

# Excusing Corporate Wrongdoing and The State of Nature

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**ABSTRACT:** Most business ethicists maintain that corporate actors are subject to a variety of moral obligations. However, there is a persistent and underappreciated concern that the competitive pressures of the market somehow provide corporate actors with a far-reaching excuse from meeting these obligations. Here, we assess this concern. Blending resources from the history of philosophy and strategic management, we demonstrate the assumptions required for and limits of this excuse. Applying the idea of ‘the state of nature’ from Thomas Hobbes, we suggest that corporate actors would be excused from duties if complying with them threatened their vital interests. We show how this excuse is not available for most individuals within firms; instead, it is an excuse perhaps available to firms themselves, but only given substantive assumptions about corporate personhood. For those willing to make these assumptions, we apply the competitive advantage construct to delimit the scope of this excuse. We suggest that firms are excused from fulfilling an obligation when complying leads to a competitive disadvantage, as this imperils the firm’s vital interests. After revealing why this excuse does not generalize, we conclude by considering when we should reform the market to avoid the legitimacy of this excuse.

**KEYWORDS:** corporate moral responsibility, Thomas Hobbes, state of nature, excuse, competitive advantage

## INTRODUCTION

There is near universal agreement within business ethics that corporate actors have a litany of moral responsibilities and should be held responsible. Conduct in business cannot be separated out and treated as not beholden to moral norms (Harris & Freeman, 2008; *cf.* Sandberg, 2008; von Kriegstein, 2019). Instead, the disagreement within business ethics often comes from how far these obligations *extend*. Among the demands most widely accepted are certain negative duties: Do not pollute the environment. Do not exploit workers or customers. But various positive duties of the firm are suggested as well (Hsieh, 2017). There may be a duty to assist others or rescue them from harm (Dunfee, 2006), or certain wartime obligations (Alzola, 2011). It has been argued that firms have a general duty to consider the ends of others (Smith, 2012), or to facilitate justice where they operate (O'Neill, 2001; Caney, 2013; Dubbink & Van Liedekerke, 2014). Surely relevant to the extent of these duties is the degree to which firms have obligations to non-shareholder stakeholders (*inter alia* Friedman, 1970; Freeman, 1984; Donaldson & Preston, 1995), or whether the firm should be conceived of as a kind of corporate citizen (Carroll, 1998; Matten & Crane, 2005).

Once we allow ethical questions to be asked of corporate actors, though, it may seem that the sky's the limit in terms of what they may be morally compelled to do. And this moral compulsion need not be toothless. When firms fail to act as they are obligated, they may be liable to social censure bringing reputational damage and measurable costs, both in terms of lost revenue from boycotting customers (Tomhave & Vopat, 2018) and a higher cost of capital (Berry & Jeung, 2013; Ghoul, Guedhami, Kim & Park, 2018). Continued moral failures may even threaten the legitimacy of the firm (Suchman, 1995; Tost, 2011).

The more we demand, however, the more we should be concerned with when corporate actors are to be morally excused from meeting those demands. In non-business contexts, we can

be held to high moral standards and yet at times issue pleas when those standards are too high. We can be excused from the duties demanded of us in the right circumstances. The same should be true in business. Corporate actors should in principle merit the occasional excuse for wrongdoing.

Here, we aim to consider an excuse sometimes gestured towards that threatens to apply across a wide swath of the market (Porter, 2004). The nascent idea is that there is something special about the competitive nature of the market environment, that the hostility of this environment in some way provides an excuse. In a competitive marketplace, firms must fight to stay afloat and flourish. Many corporations are under constant threat by industry peers, and this competitive pressure excuses corporate actors from discharging burdensome moral obligations.

For example, outsourcing overseas is a routine practice in the automotive and apparel industries, often viewed as necessary strategically. However, with outsourcing there are clear moral issues at play in terms of how it risks disrespecting local workers or exploiting foreign workers. When there is insufficient reason to think that a given firm will mitigate these risks, it may be on balance immoral for them to outsource. Nevertheless, we might be inclined to excuse firms for doing it where it is needed to stay competitive.

As another example, consider the practices of banks in the run-up to the 2008 financial crisis. While there may have been numerous parties at fault, many blamed banks for carelessly engaging in risky lending. In Ireland, the Allied Irish Bank (AIB) was faulted for over-lending to developers. However, when testifying before the Irish parliamentary body (the Oireachtas), the former chairman of AIB Dermot Gleeson said,

No bank could stop a bubble. If, through some amazing piece of insight or wisdom which we certainly didn't have, AIB had decided on some day during this period to close up for loans and say, "No more loans. We're not lending anymore", it would have damaged the bank at the time but not as much as the crash did. But, all of our customers who were

claimants for loans would have been met within the following week by our competitors with glee, the competition was so fierce. (Gleeson, 2015)

Now, this is not quite an acknowledgement of wrongdoing or plea for excuse. (Far from it.) Still, it is the competitive pressure to which Gleeson points when answering for the conduct of AIB. It is this thought that ‘everybody else was doing it,’ and perhaps they even owed it to shareholders to avoid needlessly losing business.<sup>1</sup>

Taken to the extreme, the specter of this excuse looms large, even threatening the central project of business ethics. It seems worth articulating all the various obligations in business so that individuals and firms can recognize and be motivated to act in accordance with them. However, for all of our handwringing about obligations, if this market hostility provides a generalized excuse for wrongdoing, then this undermines our efforts to ensure corporate compliance with moral norms, as well as our justification for blaming those that act wrongly. It may be true, in some academic sense, that firms have these duties—to do their part in times of crisis, to facilitate justice, to consider and respect their stakeholders—but for all practical purposes this will be irrelevant in the practice of business. Even if firms have these obligations, they are excused from failing to satisfy them. They can retain moral legitimacy regardless.

To evaluate this concern, in section [1] we begin by discussing excuses generally and adopting a particular, historically-driven framework for this kind of excuse. Following precedents, we consider the possible excuse afforded through the lens of Thomas Hobbes and the ‘state of nature’. The suggestion is that although we typically understand ourselves as no longer in the state

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<sup>1</sup> Heath (2018: 518-519) presents another case of this logic. He describes how regulatory loopholes (in the US around 2009-2010) led the pulp and paper industry to be incentivized to burn more fossil fuels in production. Firms acted on this incentive to stave off bankruptcy, despite it being clear that it was directly harming the environment.

of nature, the competitive market environment functions to keep actors in a kind of artificial state of nature, inadvertently furnishing an excuse for wrongdoing. Our aim in sections [1] and [2] is to flesh out how the excuse works on Hobbes's account and to illuminate the unrecognized assumptions necessary for its application to business conduct. It will become apparent that the excuse can only be claimed given a substantial commitment to corporate personhood, a commitment few considering this excuse are likely to accept.

Still, some may be willing to take on these commitments, and a worry will remain that we lack the standing to blame firms for wrongdoing. So, section [3] explores the scope of this excuse. We leverage the strategic management construct of competitive advantage to show how the Hobbesian excuse applies. This not only suggests a standard for claiming the excuse, but it provides natural constraints on it, guarding against the result of its universal application.

Nevertheless, worries may remain about just how freely this excuse can be claimed. To conclude the article, then, we reprise the essential claims about the Hobbesian excuse for corporate wrongdoing, and we consider what could be changed—what might need to be changed—to avoid a world in which firms can be excused for perpetrating significant wrongs.

## 1. A HOBBSIAN FRAMEWORK FOR EXCUSE

We begin by showing how the literature currently discusses excuses. After distinguishing excuses from justifications and adopting a rationale for why and how excuses work as they do, we motivate turning to a Hobbesian framework, exploring the state of nature and its role in Hobbes's political philosophy. This allows us to develop an account of a general excuse from Hobbes's discussion.

## *Excuse*

We make excuses for our failures whenever we can, both interpersonally and in court. However, it is not tremendously well-understood just how far the concept of an excuse will stretch. Judging from how we speak about excuses, the range of acceptable excuses is fairly heterogeneous (Austin, 1957). Duress can be a legitimate excuse at times, as can certain forms of ignorance, as can insanity. Even strictly in the legal domain, some have argued for a pluralistic view about the grounds for excuse (Tadros, 2001). Our concern is rather with the moral domain—when individuals are excused from blame for failing to meet moral obligations—but one could imagine that it is even more challenging to nail down a view able to derive all legitimate moral excuses.

One thing we can say is that excuse is typically distinguished from justification. When confronting someone for acting wrongly, they may defend themselves by either offering a justification or excuse. Scholars disagree about exactly how to capture this distinction both in the law and morality (Botterell, 2009), but a plausible and common way of understanding the distinction in the moral context is to say that an agent who is justified in performing some action has not acted wrongly, and an agent who is excused has acted wrongly but should not be blamed/punished. So, excused agents are blameworthy but not to be blamed.<sup>2</sup>

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<sup>2</sup> We take it that the state of nature provides an excuse for wrongdoing, not a justification, but this is a further question we need not resolve here. Green (1991) takes agents in the state of nature to be justified, whereas Heath (2018) takes them to be excused. Hobbes himself is unclear on this matter: Using tools discussed below, we can say that he holds that the fundamental Law of Nature provides that if a person cannot assure peace they may seek the advantages of war, which seems to justify conduct as there is no violation of the Laws of Nature. At the same time, he suggests that a person is permitted to violate the Law of Nature *in foro externo* when in a condition of war, but must still adhere to the Law *in foro interno*. This suggests that the Law of Nature is violated *in foro externo* but the violation is excused.

There is again no firm agreement concerning *why* an excused agent is not to be blamed. One idea that we find attractive is that it would in some way be *unfair* to blame them (Baron, 2007), or perhaps that the demand of morality they are failing to meet is unreasonably demanding. The thought is that we should not blame in this instance, since we would ourselves hope not to be blamed, were we in the same situation. That *we* would hope not to be blamed makes *our* blaming the wrongdoer inappropriate.

There is also significant disagreement concerning *how* an excuse works to get the agent off the hook—how *the claim* of an excuse works. One popular idea that we will take on-board for this discussion is that while we can normally infer from a wrongful action that the agent acted with ill will or insufficient regard for those she wrongs, an excuse offers evidence that blocks the inference (*cf.* Sliwa, 2019). For example, if Jill puts poison in Mary's tea, she has acted wrongly. But if we learn that Jill simply put in a spoonful of a white substance from a bag labeled 'sugar' (where the labelling was no fault of hers), then we can no longer infer that Jill was trying to harm Mary. Mary's ignorance excuses her for the harm caused. It would be unfair to blame her.

Given this basic picture of excuse, it is easy to see how this could apply in business contexts. Imagine a firm with a product satisfying all regulatory bodies, yet which leads to side-effects outweighing the positive benefits. The firm will have arguably done something wrong in manufacturing and marketing the product, but they are perhaps morally excused for the wrongdoing (putting to the side the question of their legal culpability). In an era of product recalls, especially in the pharmaceutical and automotive industries, we can see how this excuse might apply. Judging the appropriateness of this excuse in a given case is sure to be challenging, but it may be no more challenging than assessing the legitimacy of an excuse claimed by an individual.

If there is no reason why firms cannot in principle be excused for wrongdoing, then this opens up space for the concern that certain general excuses might be available. And we can ask whether the hostile nature of the marketplace somehow provides such a general excuse. To see this project through, we will articulate and consider the apparent excuse for wrongdoing provided by the ‘state of nature’ as argued for by Thomas Hobbes.

There are a few reasons to appeal to Hobbes in this regard. First, despite the sizable literature on self-defense or acting under duress (in the legal context at least), the condition that we are considering as exculpatory is not quite identifiable with these situations. Instances of self-defense or duress are just that – instances. They involve reacting to an immediate set of circumstances and as a response to those circumstances. If the hostility of the market can exculpate, that is not how it would be characterized. Rather than providing an immediate threat, the market creates a general insecurity of the firm’s position. As we will see, this may appear to secure an excuse for conduct that is otherwise unprovoked. If we have the intuition that there is a legitimate excuse here, then it will be one we must go outside of the current work on excuses to vindicate.

Second, as we will see, the state of nature as Hobbes characterizes it is a good fit for how we think about the hostility of the competitive market.<sup>3</sup> And we are not the first to make this observation. Several have gestured towards viewing corporations through the lens of Thomas Hobbes and the ‘state of nature’ (Kavka, 1983a; Green, *op. cit.*; Heath, *op. cit.*), and so considering

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<sup>3</sup> Why use *Hobbes’s* interpretation of the state of nature, as opposed to some other interpretation? One reason for preferring Hobbes’s interpretation is that most classical interpretations of the state of nature, such as Locke’s and Kant’s, follow Hobbes’s general formulation of the state of nature in terms of modeling the conditions and behaviors of agents. Another reason to prefer Hobbes’s interpretation is that interpretations of the state of nature that have significant divergences from Hobbes also tend to be inapt for modeling competitive markets. For instance, Rousseau’s state of nature assumes that agents rarely interact with each other, which is generally false for market scenarios.

this kind of excuse at all requires engaging with the Hobbesian framework. In contrast to these works, we will go deeper into the explication of Hobbes's theory, and we will contrast our ultimate proposal for the scope of this excuse with these authors.<sup>4</sup>

With all that said, this approach is not without risks. It bears acknowledging that embracing a Hobbesian framework suggests a commitment to Hobbes's philosophy more generally. And this may seem to be a disadvantage of this approach. Hobbes is often associated in normative ethics with a form of ethical egoism on which the morally right act is the act that maximizes one's own well-being. Though historically significant, such an approach has not remained in favor within normative ethics, and this may appear to threaten the usefulness of appealing to him.

We feel that this concern can be fairly addressed. We do not agree that Hobbes is best understood as an ethical egoist (for alternative interpretations, see Kavka [1986], Lloyd [2009], and Gert [2010]), or that his view of normative ethics is as marginalized as one might think (when

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<sup>4</sup> Despite the precedents, readers may feel that it is too roundabout to appeal to the state of nature. We may think that the competitive situation it articulates can be directly described game-theoretically, where competitors are in some form of prisoner's dilemma and are excused when acting wrongly in it. However, this approach has a few issues. First, it is actually *less* direct in the sense that it does not deliver an explanation for *why* firms in that situation would be excused. What is it about being in this particular situation, described game-theoretically, that exculpates? Moreover, it seems plausible that the exculpatory condition could be manifested through various game-theoretic models. And so limiting our analysis to a particular one is unduly narrow. Ultimately, the intuition behind the state of nature is more foundational to the presence of the excuse, and there may be a variety of game-theoretic structures that can generate the relevant moral condition, as is evident by the variety of game-theoretic approaches to explaining Hobbes's state of nature. See Kavka (1983b), Alexandra (1992), Dodds and Shoemaker (2002), Boulting (2005), Vanderschraaf (2006; 2019), Moehler (2009), Eggers (2011), and Chung (2015).

properly formulated). More importantly, the mere acceptance of the excuse generated in the state of nature need not bring with it a commitment to Hobbes's entirely philosophical apparatus. Other scholars with entirely different ethical frameworks treat the conditions found in the state of nature as excusing (Ripstein, 2009: 161-165; Shelby, 2016: ch.7-8). What we need is just the intuition that agents are excused for certain acts when in circumstances that Hobbes was foundational in articulating. Once we see how Hobbes lays out the state of nature, it will be clear even on our modern conception of what counts as an excuse that the condition drawn out will qualify.

### *The State of Nature*

Within Hobbes's *Leviathan* [L], the idea of the 'state of nature' is used as a tool to demonstrate the need for a sovereign authority.<sup>5</sup> It performs this role by providing a situation in which there is no sovereign authority, a "war of every man against every man" and demonstrating how that condition is both prudentially and morally unacceptable (L 13.13). To exit this condition some sufficiently strong sovereign authority must be created. But what exactly does it mean for a person to be in the state of nature for Hobbes?

For Hobbes, the state of nature is a relative concept (Kavka, 1986: 88-92; Lloyd, *op. cit.*: 18-25; Vanderschraaf, 2019: 192-197). Persons are in the state of nature relative to other persons, and it is possible for one person to be in the state of nature while another is not. We can see this

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<sup>5</sup> The main discussion of this condition is described in Chapter 13 of *Leviathan*. Oddly enough, the phrase 'state of nature' does not appear in *Leviathan*. Rather Hobbes talks about the 'natural condition' that humans find themselves in. The phrase does appear in Hobbes's earlier works *Elements of Laws* and *De Cive*, with arguments similar to *Leviathan*'s concerning the theoretical role that it plays. Citations for *Leviathan* are from Curley's (1994) edition, with the chapter number followed by the paragraph number according to Curley's edition.

from various descriptions Hobbes gives of agents being in the state of nature. In the condition of the “war of every man against every man”, each person is in the state of nature relative to everyone else. Hobbes admits, though, that “there was never such a time” where each person was in the state of nature relative to everyone else (*L* 13.11).

To illustrate the state of nature, then, Hobbes points to cases that do seem to exist: the government of small families in America, the factions in a civil war, and nations within the international arena (*L* 13.11-12). But in each of these cases, there are people in the state of nature relative to some, but not all others. For example, in a civil war, the members of each side are not in a state of nature with their fellow partisans, but they are in a state of nature relative to the other side of the conflict. The difference is that those not in the state of nature relative to one another have some kind of common authority between them.

To be in the state of nature, then, requires that between two agents, *A* and *B*, *A* is not under the authority of *B*, *B* is not under the authority of *A*, and there is no individual or collective agent, *C*, that *A* and *B* are mutually under the authority of. For instance, the members of a family are under the authority of the father of the family (for Hobbes), and so not in the state of nature relative to one another. But they *are* in the state of nature relative to some other family, as they lack any common authority figure.

The problem of the state of nature is that it is a condition of ‘war’ between the respective parties, that is, it is a condition where the parties have the known disposition to invade one another (*L* 13.8). This is caused by the lack of a common authority. Hobbes takes it that agents will naturally enter into various disagreements about the way the world should be. These disagreements lead to a condition in which the agents’ visions of how the world ought to be cannot be mutually satisfied. And, without an authority to appeal to and resolve these disagreements, the agents will

tend to get in one another's way, or at least be disposed to do so, and compete with one another to enforce their visions. People in the state of nature are thus in conflict with one another and each must rely on their own power to enforce their side of the conflict. We are motivated to join into a commonwealth, and institute a sovereign, to avoid this condition of insecurity and to secure "such things as are necessary to commodious living" (L 13.14).

A Hobbesian authority is an entity capable of resolving the problem of the 'war of all against all,' the insecurity people have in pursuing their goals and assuring their vital interests. There are three main component parts of an authority that is sufficient to remove agents from the state of nature: First, an authority sets rules for the interactions between the various agents it has authority over and adjudicates disputes between the various agents, determining what each agent is permitted to do towards one another. Second, an authority enforces the rules and decisions it arrives at. Third, the rules and decisions the authority enforces creates a condition wherein people are generally secure against others (L 17.13, 30.1-2). When an authority successfully satisfies these conditions, then those subject to the authority are successfully removed from the insecurity found in the state of nature.

### *The State of Nature and Excuse*

While the state of nature plays the important role of justifying sovereign authority in Hobbes's system, it also functions as a kind of excusing condition for the immorality of agents. One lesson Hobbes draws from his discussion of the state of nature is that within that state *justice*, and indeed moral norms generally, has no place, but rather force and fraud are the operative principles for individuals (L 13.13). This seems to amount to Hobbes claiming that an agent is completely excused from needing to adhere to *any* moral standards within the state of nature.

This particular claim may be hyperbolic, and in later chapters he walks back the extreme version of this claim—that justice has no place in the state of nature. But there is some truth in it for Hobbes. In his discussion of the Laws of Nature, which constitute the basis of moral norms for Hobbes, he holds that the laws of nature always bind a person *in foro interno*, in their conscience and desire to see them fulfilled, but not always *in foro externo*, in the actual performance and comportment with these laws (*L* 15.36). The Laws of Nature, for Hobbes, are rules of reason that, if followed, will allow people to live in peace with others. The fundamental principle behind the Laws of Nature is that they are the laws of peace. People, thus, are always supposed to *want* to fulfill the Laws of Nature, to act morally, when they can do so safely. The problem is that we cannot reasonably demand persons to adhere to the Laws of Nature in all possible conditions.

Hobbes notes that there are contexts in which a person's adherence to the Laws of Nature merely makes them "prey to others" and will "procure his certain ruin" (*L* 15.36). These are conditions where there is no security in the performance of others, "where no man else" adheres to the Laws of Nature, i.e. the state of nature. In this condition, the Laws of Nature are unable to establish peace, because they are not being followed by others, and so a person's compliance with the Laws of Nature simply opens them to being taken advantage of by others. For people are unable to reliably determine in advance if a particular case poses a significant threat, or a minor setback, especially when they are in conditions that rely on trusting others to keep faith. This can make it unlikely that they are able to prevent themselves from falling prey to others, at least when they lack the ability to discern whether the situation is or is not threatening. This does not require that others *in fact* violate the Laws of Nature, but rather simply that there is no *assurance* that anyone else will follow the Laws of Nature. In these conditions, general compliance with the Laws of Nature simply exposes a person to danger from others.

This does not mean that violating the Laws of Nature to protect *any* interest is excused. Hobbes holds that the setback must threaten an agent's *vital* interests. For Hobbes, an agent's vital interests concern more than just their mere survival. They include, as well, "such things as are necessary to commodious living, and a hope by their industry to obtain them" (*L* 13.14; see also *L* 30.1). For a notion that will be so important for us below, however, that is not clear enough to be entirely helpful. And how to best characterize the notion of 'vital interest' remains unfortunately contentious. Still, one thing to say is that the right way to think of vital interests is as involving not just what is necessary for having a life, but for having *a life worth living*. That is, it involves having the opportunities to pursue desires and what is required for you to flourish as a person.<sup>6</sup>

When considering what furnishes the excuse, then, it is not simply a matter of doing what is necessary to avoid being made a 'sucker' for someone else. Instead, it is focused on those instances where one's basic capacities for survival and flourishing are threatened. Within Hobbes's theory, it is held that morality cannot demand for people to do *nothing* to protect their basic interests. It is only to protect these interests that people are *excused* from following the Laws of Nature *in foro externo* in the state of nature.

We can further note that not *all* instances of violating the Laws of Nature in the state of nature are excused. The Laws of Nature still bind *in foro interno* and where a person has no reason to believe that by following the Laws of Nature they make themselves prey to others they would

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<sup>6</sup> Exactly what this entails may depend on the person or on our broader understanding of human flourishing, a notion with roots in Aristotle, or on our views of what makes life meaningful. We cannot resolve this here, but two points bear mentioning. First, it seems appropriate to think that whatever makes life worth living or meaningful is vital. And, second, the context that will matter for us concerns how to evaluate these issues when considering the vital interests of firms, and we will see below how this nicely connects with the literature on corporate purpose.

still be required to follow the Laws of Nature (*L* 15.36). Thus, only those violations of the Laws of Nature which are necessary to avoid some immediate setback to a person's vital interests or which are necessary to avoid future situations that makes it unlikely for them to be able to satisfy their vital interests are excused. In this regard only those violations which are meant to *protect* a person's vital interests, rather than simply harm another or gain some comparative advantage that is not itself related to protecting one's vital interests, can be excused on this ground.

This discussion suggests that an agent is excused when in a situation that meets the following two conditions: (a) there is no assurance that other agents will act in accordance with the norms protecting them from invasion by others and (b) violating some norms under that condition is necessary to avoid a setback to an agent's vital interests that makes it unlikely that they would be able to satisfy their vital interests. The first condition highlights the need that one's situation is akin to the state of nature, that there is a lack of security for one's person. The second condition highlights the need to ensure that one's violations of moral norm are done for the purpose of protecting an interest that matters morally, an interest that morality cannot require us to sacrifice. For Hobbes, the purpose of a sovereign authority is partially to make people no longer satisfy condition (a), that is, to create an assurance that other agents will act in accordance with the relevant norms, allowing people to be secure against invasions from others.

We take these conditions to provide a plausible basis for a particular kind of excuse: Where someone has no assurance that others will not invade or violate norms that will set back the agent's vital interests, that agent is excused in violating norms to protect their vital interests from these invasions. It seems excessive and unfair for morality to demand that you adhere to norms with no assurance that others will adhere to them and where your vital interests are at risk. So, given our

understanding of when an excuse is appropriate given above, it sounds right to say that an agent in this circumstance ought to be excused.

Moreover, we can see the claim of excuse working just as it should: If we were to learn that an agent *had* to act as they did to protect their vital interests, we seem unable to infer from their bad behavior to their having acted with ill will. They clearly may well have wanted to do the right thing (and been ashamed for not). Claiming that the behavior was driven by the conditions of the state of nature thwarts our concluding that the agent acted with insufficient regard for those harmed; it shows us that we should not blame the claimant. As a basic account of an excusing condition, then, this Hobbesian account seems plausible.

## 2. APPLICATION TO CORPORATE AGENTS

In this section, we evaluate whether and how the Hobbesian framework applies to corporate agents. After demonstrating why most individuals within firms will not be able to legitimately claim the excuse from the state of nature, we consider whether the firm could. Even asking this question presupposes a view on which firms themselves can be morally responsible for their behavior, requiring a stance in a controversial debate. Given this presupposition, however, we argue that many firms are in the state of nature relative to one another. This still does not resolve whether it is legitimate for firms to claim this position as an excuse. So, we show how a further assumption about corporate personhood is needed, one that even few proponents of corporate moral agency will accept.

*Why Individuals Are Typically Not Excused*

Individuals within the firm are often where we lay the blame for corporate wrongdoing. We may say that engineers were negligent in their design, or that the sales staff abused the trust of customers, or that managers were reckless in their pursuit of profit. Individuals across the firm may have a wide array of moral obligations they can fail to meet, and there may times when they are excused. The sales team may have been put under duress for meetings targets, say.

Despite this, it is safe to say that individuals are typically not in the state of nature relative to one another. In many states, we avoid being in this condition because the state has the authority to arbitrate disputes and give assurance that others will comply with the relevant norms. Because of the severe civil and criminal consequences, for instance, I can be confident that no one is going to steal my property without recourse for compensation and restoration.

Governments often do much to protect the vital interests of citizens and in furtherance of those interests.<sup>7</sup> Many states provide resources for citizens for education, programs for social security, loan assistance, and so on. And this social infrastructure remains in place as we navigate the corporate world in the form of job training or unemployment benefits. These supports undermine the claim of an individual's being compelled by the competitive pressures of the market to engage in wrongdoing. If you are told, "Do X or else you're fired," then this may constitute a form of duress that provides an excuse. (And given how common it is for workers to be dominated by their employers [Anderson, 2017], or to find instances of forced labor in developing and

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<sup>7</sup> Though not everything. We can still be lifted out of the state of nature even as we at times have some of our vital interests threatened. What is significant is that the vital interests of citizens generally are secured, and perhaps the state has an obligation to continue working towards fully securing vital interests. In these circumstances, we cannot appeal to the Hobbesian excuse even if our vital interests are threatened. (Though we may be excused in certain circumstances of duress.)

developed economies alike [Crane *et. al.*, 2019], it may be that an excuse appealing to duress is often available.) But the mere fact of the competitive marketplace itself is insufficient to furnish an excuse for wrongdoing. Your vital interests are secured even given the competition.<sup>8</sup> Even if all of your money is tied up in your company, you are often not necessarily consigned to the same fate of a failing firm. A sufficiently robust welfare state can secure the vital interests of individuals, undermining the excuse for wrongdoing.

Of course, this kind of state support is not universal. In particularly impoverished communities, the material well-being of individuals may be insufficient to secure their vital interests, and the police may fail to protect the individuals against predation by others. Some take these facts to suggest that the individuals in these communities *are* excused for failing to adhere to certain legal regulations (Shelby, *op. cit.*). Watson (1987) infamously marks out an unsettling ambivalence in our attitudes about morally blaming individuals with particularly tragic backgrounds, those insufficiently protected by society. However, in typical cases of workers engaging in wrongdoing, such an excuse will not be available.

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<sup>8</sup> This is in clear disagreement with those who have discussed and endorsed some form of the Hobbesian excuse in the business world. Kavka (*op. cit.*:62) gives a case in which an individual may claim this excuse, and Green (*op. cit.*) gives several. However, in reading their examples, what comes out is that these are not simply individuals working within a business. The individuals at issue are closely related to the firm in which they operate – they are managers, and their decisions influence what the firm itself does and how it affects others. This muddies the waters by conflating what it is to act *in* a firm with acting *for* a firm, acting on the firm’s behalf, as we will see below. Perhaps Kavka has some rejoinder on this point, as one of his examples involves an individual in charge of a firm, but who seems excused because their *life’s work* is in jeopardy if they do not guide the firm to act wrongly. So, we could try to construe the company’s success as necessary to secure their vital interests. But this implausibly inflates the notion of a *vital* interest.

Though individuals within firms are likely not in the state of nature, it is still possible that the firms *themselves* are in the state of nature relative to one another. It is the fierce competition *between firms* that is at issue in the competitive marketplace, after all. If firms are in the state of nature relative to one another, and if this provides an excuse for their failing to meet their obligations, then this certainly complicates matters for managers. On the one hand, managers have an obligation to do the right thing even as they act on the firm's behalf, and they cannot advert to the state of nature to excuse their own conduct. But on the other hand, if the firm can be excused for acting wrongly, and it would be in its interest to do so, managers may take themselves to have an obligation to the firm to act wrongly in its interest.

In cases like this, managers would have genuinely conflicting obligations. This could perhaps justify their acting badly on behalf of firms (not simply excuse it), or it may be that managers are neither justified nor excused for failing to do their part in ensuring that the firm meets its obligations. How we resolve this issue depends on answering hard questions about the source and strength of the managerial obligation to the firm, which is not our focus here. What it *also* depends on, though, is that the firm itself can be in the state of nature and excused for acting wrongly for this reason. But this is far from obvious. So, in the rest of this section, we turn to consider what kind of commitments are needed to make this claim.

### *The Corporation as a Moral Agent*

For the firm to possibly merit an excuse via the state of nature, we must already presuppose that the firm itself is even the kind of thing that can act and have obligations. Now, from one perspective, this is all too natural to presuppose. Of course Johnson & Johnson does things and can be responsible. But though we may all be willing to talk this way, we may not all mean the

same thing. In fact, scholars within business ethics have been heatedly debating for decades whether this way of talking is literally true.

For many, when we say, “Johnson & Johnson can be responsible”, this is just straightforwardly false. Johnson & Johnson is a legal fiction, a nexus of contacts, or some other phantom of our imagination (Jensen & Meckling, 1976). As such, it cannot have responsibilities. Alternatively, others argue that firms are not legal fictions, but instead are just to be identified with certain groups of people. So, they will claim that sentences like “Johnson & Johnson is responsible” is actually an elliptical way of referring to some group such as the shareholders or employees (Hasnas, 2010; Ludwig, 2017). These scholars will take whatever obligations firms have to fully reduce to the obligations of stakeholders. If all of the employees have met their moral obligations, then there is no sense in which the firm could have failed in its obligations.

On either of these approaches, the firm itself will not merit an excuse via the state of nature. On the first approach, the firm does not literally act or have responsibilities from which to be excused. And, on the second approach, the firm can have responsibilities and be excused, but only in the sense that certain individuals have obligations. But we have already argued that individuals associated with the firm generally cannot merit an excuse stemming from the state of nature.

There is, however, a prominent alternative approach to the metaphysics and agency of corporations that possibly vindicates the state of nature excuse. Proponents of this alternative maintain that corporations exist, act, and indeed have obligations just as our regular speech presupposes. (Though a longstanding position in the law, it has its roots within business ethics from French [1979], Donaldson [1982], Werhane [1985].) Part of the argument given is negative, arguing that attempts to reduce the agency of corporations entirely to the agency of individuals within them fails. Proponents point to cases of apparent wrongdoing where we judge that surely

something is responsible—the firm is responsible—even where the acts of the individual agents may each be justified (Copp, 2006; Pettit, 2007; Collins, 2019).

Alternatively, proponents give positive arguments for establishing corporate agency and responsibility. These may emphasize the distinctive character of the decisive procedures or structures within firms (French, *op. cit.*; Pettit, 2003; List & Pettit, 2011), or the standpoint from which firms act (Hess, 2010, 2018), or the ways in which firms can be characterized as expressing reactive attitudes (Silver, 2005; Björnsson & Hess, 2017), or as having beliefs/desires/intentions (Tollefsen, 2002; Arnold, 2006; Hess, 2014), or how firms can respond and answer to reasons (Pettit, 2017; Silver 2021). Collectively, then, this prominent alternative approach has delivered the resources for a view on which firms can have obligations over and above the obligations of their employees.

We are agnostic about the truth of this view, but this kind of view has the ingredients necessary to characterize firms as things perhaps capable of being in the state of nature relative to one another. These scholars will take firms themselves to have interests, often well beyond their profit margins. As French says, “Corporations have reasons because they have interests in doing those things that are likely to result in the realization of their corporate goals regardless of the transient self-interest of directors, managers, etc.” (*op. cit.*:214). That corporations have interests has of course been challenged (Keeley, 1981), but it is widely accepted in this tradition.

As far as we know, it has not been discussed whether firms can count as having *vital* interests, or what those vital interests would be. But it is plausible that these proponents would accept that firms do have vital interests. As to which interests are vital, this may be hard to say. After all, while an interest in survival may be a clear vital interest for creatures like us, corporations

are very different kinds of things. Nevertheless, it does seem clear to us where to look for a possible answer to this question.

Work on the theory of the firm within management scholarship is broadly focused on the explanation of or justification for corporate entities in the marketplace (e.g., Coase, 1937; Blair & Stout, 1999; Dari-Mattiacci *et. al.*, 20017). In particular, work on corporate purpose focuses on what the firm ought to be doing, and whom it ought to be doing it *for* (e.g., Jensen & Meckling, *op. cit.*; Fontrodona & Sison, 2006; Ciepley, 2013). Scholars disagree widely, but how we answer this question seems deeply relevant to the question of the firm's value or worthwhileness, and so what counts as among the firm's vital interests. If, for example, we are convinced that the purpose of the firm is to maximize profits for shareholders, then bankruptcy might not be in the interest of the firm, or a strategic bankruptcy might be after all. A view of the purpose of the firm will guide our conception of what are among the vital interests of firms.

Recently, there has been some work directly at the intersection of corporate purpose and corporate moral agency. Tom Donaldson, one of the longstanding proponents of corporate agency, has argued for a pluralistic conception of corporate purpose. Corporates in different industries are constructed in different ways, and so better suited to different purposes (Donaldson, 2019). Where these purposes are better supported by emphasizing or furthering different ends, this suggests possible differences in the vital interests of firms. In contrast, Morrison & Mota (forthcoming) suggest that the purpose of firms as agents is to 'sustain the corporate mind'. This suggests that it is at least among the vital interests of firms to persist as corporate agents. So, it may be appropriate to understand survival as among the firm's vital interests. However, Morrison & Mota can also endorse a kind of pluralism about a firm's vital interests, as those interests will depend on to what ends the firm puts its 'mind' to use.

Going forward, we will take it for granted this idea that many corporations have survival as a vital interest. They work hard to avoid bankruptcy, implement corporate governance mechanisms to avoid takeovers (Barry & Hatfield, 2012), and they grow as much as they can for as long as they can. It is not hard to imagine a corporation as acting as if its life depends on it, doing anything to continue or reestablish earnings growth before all other ends are pursued. This would seem to provide proponents of corporate moral responsibility with the resources to maintain that firms are the kinds of things that at least *might* be capable of warranting the excuse furnished by the state of nature, where firms fight for their survival.<sup>9</sup>

Even here, though, this will not apply to *all* corporate entities. For these proponents, not every corporation is a corporate with responsible agency. Most proponents maintain that the firm must have a large number of employees to plausibly bear responsibility distinct from those employees, or some suitably complex internal structure or decision-making mechanism. Exactly how many employees the firm must have or the kinds of internal decision procedures that are necessary is up for debate, but theorists typically aim to rule out shell corporations, joint partnerships, sole proprietorships, or other small firms as potential corporate agents. And so, these firms will not possibly merit the Hobbesian excuse.

Our aim here is not to settle this longstanding controversy concerning whether and which corporations can be genuinely morally responsible. Instead, what we want to bring out is that those

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<sup>9</sup> This stands regardless of what Hobbes would say about it, but it is worth noting that Hobbes himself had a strong notion of corporate agency. Take his theory of the sovereign person in the introduction to *Leviathan*: the commonwealth is depicted as an ‘artificial man’ with a soul, judgment and executive capacity, nerves, memory, health, reason, and will. The commonwealth amounts to a kind of person for Hobbes, and commonwealths are also in a state of nature relative to one another (*L* 30.30). Hobbes’s theory also requires group agency more generally (Wadle, 2017), and he discusses it in the case of private organizations (*L* 22.1-4; 22.26).

hoping to rescue an excuse for bad corporate conduct via the state of nature will need to take a strong stance in this debate on the side of corporate moral responsibility. They will need to say that even if individuals are not in the state of nature, firms themselves can be, given the assumption that firms are agents.

This is not necessarily a bad thing. Though still subject to vigorous debate, this view is not a minority position. Moreover, some of the duties gestured towards in the introduction are only meant for firms and so only viable given an acceptance of corporate moral responsibility. Still, this is a serious commitment about the nature of the firm, and it is clear in reading Kavka (*op. cit.*) or Green (*op. cit.*) that they do not appreciate this commitment. And, indeed, we will argue that the commitments required for the excuse are even more costly than this. Before we can show this, though, we will first make the case for thinking that corporations, as agents, are often in the state of nature relative to one another.

### *The Relation Between Corporations*

Showing that corporations act and have vital interests does not itself show that they satisfy the conditions (a) and (b) above for being in the state of nature and being excused because of it. So, let's first consider whether corporations satisfy (a). To do so, they will need to be in a condition where there is no assurance that others will comply with the relevant norms protecting them.

Despite the initial intuition about the competitiveness of the marketplace, an immediate problem arises. Firms don't exist on their own in vacuum; they fall under various governmental jurisdictions just like the rest of us. This authority provides assurance to firms that other firms will

follow the laws (at least theoretically).<sup>10</sup> So, the state seems to lift firms out of the state of nature just as it does for us. However, this fails to adequately account for the condition that corporations find themselves in. It is not enough to simply show that there *is* an authority, or that the authority effectively enforces *some* laws. The authority must effectively protect peoples' interests. When the state fails to do this—when, for instance, people must consistently rely on self-help for their own security—people are thrust back into the state of nature.

The question, then, is whether this is the position that firms find themselves in, and whether it excuses them to some degree. Even if the state is effective, for example, in its enforcement of contracts between corporations, the state does not generally assure corporations of their integrity against outside influence and attacks. Other corporations and market participants can act in ways to bring about the destruction of a corporation, or various other significant setbacks of their vital interests. And they can do so without intervention from the authorities.

If a corporation is driven to dissolution, the government does not generally prosecute those responsible. Corporations can and regularly do have their market share stolen away, or go bankrupt after losing a price war. And this is not considered a great crime to be regretted or avenged. This is no casual accident of the construction of our society. On the contrary, the marketplace is set up to induce this kind of competition. This is how it looks when the system is *working* and competition

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<sup>10</sup> This question of the efficacy of legal enforcement looms large. What we will argue is that firms are in the state of nature even if the regulatory apparatus is working well. (In fact, regulatory regimes work to actively keep firms within the state of nature.) But, of course, there is good reason to be concerned about effective industry regulation. Enforcing regulations is an expensive and complex function of government. At least when it comes to enforcement of criminal wrongdoing, it has proven extremely challenging to hold corporations criminally liable (Laufer, 2006). The state may outlaw fraud like it outlaws murder, but the state is much *better* at prosecuting murder. So, even laws on the books may be insufficient to secure firms from threats.

is *fair*. We celebrate vigorous corporate competition that ends in the ruin of most of the competitors (and the lowest prices for consumers). The system is highly adversarial, and it is often taken to be justified given the gains society receives as a whole because of it (Heath, 2014).

Though the system is adversarial, it might seem somewhat dramatic or overblown to claim that corporations are genuinely in the state of nature relative to one another because of this. After all, even if the government does not stop companies from competing for customers, many governments *do* stop them from committing fraud, or blackmail, or blowing up a competitor's factory for that matter. A cursory glance at intellectual property law, for instance, is sufficient to see the kinds of steps that the state has been willing to take to respect the property rights of private enterprises. And a similar glance at employment law reveals the extent to which at least US law guarantees the liberty of firms to hire and fire at will. Governments do not merely enforce contracts and then walk away; the vast regulatory arm of the state (as well as other trade unions and regulatory bodies) work to carefully constrain and support industry conduct.

We appreciate how many of these laws and regulations in certain ways do protect corporations from one another and from their stakeholders, but we still claim that they do not do so sufficiently to assure corporations against threats to their vital interests. On the contrary, many of the regulations are enacted by authorities to encourage competition, and this is precisely the opposite of assuring corporations against threats. It makes competitors more threatening.

Imagine a situation (similar to the one depicted in *Battle Royale* or *The Hunger Games*) in which there is an involuntary battle for survival between a few competitors. This competition is hosted by the government for the amusement of the masses, and so imagine that the government lays down certain rules for the competition. (Perhaps competitors cannot team up to form

coalitions.) These rules would obviously not take the competitors out of the state of nature; it would instead institutionalize the most dangerous elements of the natural condition.

This analogy may seem to sensationalize the situation of the modern firm, but we submit that it is largely appropriate. It is hard to see what the difference could be with those laws and regulations delivered by authorities with the explicit aim of facilitating vigorous and continual competition. What's more, when the regulations enacted do not stimulate competition, this is often because one of the competitors have successfully engaged in regulatory capture, where some of the competitors influence the shape of those regulations in their favor. Regulatory capture is a fact of modern market life, but it is no solace to a given corporation to know that the apparent authority issuing regulations is being directly influenced by the competitors in that market. If my company is subject to regulations crafted by competitors to entrench their own position, then how can my firm be assured that those regulations will protect it against threats? It cannot.<sup>11</sup>

But perhaps there is another way. Perhaps firms in a market reach a security-providing equilibrium naturally. In the research stream applying population ecology to organizations in the market, some have argued that markets can evolve with niches carved out through specialization (Hannan & Freeman, 1977; Carroll, 1985; Baum, 1999). One could leverage this to argue that many firms will come to secure niches in the market, undermining any excuse from market competitiveness. Even accepting this framework, however, we are skeptical of its ability to

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<sup>11</sup> Instead, this may persuade firms to pursue regulatory capture for themselves. Assuming it is a bad thing for regulatory regimes to be captured in this way, we may wonder whether firms are excused for engaging in this behavior, and in the next section we will see how securing this excuse turns on satisfying a number of conditions. For instance, would the firm be at a competitive disadvantage if a competitor succeeds at regulatory capture instead, and is it reasonable to think that a competitor would succeed?

undermine an excuse. Even if a firm is the only provider of a particular service or inhabitant of a market niche, the threat of new entrants remains, as does the threat of market upheaval through processes of innovation (i.e., creative destruction). Indeed, this skepticism is furthered when considering the feasibility of a firm's building sustainable barriers to entry (Barney, 1986), apart from the context of specific governmental market interventions and assistance to be discussed more below.

Our judgments on this matter will ultimately involve assessing a firm's market power and the level of government assistance. Even at this high level, though, firms across many industries are clearly in constant competition, as the prevalence of competitive strategy in management theory and practice makes evident. Many firms must act to secure their vital interests against the actions of others. This makes it appropriate to characterize firms as being in the state of nature with respect to each other.

### *Corporate Moral Status*

Even granting that many firms have vital interests under threat from competitors, there is yet a final hurdle that must be met for firms to legitimately claim the excuse. Condition (b) above only mentions having vital interests, but we saw above that there is a background assumption at work. The assumption is that one's vital interests are morally significant; they are *worth* securing.

If it is not important in some sense that you secure your vital interests, then there is no excuse for you to transgress moral norms in the name of those interests. Those interests must be morally significant. In fact, *you* must be morally significant, a being with a certain moral status, if an interest is going to carry any weight in virtue of being *your* interest. Only an agent who has the right kind of moral status, a moral status that makes their interests matter from a moral point of

view, can allude to their interests to excuse their conduct. The question is: Do corporations have this moral status, such that their vital interests can be morally significant?

For many proponents of corporate moral responsibility, answering this question in the negative is precisely how they should avoid the Hobbesian excuse. Some scholars unambiguously deny that corporations have any moral status. Manning (1984), List & Pettit (2011:fn.128), and Hess (2013) each deny corporations rights because they are not sentient or properly vulnerable to having those phenomenal experiences (i.e., pain) that ground our rights. If the firm does not have a right to act to protect its vital interest, then advertent to those interests cannot stop us from concluding from a firm's bad conduct that the firm lacked sufficient regard for individuals that actually matter morally. Moreover it would not be unfair to blame firms, because firms would not have any claim to fairness or equal treatment.

For a few others, though, the excuse may still be available. Donaldson (1982), for example, affords corporations certain rights distinct from the shareholders/employees, such as minimal rights like the right to exist, to go under a heading, and to hire employees. And Silver (2019) argues that corporate agents satisfy the criteria of numerous theories of what it takes to have moral status. Though it may seem odd to take corporations to have any moral worth, even the mere acceptance of corporate interests, insofar as they constitute desires of the corporations, will ground their moral significance on some conceptions of value. Others take for granted that corporate agency entails certain rights and instead discuss the scope of the rights that would follow (Sepinwall, 2015; Hasnas, 2018; *cf.* Hindriks, 2014).

Our aim here is not to settle this controversy concerning corporate moral status. Instead, we want to bring out that yet again those hoping to claim the Hobbesian excuse for firms will need to take a rather strong stance. They will need to say that firms are not only agents with moral

responsibilities, but subjects with rights that deserve protecting. This position is not without precedents, but it is a substantial commitment to corporate personhood not even accepted by most authors arguing for corporate moral responsibility. And, critically, this theoretical commitment is required, as apparent intermediary positions sometimes suggested fail to secure the excuse.

First, even if the firm has no moral worth, it may seem excused for acting to protect its vital interests if its interests are gotten from or shared by those in charge of it (or its shareholders). But this will not work, because proponents of corporate agency like Peter French, Philip Pettit, or Kendy Hess do not think that this is from where the interests of firms are derived. These scholars motivate their position by arguing that the interests of the corporation often come apart from any individuals associated with it. Besides, even this is far from the claim that the corporation's *vital* interests are the same as the vital interests of individuals, which seems implausible.

As another intermediate position, we might think that corporations do have rights, but that these rights are entirely derived from or had in virtue of the fact that some group that composes the corporation has rights (Ozar, 1985; Orts & Sepinwall, 2015). On one way of understanding this thought, the corporation's conduct can be excused insofar as it is in service of the rights of those that compose it. For instance, Kavka holds that while organizations might have a right to self-defense, this right "must derive from the corresponding rights of individual members of the organizations" since "a corporation has no significant moral right to survive" (1983a:64). The right of a corporation to violate norms follows from the moral status of the individuals composing it.

This also fails to furnish an excuse for the firm. The problem is that, as we have already seen, the conditions in which the corporation finds itself are *different* than the conditions of individuals associated with it. Those individuals are not themselves in the state of nature, lacking assurance that their vital interests will be secure. Stakeholders will have interests in the corporation

that can be negatively impacted, but stakeholders do not have a general standing to violate moral norms on these grounds. Their vital interests are simply not at stake. Since individuals are not properly positioned to be able to claim an excuse, the corporation cannot act poorly and then claim an excuse on their behalf. If the firm is to merit the Hobbesian excuse, it must be because it has distinct vital interests that deserve to be respected by others.

With that said, we want to press on in the next section to think about how far this excuse would extend if one were willing to take on the necessary commitments. We submit that this needs to be done for a few reasons. First, as we saw, the resources are available for the excuse to be claimed. It will be a minority position, but those most hopeful for a legitimate corporate excuse may be willing to entertain it. Another significant reason is that even if firms do not actually merit the excuse, we in society may lack the *standing* to blame firms for engaging in these wrongdoings.

In the recent flourishing of work on the standing to blame, authors routinely claim a nonhypocrisy condition on appropriate blaming (Fritz & Miller, 2015; Todd, 2019; *cf.* Dover, 2019): Agents who are hypocritical with respect to some norm violation lack the standing to blame others for violating that norm. Of course, we are discussing blaming firms for violating moral obligations that may not apply to us and that we have not ourselves failed to meet. Still, we will count as relevantly hypocritical if we likely would engage in the same wrongful behavior in their situation (Piovarchy, 2020). And, indeed, it seems likely that, were we in the state of nature, we would fail to meet obligations in order to protect our vital interests. It is hypocritical of us to blame firms for acting wrongly in this situation, and so we should not do it.

Others have also discussed what amounts to an ‘involvement’ condition on blaming (Cohen, 2006; King, 2015; Todd, *op. cit.*): those suitably involved in and responsible for the agent’s wrongdoing lack the standing to blame the agent for that wrongdoing. And we may lose

standing on these grounds as well. Firms are in an adversarial market environment because we have engineered this condition, a condition where it is foreseeable that they will act wrongly to protect their interests. Even if firms cannot be excused for wrongdoing, it is not hard to see ourselves as responsible in part for that wrongdoing or indeed as complicit in it (as we benefit from the market structure). In either case, we will lose the standing necessary to blame firms. So, while the bar for appropriately excusing firms is higher than we might have thought, the bar for inappropriately blaming them is far lower.

### 3. THE SCOPE OF CORPORATE EXCUSE

If corporations are in the state of nature with respect to each other, and taking on board the commitments required for their being in the state of nature to be exculpatory, we should be worried about the scope of the excuse offered. The profits of the corporation are threatened by competitors constantly and by design. While ExxonMobil isn't going out of business *tomorrow*, some companies will. According to the US Small Business Administration Office of Advocacy, half of new businesses do not survive the first five years (SBA, 2018). Given this, it is not hard to be worked into the position that corporations must often act directly in support of their vital interests. But how frequently? The worry is that we are not far from excusing their failure to conform to any kind of duty we might take them to have.<sup>12</sup>

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<sup>12</sup> There is a parallel worry that Hobbes holds that within the state of nature an agent may be always taken as excused when acting to secure some kind of comparative advantage on this ground. Hobbes seems to think that since people's position in the state of nature is *so* precarious that agents should recourse themselves with any advantage they may be able to acquire. But this is not *required* by his thought, and he does contemplate instances where agents in the state of

Now, we have already seen a few qualifications that help to curtail the application of this excuse. We saw that the Hobbesian excuse will not apply to small firms, as these firms are too small to count as agents with distinct obligations in the first place. And we saw how firms will not qualify for the excuse if they operate monopolies or else have successfully engaged in regulatory capture, or if they are being actively protected by their government. This rules out many firms from ever qualifying for the Hobbesian excuse. Still, for those that might, the worry remains that *all* of their bad conduct will be excused. To address this, authors who have endorsed the Hobbesian excuse have offered a number of limits on its application, or else further obligations that it entails. For Kavka (1983a), corporate actors can only be excused for acting defensively in certain ways. Heath (2018) is critical of this approach. More important for him is that the excuse is conditional. Corporations can only be excused when they have lobbied to establish systems that would have *prevented* them from acting wrongly.

In the next two subsections, we will consider the scope of this excuse in light of these authors. We will first argue that the excuse is helpfully framed using the concept of competitive advantage. So framed, we will be able to see limits on the excuse that go some way toward addressing this concern of its over-application. Then, we will show how the foregoing makes space for some of the positive duties mentioned in the introduction.

### *Defensive Violations and Competitive Advantage*

When considering excuses from a Hobbesian framework, Kavka (1983a) draws a distinction between ‘defensive’ and ‘offensive’ violations. A ‘defensive’ violation for Kavka is

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nature are not excused, e.g. in the case of covenants where another has already performed their part (*L* 15.5). For some discussion see Lloyd (*op. cit.*: 31-32) and Vanderschraaf (*op. cit.*: 192-194).

where violations “are motivated by the desire to protect oneself against suffering the unilateral disadvantages that would result from your complying while others do not,” while an ‘offensive’ violation is one where the violations “are motivated by a desire to gain a unilateral advantage over others who are complying with the relevant rule or rules” (62). As we might expect, defensive violations are excused and offensive violations are not. The reason why defensive violations of a norm are excused is because they are meant to avoid making a person prey to another, that is, they function as a kind of self-defense against the actions of others. Offensive violations, lacking this feature, just count as aggression against others.

Despite its initial plausibility, there are cases that blur the defensive/offensive distinction, and the excuse afforded by Hobbes may be broader than Kavka intended. For Kavka, the legitimate excuse requires that the norm in question must *already* be violated by others. What is critical for Hobbes, however, is not that the norm has already been violated, but that the agent does not have adequate assurance that others will comply with it. If one suspects that such a violation is imminent, and that that would put one at a disadvantage, this could excuse *preemptively* violating the norm in a way that looks offensive. For example, it could involve being the first in an industry to begin some wasteful practice, where the firm only suspects that others are going to adopt it.

Heath recognizes this slippage that leads to excusing preemptive strikes, and he uses it to motivate a further concern for Kavka. On this way of delimiting the excuse, whether one is actually excused will worryingly depend on the mental state of the agent. If she is able to convince herself that her preemptive conduct was necessary, then it will seem excused on this understanding of the distinction. He says,

Since the only difference between “defense” and “offense” lies in what is going through your mind, there is no way that anyone else can tell by looking which is going on. Typically, then, what happens in a collective action problem is that everyone regards the

actions of everyone else as “offensive” and their own as “defensive.” Thus the conceptual distinction seldom helps to sort out the issue of culpability, if anything it just deepens the collective action problem, by making everyone feel morally entitled to defect. (2018:527)

So, we are left with skepticism about whether the conceptual resources given provide space for a meaningful excuse that is not subjectively determined and wildly overapplied. To respond, we propose appealing to distinctive conceptual resources from the literature of strategic management. In particular, the ubiquitous concept of competitive advantage provides a framing for this excuse and its appropriate deployment.

A competitive advantage may be associated with the way in which the firm is positioned in its industry relative to peers (Porter, 1985), or it may involve the cultivation of particular resources that are hard to replicate or imitate (Barney, 1991), or it may involve certain dynamic capabilities of the firm (Teece, Pisano, & Shuen, 1997). Regardless of exactly how we characterize competitive advantage, of the many ways it has been characterized (Sigalas & Economou 2013), it is critical for our discussion insofar as it is taken as an aim of management and of corporations generally. It may not be that gaining competitive advantages are among the firm’s stated interests, but it is widely thought to be instrumentally critical to achieving corporate ends that firms pursue advantages. Firms must also avoid disadvantages, where a competitive disadvantage is not merely failing to have an advantage (Powell, 2001). Given the boon or threat offered by a prospective (dis/)advantage, and the stakes of failure, firms must act on information regarding them.

Conceptually, competitive disadvantage appears to be the right tool for articulating that position of a firm in which its vital interests are threatened. Moreover, that competitive advantage is so widely discussed, studied, and taught suggests that it is a sufficiently steady and publicly understood concept to be used in the recognizing and adverting of corporate excuses. However, exactly how plausibly this excuse can be claimed will then turn on how plausibly firms can

determine, differentiate, and delineate genuine advantages and disadvantages. There is a legitimate concern about whether competitive advantage/disadvantage can play this role.

Some have been skeptical about the place of competitive advantage as a significant or useful concept within strategic management (Lieberman, 2021). That there are so many definitions for it, for instance, may leave it ambiguous whether some situation would constitute a competitive disadvantage, and so harder to determine whether the firm could be excused in that situation. Our view is that a firm could be legitimately excused for acting wrongly when in a situation threatening their vital interests, and this is true whether or not strategic management scholars ultimately vindicate the concept of competitive advantage. If the concept cannot be vindicated, however, then what this means is that a firm could be in a situation in which it ought to be excused, but the conceptual resources will be lacking to easily articulate *why* that excuse is warranted.<sup>13</sup> It will be harder for the firm to *express* this excuse. Key to being excused is both deserving to be excused *and* being able to sufficiently communicate that an excuse is warranted when answering for wrongdoing. So, we are not committed to the competitive advantage construct, but some such construct is necessary to claim this excuse.

Another challenge with advertizing to advantages concerns differentiating advantages across a broad range of corporate activities and strategies. Rather than seeing firms as pursuing singular competitive advantages, or gearing their business to entirely avoid a singular disadvantage, firms may have strategies that involve pursuing certain advantages, avoiding certain disadvantages,

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<sup>13</sup> In other contexts, an impoverishment of conceptual resources necessary for making moral claims on others is sometimes taken to itself constitute a kind of injustice: hermeneutical injustice (Fricker, 2007). We take it that such an injustice is not at work here, as the long history of strategic management scholarship undermines any claim that insufficient resources have been marshalled to articulate the concepts necessary for this excuse.

maintaining parity with competitors, or negotiating the tradeoffs between these positions across the business. This again complicates the excuse. It may be that what is significant for the excuse is not the avoidance of disadvantage simpliciter, but rather the avoidance of *net* disadvantage. And, as a matter of claiming the excuse, it may be much harder to *show* that the firm is in this position.

Despite these challenges, it seems clear that the competitive (dis)advantage construct is the right kind of resource from strategic management to claim the kind of conduct recommended from within the state of nature (if anything is going to be able to play this role). Re-reading Kavka on defensive/offensive violations, it is clear that he is concerned with the firm incurring certain disadvantages by failing to avail itself of an opportunity. While it may not be true that any particular instances of polluting, say, will jeopardize the firm's vital interests, adopting a corporate policy that involves non-polluting as other firms pollute regularly is sure to put the firm at a competitive disadvantage. Incurring a competitive disadvantage threatens the firm's vital interests, and so the firm would be excused for conduct necessary to avoid the disadvantage.

To generate a worry of the kind we saw for Kavka, one could argue that excusably acting to avoid a disadvantage may extend to an alarming amount of conduct. A firm could act proactively, yet unethically, in pursuit of some advantage, and yet suggest this is an excused means of ensuring that competitors did not take that advantage and leave the firm at a relative disadvantage. This would lead firms to expect to be excused for acting unethically *preemptively* to secure a competitive advantage. That the excuse may be used in this way even on our understanding of it is concerning; it suggests that the excuse is much broader than we might hope or that might seem appropriately. However, we will show how framing the excuse in terms of competitive disadvantage provides the resources of addressing these issues about when the excuse is claimed, and it charts a course to avoiding its over-use.

Recall that Heath's concern with appealing to the defensive/offensive distinction was that it was implausibly subjective. Acting defensively is a matter of the firm's perspective; it depends on whether other market participants are viewed as acting offensively. (And, unsurprisingly, they often are.) Now, however, matters are not quite as subjective. It is not how threatened the firm *feels*, but the availability of various competitive advantages and disadvantages that is relevant. And this is something that the field of strategic management has at length discussed, taxonomized, and to some degree operationalized.<sup>14</sup> Put in terms of competitive advantage, then, we think that the resulting excuse is quite plausible.

Consider an industry where there is a demonstrated advantage to being a first-mover. In this case, a firm will be at a relative disadvantage in failing to act first, and so it is intuitively appropriate to excuse the firm for acting first on an unethical strategy (assuming it satisfies the constraint below). On the other hand, there are many factors relevant to whether acting first in an industry genuinely confers any advantage (Kerin, Varadarajan, & Peterson, 1992). In a situation where there is no advantage to being first-mover, then the firm will not be excused. Moreover, in a situation where there is an advantage to being first-mover, and a disadvantage for failing to be,

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<sup>14</sup> To be careful, what is relevant here is not *entirely* objective. As we will see, the excuse depends not on the existence of possible advantages or disadvantages, but rather those dis/advantages that would be epistemically accessible to firms if they met some reasonable standard. In our own case, we are often subject to a reasonable person standard. For example, you may act negligently as an engineer if you fail to check a meter that any reasonable engineer would check. What is key to your negligence is not the mere *existence* of some indication the observation of which would have led you to avoid harm; instead, what is necessary is that you did not observe some indication that *a reasonable person* situated as you were would have observed. Key to your exculpation is arguing that a reasonable person *would not* have observed the indication. Similarly, what matters to whether the firm has an excuse are not the dis/advantages that are possible, but those that agents situated as the firm could reasonably be expected to recognize.

but where the disadvantage is insufficiently substantial, then the firm will again not be excused. Failing to act first would not put the firm at a net competitive disadvantage. This tracks with our judgments.<sup>15</sup>

To determine whether the excuse is genuinely appropriate, and to show how this excuse does not extend too far, we want to highlight a constraint on the excuse and two further qualifications. The constraint is that the firm can only be excused if the relevant conduct is genuinely *necessary* to secure the firm's vital interests. Necessity conditions are a common inclusion in discussions of exculpation. The firm is thus only excused for pursuing an unethical strategy if pursuing that strategy was necessary to secure the firm against a competitive disadvantage. If there is a choice between viable strategies to pursue, then the firm is not excused for engaging in an unethical strategy as long as there were other, less unethical strategies perceivable by reasonable management teams that also would have avoided disadvantage.<sup>16</sup> Or,

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<sup>15</sup> Moreover, this fits with work on instrumental/strategic CSR. In that literature, scholars are sensitive to how firms can be powerful engines for good, but also how CSR efforts relate to overall firm strategy (McWilliams, Siegel, & Wright, 2006; Vishwanathan, van Oosterhout, Heugens, Duran, & van Essen, 2020). Some of this work explains how providing certain public goods is in tension with the firm's maintaining an advantage, and how firms may be less likely to provide needed public goods in competitive markets (Bagnoli & Watts, 2003). And much work is focused on showing the ways in which CSR can be leveraged to provide both a competitive advantage and benefits to society (e.g., Porter & Kramer, 2006). However, this can all be true without it being clear that these reasons of strategy provide sufficient moral reasons for ever failing to provide services. Given the foregoing discussion, though, we can suggest that there may indeed be obligations of CSR beyond those prescribed by strategic CSR. In these cases, the firm is not justified in being merely strategic, but it may be excused.

<sup>16</sup> Lazar (2012) and McMahon (2016) discusses similar necessity conditions in the context of self-defense. The comparison to the self-defense literature is imperfect insofar as that discussion concerns justifications, while ours focuses on excuse, but we find the idea of a necessity condition for the appropriateness of an excuse no less plausible.

again, the firm may be called to absorb the disadvantage, as long as the firm will thereafter remain in a net advantaged position.

We can apply this to the above cases easily. Where a firm is in an industry full of polluters, the firm may be excused from polluting. This is not simply because everyone else is doing it, but because a failure to do so as well might constitute a disadvantage. But if joining in the polluting was not genuinely necessary to avoid the disadvantage, then that “everyone else is doing it” would be no excuse at all. As another example, we saw how a firm may seem excused for pursuing an unethical strategy first when there is a first-mover advantage. However, this excuse is illegitimate if there were any other means reasonable available to the firm to secure against that competitive disadvantage, or if the firm could instead pursue some other advantage of sufficient value.

This constraint shows why the excuse does not overapply. We can also see how accepting it will not lead to a rush of bad conduct under cover of it. First, the conduct may still be against the law. The existence of an excuse that makes it inappropriate to hold the firm *morally* responsible may not similarly make it inappropriate to hold the firm *legally* responsible. There are hard questions to answer about the relation between moral and legal excuses, but for all we have said here, corporations may still be subject to civil and criminal punishment for wrongdoing. (Hobbes himself did not see this excuse as amounting to a possible legal excuse [e.g., *L* 21.14, 21.16-17, 28.3].) There may be good reasons for thinking that the stresses of the market cannot provide a legal excuse, or there may be sufficient reason not to allow firms to use it as an excuse. And even if it could exculpate firms criminally, firms would still be liable civilly to compensation victims for harms caused. Moreover, individuals carrying out the firm’s policies will not be shielded from moral blame insofar as this is the firm’s excuse and not their own.

Second, whether the excuse applies depends on the shape of the market. If the market is not well-defined, or there is a threat of new entrants that is hard to quantify, then this makes it harder for the firm to demonstrate that some immoral conduct is genuinely necessary to avoid disadvantage. Perhaps firms can at times meet this burden. Firms should not be held to the standard of showing that conduct will *with certainty* avoid disadvantage; instead, showing that it is reasonable to expect that the conduct in question would have this result is sufficient. Still, this provides a kind of limit, because the burden is on the firm to demonstrate that the market really is structured in a way some bad conduct is necessary to avoid disadvantage.

Finally, nothing that we have said rules out the possibility that firms may have moral interests that screen off pursuing unethical advantages. (Or, even if a firm only cares about pleasing its investors, those investors may themselves care about being socially responsible [Mackey, Mackey, & Barney, 2007].) If corporations have distinct social interests as agents, then it may be rational for them to choose to identify with and pursue moral ends that discourage pursuing unethical advantages.

It could be that incurring what might be seen as a disadvantage is actually in line with the firm's particular vital interests, depending on how we understand those vital interests to be determined. As we saw above, perhaps different conceptions of corporate purpose will suggest different interests as vital, or it may be that a firm's vital interests are determined by the firm itself or the market. So, how a scholar understands corporate purpose can influence the scope of the firm's conduct that can be excused. Even if the firm's social interest is not understood as vital, however, we note that the Hobbesian theory does not rely on the idea that agents *only* care about their vital interests. Just as individuals can choose to avoid unethical behavior even if it would benefit them, so can firms.

### *Positive Duties*

Recognizing the importance of competitive dis/advantage puts us in a position to see how the firm can retain many of the duties mentioned in the introduction, though not all. There may be a strong case for excusing the performance of certain duties prescribing ongoing action by the firm. For example, if there is a duty to promote justice in the community in which you operate (given failures of other institutions in that community), the firm could be excused if it has clear competitors not operating in that community that will be advantaged for not bearing those costs. However, not all ongoing duties are sufficiently burdensome to warrant the excuse. Heath (2018:528-9) suggests that firms operating in industries with the regular exploitation of market failures have an obligation to lobby to change the regulatory framework of the industry. Mere lobbying for regulatory reform that would positively affect the market is unlikely to be so expensive as to constitute a competitive disadvantage. Besides, firms likely have an interest in preserving the integrity of the market, and lobbying serves that interest.

In contrast, duties that involve one-time payments of aid or short-term assistance in wartime are unlikely to put the firm at a competitive disadvantage. As a recent example, many publicly argued that firms had an obligation to respond to the Covid crisis by engaging in short-term manufacturing/logistical assistance, whether for PPE or vaccine production/distribution. And, indeed, many firms did respond to this duty of beneficence, and for good reasons (Ostas & de los Reyes, 2021). It is clear that these firms could not point to the competitive environment for an excuse for non-compliance except in those rare cases where the goods needed were expensive to produce and involved high switchover costs (as in the case of ventilators). Our model tracks with

the intuition that the more expensive it would be for a firm to assist, the more plausibly excused they are for failing to, though they would still be acting wrongly in so doing.

Finally, we might wonder about duties concerning the ends the corporation assumes, or the duties concerning its interests. For example, Dart (2004) argues that the emergence and trajectory of social enterprises are critically tied to our aiming for organizations that are morally legitimate. We could imagine that one reasonable constraint on the moral legitimacy of a social enterprise is that it takes the promotion of some social good as one of its vital interests, rather than profit. Assuming that a duty on one's interests is one that can be integrated without cost, we see no reason why a firm would be excused from it. Accepting these constraints on the corporation's ends will surely not itself threaten its vital interests. So, we should expect corporations to remain subject to positive duties concerning their interests.

## CONCLUSION

We began by observing how extensive the apparent obligations in business can be. Business ethics as a field is largely in the business of charting out these obligations and marshalling blame for the non-compliant. While we might expect that corporate actors can be occasionally excused for wrongdoing, the fact that businesses might be excused for wrongdoing is infrequently acknowledged and even less frequently theorized. Indeed, this ambition of holding corporations responsible is undermined if we come to believe that excuses are pervasively available in business. As we saw, the unforgiving competition of the market—ever threatening to drive those in it out of business—purports to provide just such a universal excuse.

In response, we have endeavored to defang this threat by clarifying the assumptions needed and those conditions in which the excuse could be claimed. We saw how the excuse is best expressed by assimilating it to the excuse provided by inhabiting the Hobbesian state of nature. So understood, the excuse likely cannot be claimed by individuals in firms (*contra* Kavka [*op. cit.*] and Green [*op. cit.*]), as many states provide individuals with this assurance. Instead, if it is to be claimed, it must be to excuse firms themselves. But this requires accepting not only that corporations can be morally responsible (which is controversial), but that firms are entities with vital interests that are morally significant (which far fewer will entertain).

However, we saw that there was still reason for concern. Proponents of this excuse may take on these commitments. But even if not, we may lack the standing to blame firms for acting badly in this competitive environment anyway. This leaves us in a situation equivalent to their being excused. So, we considered how best to determine the scope of the excuse. By framing it in terms of avoiding competitive disadvantage, and by respecting certain constraints and caveats, we showed how the excuse could not be universally claimed. (Indeed, the excuse is quite hard to actually claim satisfyingly, as a firm needs to demonstrate that some conduct would lead to *net* disadvantage in their industry (which may be poorly defined) given their interests (which may not have been well-communicated).) There is no excuse for failing to perform many duties. And what uses of the excuse remain cleaves to our intuitions. We should not blame firms for acting wrongly where that was the only reasonably foreseeable way of avoiding disadvantage.

This has immediate implications for normative business ethics. While the project of the field is not undermined, and scholars are encouraged to continue exploring the potential duties of firms, this exploration needs to be sensitive to the competitive reality of the market. There are times when firms may be excused, and judging whether they are excused requires a recognition of

different features of particular markets, which shape the security of the firm and what is required to avoid competitive disadvantage. There needs to be a broader integration of the tools of strategic management into business ethics to help scholars and practitioners judge when obligations apply.

The question that remains, however, is: Does this *still* leave firms with too many excuses, and what should we do about it if we think so? If certain moral obligations simply must be met, then it is a real problem if we can predict that certain firms are likely to not meet them and be excused for so doing. And this is *our* problem as a society. *We* are responsible collectively for the market structures that lead to this bad behavior.

We lack the space to solve this problem, but we should feel empowered when confronting it. After all, we can alter the availability of this excuse if we choose to alter the market structure. And whether we make this choice is at our discretion, depending on the value of a particular competitive market to us. It is an enduring and multifaceted question precisely when the public is best served by private competition versus publicly owned monopolies, say. This goes back to at least Adam Smith and Karl Marx, but the conversation over how public interest should inform organizational and market structure continues to this day (Lazzarini, 2020). The contribution of this paper, then, is to provide a distinct normative dimension along which to assess this issue.

If a competitive market is too valuable to abandon, but it leads to excused harms, then this may generate additional obligations for society to mitigate the damages caused. This would follow from an obligation of restorative justice for collateral damage (Smart & Majima, 2012). If, on the other hand, the efficiency gains of a competitive market do not justify the foreseeable harms, then this is the makings for an argument for socializing an industry, for the controlled creation of a monopoly which can be held accountable without excuse.

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