is man's possession but before he could make use of it, it needed to be appropriated. The rightful means of appropriation for Locke is derived from the postulate that every man has a property in his own person. So as McPherson adds, "from two postulates, that men have a right to preserve their life, and that man's labour is his own, Locke justifies individual appropriation of the produce of the earth which was originally given to mankind in common."²³² Kant sees this view of the derivation of property rights as lacking both universality and necessity. Locke cites two circumstances for the founding of property rights namely our need for survival and the natural plenty all around us. Kant, however, states that rules establishing the right to own property have to be derived independently of any particular state of affairs. They have to be both universally operable and necessary.

Kant claims Locke confuses empirical possession with intelligible possession. The physical appropriation of an object through labour is a necessary, not sufficient, condition for ownership. If it were sufficient the object would not be ours once it was no longer in our grasp. Locke's account confuses possession with ownership, of the former he may be correct but the latter, ownership, requires an initial social contract making possible private property. Although labour is added to the objects this labour does not amount to ownership being recognised by others or proceeding into the future. The only way to maintain that ownership apart from a social contract is by physically possessing and defending the ownership of the object. Ownership that is universal and necessary that moves beyond possession requires a social contract. A requirement for private property is that others perceive the property to legitimately be that person's private property. Thus, Kant also requires some form of the state of nature from which the social contract develops but for Kant this state of affairs has never existed nor need it have. For Kant the state of nature is an idea of pure practical Reason, which has a moral, rather than an empirical reality. "Much as God exists in his moral philosophy to explain and support our moral predispositions, so Kant invokes the idea of a

²³¹ Howard, W. 1977: 34

²³² McPherson, C.B. 1962: 200/1

state of nature as an *a priori* postulate to provide the rational grounds for the existence of property.”²³³

Property rights for Kant depend on the good will of men treating each other in a moral way. Property then is only possible in a civil society and this civil society may need to be brought about through coercion. The existence of a universal will that will bind everyone to a civil society subject to their freedom is an *a priori* idea of pure practical Reason, and where a civil society exists such a universal law has to be presupposed, and the contract may not exist in reality. In summary then, Kant would admit that a contract was never signed to institute civil society, but underpinning a civil society must be tacit agreements which all capable of moral judgements must recognise. “Without these tacit agreements being kept by the majority of men [sic] the cohesion of the society would be threatened.”²³⁴ Thus, civil society and property rights are closely related.

A Kantian argument for patent rights is that without the possibility of a person being able to own the fruits of their intellectual labour one would be reverting to a state of nature, one in which civil society could not be maintained. It is a tacit agreement that a precondition of any person having rights over their intellectual property involves all having rights over their intellectual property. To not do so, is to remove the universality of ownership, act towards others in an immoral way, and to revert to a state of nature.

There are two possible ways to argue against this version of the Kantian argument for patenting pharmaceuticals. The first is that the division of property is meant to reflect the universal will of man as embodied in civil society. Although particular people may disagree about the right of some to own property, the right to property must be necessary and universal and this is derived from the fact that there is a civil society that requires property rights. Intellectual property rights may be refuted to the degree that they are not instantiations of the universal will of men. That is, we do not recognise that a single individual can justifiably have exclusive ownership of intellectual property or that a single individual in certain circumstances should not have exclusive ownership of intellectual property. Another route is

²³³ Howard, W. 1977: 36

²³⁴ Howard, W. 1977: 37

to argue that enforcing a right can show that a person has a morally deficient character, motivation, intention or other internal state.

Examples where a person shows themselves to be lacking morally in a motivation, intention, character trait or other internal state is when they enforce their right to property when not doing so would be generous, kind or unselfish. Being able to forfeit one's property rights is a necessary condition for benevolence, kindness, love and possibly friendship. For instance, a person who has bought a loaf of bread to feed some pigeons in the park and is faced with a beggar who is on the brink of starvation and refuses to give the loaf of bread citing his right to ownership of the loaf of bread, shows themselves to be cruel, callous, selfish and generally one who is acting unethically in maintaining her property rights. I now deal with both these responses and how they relate to the actions of the lucrative and non-lucrative hypothetical pharmaceutical corporations.

I have already argued that is wrong to view the members who form the social contract as isolated, self-interested, greedy competitors who are only seeking profit. What I now argue is that viewing the members as such would mean that the universal will would not reflect the patenting of life saving medication when there is a pandemic in poor countries and retaining the patents will result in less access to the medication.

The first question I ask concerns the nature of the people who institute the social contract and the second question is whether their universal will would enforce patent rights in certain hypothetical situations.

I have argued in the preceding chapters that it is wrong to view individuals as only rationally self-interested. Rather, I have argued for viewing individuals as being situated within a specific context and having certain needs, desires, motivations, intentions and characters. I have argued that given this situation we have different descriptions of ourselves that are necessary such as mother, friend, agent, humans, and other morally relevant descriptions. It is wrong merely to think that we are isolated individuals that only seek the best state of affairs for ourselves, but that we should develop motivations, intentions and character traits that reflect friendship, love, compassion, courage and caring. Viewing the agents as such requires that we conceive of their universal will as not only reflecting the desire to maximise profits at all costs or to retain property rights irrespective of the consequences of holding those property

rights. The question then is “ what character traits would a person exhibit who willed that they could have the exclusive ownership of the treatment for a pandemic in poor countries given that the result would be the death of numerous people?”. The answer is that they would not be compassionate, caring, kind, considerate, respectful and possibly not have other virtues needed in our current human condition. To desire this state of affairs would reflect negative intentions, motivation and character traits.

Having talked of hypothetical cases whereby pharmaceutical corporations are lucrative, can afford to research medication afflicting poor people even though no profit would be gained, and that lifting patents is essential to treatment, I now look at the actual situation of South Africa and ask whether in this context pharmaceutical corporations act ethically or not by retaining their patent rights.

The statistics gathered in chapter three show that South Africa is a poor country, with a pandemic, and that pharmaceutical corporations are lucrative. There is a decrease in research into pharmaceuticals that treat HIV/AIDS but this does not reflect a reduction in the resources available for research but rather that HIV/AIDS research has been reprioritised. That the threat of compulsory licensing²³⁵ has resulted in the lower prioritising of HIV/AIDS reflects that pharmaceutical corporations are being affected by the possible reduction in patent monopolies. This lessening of the priority for HIV/AIDS research does not reflect a reduction in the HIV/AIDS pandemic or the potential loss of life. There is still a great need for treatment for those suffering from HIV/AIDS. As was shown in chapter three the HIV/AIDS pandemic is continuing and will cripple many developing countries if treatment is not forthcoming. AIDS orphans, mortality, reduced GDP, death of skilled labour, reduction in military and food security, just to mention a few.

Given that there are no justifications for not removing patent rights in these poor countries and given that the consequence of not doing so is so horrendous, pharmaceutical corporations have a moral obligation to remove their patent rights in poor countries. Not doing so reflects not only that their actions are morally deficient but also that their CID structures are such that they inappropriately prioritise profits rather than health which is their true function.

²³⁵ Compulsory licensing is when a government gives permission for someone besides the holder of the patent right permission to produce that product without the permission of the patent right holder.

Their CID structures also reflect that their intentions and motivations are not directed towards increasing the health of people in South Africa so much as increasing profits, marketability and brand leadership.

They cannot argue that removing patents in South Africa would reduce profits, as this is not a market that is able to increase the profits of the pharmaceutical industry. With stringent controls on the generic products not entering the first world markets no excuse can be made for not lifting these patents. If a compulsory licence is given to a local manufacturer, generics could be produced at a cheaper price.

The reasoning reflected by a lucrative corporation that weighs the possible losses in profits against the millions who would lose their lives shows callousness, cruelty and lack of compassion. For this reason there is a deficiency in their CID structures, which does not fully reflect rationality and respect. We require that corporations take the moral point of view, and in this respect they show themselves as not taking the moral point of view.

Their proscriptive responsibilities as defined as moral agents, and specifically as corporations that add to the ultimate good of health is not fulfilled and they are thus retrospectively responsible for not lifting patents that negatively impact on poor persons in South Africa.

What I assume is that, whatever the prospective responsibility entails to maximise health, it is not fulfilled by a pharmaceutical corporation that, by the act of retaining patent rights or by the omission of not giving licences to other pharmaceutical companies to produce generics, results in prices for pharmaceuticals that cannot be afforded by individuals or by government health care and consequently their death. That this state of affairs results directly from their acts or omissions makes them retrospectively responsible for the death of millions of people as they fail to fulfil their prospective duty to maximise health.

This duty is not unqualified. What is obviously required is not merely short term solutions but long-term health benefits. I have argued that it is not true that the long-term health benefits should be a reduction in the amount of research and development that goes into treating poor people afflicted by a pandemic. That if this is a consequence it is not a necessary consequence for lucrative pharmaceutical corporations but rather reflects their inappropriate intentions, motivation or character.

The arguments above have focused on patenting; obviously the other issues involved are the ethics of poverty. An absolutely destitute person will die of the common cold if not sheltered or nourished. There is no price for medications that could be afforded by the destitute. I have argued that retaining patents in poor countries adds to the problem of the HIV/AIDS pandemic and that a pharmaceutical corporation is responsible for that act. I do not argue that they are responsible for poverty or that they are responsible for any of the other ethical issues that arise as a result of the HIV/AIDS pandemic. When a pharmaceutical company “threatens” reduction in research and development into HIV/AIDS as a result of the removal of patents this is not a result of their financial capabilities but rather of their prioritising profits over health. This shows an inversion of the appropriate attitudes and is thus a weakness in their CID structure that allows for such a set of priorities.

I do not assume that this is a solution to the HIV/AIDS pandemic in South Africa or elsewhere; rather infrastructure, finances, resistance to medication and other challenges will still face those wishing to sufficiently treat those suffering from HIV/AIDS. What this thesis has argued is that corporations *qua* corporations can be held morally responsible for both their actions and their intentions. I have argued that a pharmaceutical corporation patenting medication used to treat poor people during a state of pandemic, in so doing makes access for treatment more difficult and is thus morally responsible given its proscriptive responsibility to further health. A consequence of my position is that a pharmaceutical corporation does not completely fulfil its responsibility to maximise health only by researching and developing treatments to diseases but that it is, by the fact that it may either patent or not patent the resulting discoveries, intimately involved in the access to treatment. That for it to fulfil its responsibilities adequately and thus not be held retrospectively responsible will sometimes require it not patenting pharmaceuticals in certain markets. I have argued that HIV/AIDS pandemic in poor countries is such a market.

Where should the blame be located? I have argued in this thesis for two levels of responsibility: one at the level of the corporation itself that captures the ‘corporateness’ of the responsibility, and another at the level of the individuals within the corporation. The responsibility at the level of the corporation is decided if the act in question is in keeping with and a consequence of the CID structure of the corporation. In order to settle whether the corporation’s CID structure is such that it actually allows for the patenting of medication used

to treat persons suffering from a pandemic in poor countries it will require analysing whether each pharmaceutical corporation in fact did follow corporate rules and policies for arriving at the decision to patent the medication in this situation. I cannot accomplish such a task here. My thesis has claimed that there is a requirement on any pharmaceutical corporation's CID structure that it reflects rationality and respect. What I have argued in this chapter is that a corporation that has a CID structure that reflects this rationality and respect will not allow for the patenting of medication in the context of poverty and pandemic. This can now be used as a yardstick to improve the CID structures of pharmaceutical corporations and also to judge whether they should be held retrospectively responsible for their acts of patenting medication within the context of poverty and pandemic.

The individuals within the corporation are responsible to the extent that they followed the correct CID structures for arriving at the decision to patent pharmaceuticals within the context of poverty and pandemic. They are also responsible to the degree that they do not instantiate a CID structure that reflects rationality and respect and hence decisions like not patenting medication during a pandemic in poor countries.

Another issue is whether corporations should be held legally responsible for the ensuing deaths that result from the action of patenting pharmaceuticals during a pandemic in poor countries. I will not attempt to answer this question. It seems to me that we cannot be legally responsible for every ethical shortcoming and that the law cannot instantiate all ethical responsibilities. Culpability for the deaths of the persons as a result of retaining patents will be difficult to prove, as the removal of patents in itself will not necessarily result in the reduction of those who will die from HIV/AIDS. As I have already mentioned there are many other factors such as extreme poverty, drug resistance, lack of adequate infrastructure etc. that makes actually treating all persons in a poor country for the pandemic difficult. What I have argued is that although lifting patents will not solve the problem of the HIV/AIDS pandemic in South Africa and elsewhere there is still an ethical responsibility on the pharmaceutical corporations not to patent that medication. This negates the common assumption that if we cannot solve a problem there is nothing that we are ethically obligated to do. I argue that patents are one of the ethically unjustified acts that are being performed in the HIV/AIDS context and that this act should not be performed. There are many other such acts being performed and a solution to the HIV/AIDS pandemic will require many more of these ethical

investigations. Although we may all be acting ethically, the HIV/AIDS pandemic poses problems that may not be solved by ethics alone.

CONCLUSION

This thesis has argued in chapter one that corporations *qua* corporations are moral agents. As such they can be held morally responsible for their actions. Pharmaceutical corporations are also moral agents and they can be held morally responsible for their actions. In this thesis I argued that they should be held morally responsible for the act of patenting pharmaceuticals used to treat a pandemic in poor countries. I argued that South Africa is a poor country that is currently suffering from the HIV/AIDS pandemic and that it is unethical of pharmaceutical corporations to retain their patent rights in South Africa.

I argued for a moderate virtue theory that incorporates both utilitarian and Kantian reasons for judging actions to be unethical. It also incorporated character, motivations, intentions and desires into the scope of what we can be held morally responsible for. I argued that pharmaceutical corporations that patent life saving medication in poor countries during a state of pandemic are acting in a morally irresponsible way. I argued that in addition to this they reflect unethical characters, motivations, intentions and desires in their CID structures.

I accepted that this is not the only ethical issue that needs to be discussed in relation to pandemics in general, and the HIV/AIDS pandemic in particular. There is still a great need for more academic papers to be written about the ethical issues surrounding pandemics and specifically the HIV/AIDS pandemic.

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