

DOES KUTZ'S THEORY OF JOINT ACTION ATTRIBUTE RESPONSIBILITY TO SHAREOWNERS?

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INTRODUCTION

In this paper I argue that Christopher Kutz misapplies his theory of joint action when he attributes shareowners responsibilities on the basis of their intentional participation in the corporations in which they invest. Instead I propose that his theory of joint action should be used to attribute shareowners responsibilities on the basis of their intentional participation in the stock market.

If shareholders' accountability is grounded in their intentional participation in the stock market, then shareholders cannot take responsibility for corporation's individual actions. Instead they are solely responsible for the benefits they gain from holding shares if these are a result of moral wrongdoing and for this they should be held accountable.

In order to reach this conclusion this paper starts with the concept of responsibility and of being held responsible in §1. §2 introduces the reader to Kutz's theory of responsibility, followed in §3 by an explanation as to the two main ways in which Kutz's intentional participation differs from that of others. Kutz's argument for why participating in joint action leads to individuals being responsible for the actions of others is presented in §4.

In §§5-7 I argue that shareholders do not intentionally participate in corporations. I start by explaining how investors become shareholders in §5. Reasons as to why an investor would chose to invest in a given corporation are discussed in §6. Failing to show shareholders' intentional participation in corporations through exploration of the acquisition process or investors' motives, §7 examines other reasons for which shareholders can be said to intentionally participate in the corporations in which they invest.

My proposal, that we should view shareowners as intentionally participating in the equity market rather than in individual corporations, is presented in § 8.

From this it follows that shareowners become morally tainted by virtue of their participation in the equity market, which in turn results in benefiting from wrongful acts. As such they become accountable for rectifying the wrongdoing.

1. THE CONCEPT OF RESPONSIBILITY AND OF BEING HELD RESPONSIBLE

Intuitively the term responsibility may evoke a negative connotation and be associated with blame, yet importantly can also include praise. It can relate to responsibility for past and future events. More often than not the issues of responsibility and being held responsible relates to past negative events attributing blame to an agent. In situations when speaking of *y* being responsible for *x* having happened, we firstly refer to *y* (*y* here being a legal and moral agent) having directly or indirectly *caused* *x*. In the case of past events an agent would need to be viewed as being the cause of *x*, where *y* would have had to perform some form of act or event directly or indirectly resulting in *x*.

That *y* caused *x* is not by itself sufficient for *y* to be responsible for *x*. In these types of situations we tend to use the term responsibility and accountability interchangeably. When using the term 'accountability' I refer to when an agent is held to account for their actions. At this point we can still argue that *x* was an accident, and thereby even though being the cause of *x*, *y* is not responsible for *x* in all the senses of the word, for *y* does not deserve to be held to account for *x*. The agent can here be said to be causally responsible for *x*, but not yet legally or morally responsible. To credit *y* with wider responsibility, further evidence of control is needed, i.e. that *y* was in a position to control what she was doing. Such control is most often associated with motive, i.e. that *y* intended to cause *x* and that *y* was free to either cause or not to cause *x*.

Yet even with the addition of motive and free will it is possible to claim that *y* is not responsible in the strictest sense. Take the example of a child doing some harm. The child may have caused the harm, with the intent to cause it, yet we would not want to make the child accountable in the same fashion as we would an adult, for we do not see them as having the same level of understanding or knowledge of the consequences of their actions. Yet, lack of control,

understanding or knowledge may free one from moral responsibility, but not from most legal responsibility. The purpose of attributing agents' moral or legal responsibility and accountability is often to either deter or encourage certain behaviour. However, we also attribute agents responsibility simply because we see them as deserving to be held responsible.

What I have presented above involves causal, moral and legal responsibility that others attribute *y* as a result of having caused *x*, yet it is also relevant to reflect on the responsibility that *y* attributes herself. When speaking of instances where agents attribute responsibility to themselves such instances are often combined with emotions of guilt, shame, pride or joy either for performed or omitted actions.

All of the above are examples of individual responsibility, i.e. that an individual is held individually responsible for her own actions or lack of them. It does not fully help us understand how we attribute responsibility to individuals for harms caused by others. And it is this type of responsibility with which Christopher Kutz is concerned.

2. INTRODUCTION TO KUTZ'S THEORY OF RESPONSIBILITY

In his *Complicity: Ethics and Law for a Collective Age* Kutz attributes responsibility to shareholders for the harm done to victims of corporate wrongdoing. This is not to say that they are morally responsible for the actions that caused harm (Crowe 2012:161). Instead he is claiming that shareholders should be held liable for unlimited repair demands if the corporations in which they are invested are unable to repair the damage themselves.

Kutz develops a theory of responsibility where agents are individually held responsible for other agents' actions on the basis of complicity. The reason for Kutz wanting to develop such a joint action theory of responsibility is the following concern:

The most important and far-reaching harms and wrongs of contemporary life are the products of collective actions, mediated by social and institutional structures. These harms and wrongs are essentially collective products, and individual agents rarely make a difference to their occurrence. So long as individuals are only responsible for the effects they produce, then the result of this disparity between collective harm and individual effect is the disappearance of individual accountability. (Kutz 2007: 113)

Two examples of such collective action are collective and systematic rape during the Second World War, and the disasters' oil spills in the Nigerian Delta. The first occurred across conquered Europe in 1945, performed mainly by the Red Army as they made their way to Berlin. A crime sometimes said to be the greatest ever crime against women. Archbishop Bernard Griffin for example reported that, "In Vienna alone they raped 100,000 women, not once but many times, including girls not yet in their teens, and aged women", and some 20% of children born in Berlin in 1946 are suspected to the result of rape (Dwork and Pelt 2009).

The oil spills are attributed to Exxon Mobil's and Shell's actions. More than 7,000 spills were recorded there between 1970-2000 amounting to 13 million barrels of oil, causing thousands of deaths and continued explosions through to the present day. None of the affected individuals have yet been compensated (Vidal 2010).

Both these harms were only made possible through joint action, where it is often claimed that no one individual can be held responsible for the disaster for a) the effect they individually had on the outcome was marginal and b) it would have occurred even if they had not taken part.

Kutz argues that existing theories of responsibility and attribution of responsibility are not equipped to provide individual responsibility and accountability in such cases since they are based on the following three principles:

A. Individual Difference Principle:

I am accountable for harm only if what I have done made a difference to that harm's occurrence.

B. Control Principle:

I am responsible for harm only if I could control its occurrence.

C. Autonomy Principle:

I am not responsible for the harm other agents cause, unless I have induced or coerced those agents into performing the harm.

If we restrict our concept of responsibility and the way in which we attribute accountability to the above three principles this would leave us having to say that a soldier in the earlier systematic rape example is not responsible for his part in the collective action. An individual soldier not raping a woman would not stop the systematic rape. One can also claim that one woman being raped may be said to be insignificant when looking at the larger situation. The soldier can be said to not have control over the occurrence of systematic rape because a) he was acting on orders, b) he was not in a position to stop others from raping nor c) did he induce or coerce other soldiers to rape. He can only be said to be responsible for the single rape he committed, yet most of us would also strongly feel that he has played a role in the systematic rape and thereby individually responsible for his part in that collective action.

In order to overcome this moral vacuum Kutz presents us with a theory of responsibility originating in intentional participation. We are made complicit to others wrongdoing in virtue of our intentional participation. His theory enables us to justly attribute responsibility and accountability to the individual agents where collective action has led to harm by drawing on intentional participation alone.

3 JOINT ACTIONS AND INTENTIONAL PARTICIPATION

Kutz calls this theory a 'minimalist conception (Kutz 2007: 90) of joint action. Like Shapiro (2007) and Bratman (1012), Kutz starts by looking at the individual's reasons for participating in an action when determining if that individual is participating in a joint action. This differs from Gilbert (2013) and Searl (2010) who instead take the social phenomena of groups as their starting point. According to Kutz's minimalist conception, all joint action (Kutz 2007: 75) requires is intentional participation, and extensional overlap, which I shall now explain.

3.1. Intentional Participation

Kutz claims that for an agent to act with participatory intention, such an agent a) acts on the conception that they are doing their part in a collective end, where b) a 'collective end' is simply the object that is a causal project of different individual's acts. A causal project can be a commitment to jointly paint a house, or jointly go to the movies. Before developing this idea any further I first want to take a closer look at the concept of intentionality.

What does it mean for somebody to do something intentionally? A man raises his hand in a crowd, but was it intentional? It might involve him freely and voluntarily raising his hand, in which case we can say that he did so intentionally. But does this imply that it was his intention to raise his hand? We are unable to answer that without further information for we do not yet know his reason for raising his hand. Perhaps it was to provoke somebody's attention. In which case we would say that it was not his intention to raise his hand as such, but instead his intention was to provoke attention. But how intentional was this intention? Did he deliberate about what he was going to do before doing it? Perhaps he did it because he thought he recognized somebody, but after that first impulsive reaction realized he was mistaken. We might then want to say that he did not intentionally provoke that person's attention at all. So did the man who raised his hand in a crowd do so intentionally?

With the above example I show that intention is closely linked to the notions of purpose and deliberation (Austin 1966). In its fullest sense intention includes all three, i.e. that an agent acts intentionally when she after deliberation acts with the intention and purpose of performing that act. Deliberation implying that we have thought of our options and potential effect of our actions. Purpose referring to our motivation as to why we perform or refrain from performing a specific act. Kutz's explanation as to what is needed to intentionally perform an act takes all three of these into account. Yet such intentions need not be made explicit. This lack of need for making intentions explicitly known will be discussed further in §4.

3.2 Extensional overlap

Turning now to Kutz's second requirement for joint action, namely that the individuals involved have sufficient extensional overlap in their intentional participation. Extensional overlap focuses on the requirement that agents need to have a real overlapping joint goal in mind in which they can intentionally participate in order to be said that they are acting jointly.

Take the case where two friends want to go out for dinner together. Yet, one wants to go to a French restaurant and the other a Vietnamese, neither being willing to compromise. There is a sense in which the two have the participatory intention to go out to dinner together, but this could be seen as a potential overlap of intentions rather than real overlap. Neither are willing to change their minds, so there is no substantial overlap in intentions to result in the two going out for dinner.

This is not to say that intentions have to overlap in a perfect manner to fulfill Kutz's requirement. As will be discussed in more detail later in the paper, the agent for example does not have to have the intention to actually realize a 'joint goal'; they only need to have the intention to contribute to it in some fashion. Yet the level of intention is still important when looking at legal responsibilities (why the switch to the legal?). One can be considered to have participatory

intentions in one way but not in another (give example), and thereby only be held accountable for the intended part of a resulting action.

4. TWO MAIN DIFFERENCES

Kutz's theory of joint action can be distinguished from others' (Bratman 2012, Shapiro 2007, Gilbert 2013) on the basis of two claims. First, he claims that participatory intention does not require support for the end goal and, second, his claim that an agent does not need to communicate his intentions to others.

Kutz states that an agent's participatory intention does not require the agent supporting the end goal in itself. For example, an employee may participate in a corporation while being simply interested in her own job and salary. Yet through her work she may help facilitate the corporation's end goal. This does not necessitate that the employee shares or supports the corporation's end goal in itself.

Kutz also does not require openness amongst participating agents in terms of intentions and shared reasoning as to how to achieve their common goal (Bratman 2012). This lack of openness of intentions not only relates to explicitly stating one's participation in the joint act, but also stating one's own end goal and how one aims to achieve it. There is no need to ensure that changes to goals or plans as to how individuals intend to achieve these goals are communicated. As such, participants can be left in the dark regarding new circumstances entering the equation, which may conflict with participants' individual intentions or norms.

Take the example of two men having decided to jointly paint a house. A is responsible for buying the paint and B buys the rest of the equipment. They are both in agreement as to what they need and when they need it by. As they both complete their part of the deal they go on to paint the house together. So far there is a clear case of a joint action.

But what if it turns out that A has bought stolen paint in order to save costs and did not inform B of this? According to Bratman, the decision as to how one was to acquire the paint is a sub-plan of the joint action. As such it needs to be communicated between A and B. B was entitled to this information as it would change things significantly for him to the extent that B would not have chosen to paint the house with A, were he to know that A would be buying stolen paint. Is B then complicit in something unethical?

According to Bratman (2012) and Shapiro (2007) he is not, for B would not have contributed to the joint action of painting the house had he known of the sub-plan to use stolen paint. For Kutz, however, B is morally tainted, for it is not necessary for A to communicate all his sub-plans. Instead B has to take the consequences of expanding his powers through joint cooperation, thereby risking that A would do something in direct conflict to B's moral norms.

How, then, is one to know others' intentions if these are not expressed explicitly?

4.1 The influence of Davidson

In instances where intentions are not made explicit the only way to attribute individuals a participatory conception is through attributing them goals by virtue of their behaviour.

Kutz refers to Davidson (1963) when looking at the issue of intentional participation. Davidson (1963) argued that we can make sense of people's behaviour by assuming that people act rationally. Such rationality entails that the reasons for agents' action are their beliefs and attitudes (Davidson 1963:7). By taking this Davidsonian approach it follows that Kutz is claiming that x acts in a participatory way when, x holds the *belief* that they are doing their part towards a collective end, and the *attitude* that this is the right way to act.

It is then the beliefs and attitudes, that others assume agents hold by analyzing their behavior that justifies them to attribute such agents' intentional participation. But how does Kutz take the step from an agent's intention to

participate in a joint action to them being personally responsible for what others do? This is the question that is the focus of §5.

5. PARTICIPATION MEANS IMPLICATION

Kutz is concerned with attributing agents with responsibility and holding them accountable in cases where a deed has been performed, not where deeds might be, or are expected to be performed, in the future. It is mainly moral and legal responsibility of this sort that is of interest to Kutz. What then are the differences between legal and moral responsibility?

Legal responsibility involves rights and obligations. Such rights and obligations apply to those recognized by law to be natural and legal persons. Our modern common-law notion of criminal responsibility requires that the agent intentionally brought about the wrongful act, and that they did so freely, i.e. both *mens rea* and an *actus resus*. Some other areas of law are less concerned with intentionality. All areas of law will hold us legally responsible for our actions irrelevant of our knowledge of the law.

Unlike legal responsibility, moral responsibility requires the agent to be aware of what is morally expected of them. Such expectations are far from straightforward as they differ by community, culture and religion. One must also be deemed to be a moral agent in order to be held morally responsible. For Kutz the term 'moral agent' assumes metaphysical concepts of personhood requiring rationality and metaphysical libertarianism allowing for free will. Further requirements of mental states, such as for example the capacity to feel regret are not clear.

As mentioned, Kutz not only wants to attribute moral responsibility to agents, but also to hold them accountable. Accountability here both implies that agents are aware of the effect their actions have had and that they are to be held to account for such effects by themselves and others.

What differentiates Kutz's model of moral and legal responsibility from most is that he attributes responsibility to individuals for the actions of others. He claims that we are justified in casting judgement on individuals for the action of others in virtue of their intentional participation in a joint action.

Participation means implication. It is the basis of accountability for what others do. (Kutz 2007: 205)

It follows, for Kutz, that all those intentionally involved in joint action are inclusively accountable for the consequences of the joint action. Yet, such responsibility is not necessarily distributed evenly, but rather takes the individuals' roles into account.

Take the example of an athletics relay race. In a team of four only one runner needs to drop the baton in order for the whole team to be disqualified. That is not to say that all four would be equally guilty of the disqualification, nor that all four contributed to the harm, but still all four are held accountable for being disqualified. It would still be the case that harsher judgement would be attributed to the person either dropping or handing over the baton, both by themselves and by others.

Yet Kutz does not seem to be as willing to treat individual shareowners in the same fashion. By this I mean that he treats all individual shareowners identically irrelevant of their individual participation, knowledge or potential capacity to effect events.

Stockholders' intentional participation in the collective endeavour does not make them blameworthy – they have done nothing wrong by purchasing stock, nor have they failed in any way in their duties as shareholders (whatever those might be) But it does render them accountable in the domain of repair for the company's accidents, when the company cannot meet its warranted claims. (Kutz 2007, p.246)

The only individual differentiation that Kutz proposes is that such compensation should be distributed proportionally to the number of shares individuals hold.

But what is this 'intentional participation' that shareowners have committed themselves to and why does this make them and not others personally accountable in the domain of repair for a company's accidents if the company can't fulfil its obligations? The first step in answering this question relates to how investors become shareowners in the first place. §6 provides more clarity on this issue.

6. HOW DO INVESTORS BECOME SHAREOWNERS?

Let me start by making it clear what I mean when using the terms 'shareowners' and 'shareholders', as I do not intend for the two to mean the same. Shareowners are those that own the shares. I mean those who have the right to the income from the shares and those on whose behalf shares are bought. In contrast, shareholders are those that trade and control the voting right for shares. An individual agent may or may not hold both roles. Shareholders include institutional investors such as mutual funds and pension funds. Such institutional investors are rarely the owners of shares. Instead they are custodians who act on behalf of the owners. Investors are those that directly invest in the equity market either on their own or others' behalf.

Kutz uses the term 'shareholders' throughout his book. In chapter seven Kutz acknowledges that shareholders include direct investors as well as institutional investors who invest on others' behalf. However he does not explicitly differentiate between the two when attributing intentional participation or accountability. I, on the other hand, think it is crucial to distinguish them due to differences in control and motivation.

6.1 Control at point of acquisition

I start by examining what control shareowners have when determining what shares they buy. It is at the point of buying shares that investors can first be said to behave in a fashion that infers commitment and intentional participation to a

joint action. Does the fact that an investor buys shares in a given corporation entail that the investor intentionally participates in the corporation? To answer that question, I start by exploring if shareowners buy stocks knowingly and voluntarily. Whether shareowners do so is not clear for a large proportion of them.

One of the biggest changes in the market since the 1980s is the growth of the institutional investor and the reduction of direct private ownership in the equity market. The table below shows how ownership of the US equities market has changed since the 1990s, but similar changes to holdings have occurred globally.

Major Holders of U.S. Equities *

	1990	2000	Q3 2006	Q3 2012
Households	55.54%	46.32%	39.49%	37.92%
Mutual funds	6.60%	18.36%	20.41%	19.38%
Rest of the world	6.87%	8.44%	10.12%	13.44%
Private pension funds	17.16%	11.21%	11.45%	8.73%
State & local govt employee retirement funds	8.06%	7.39%	8.04%	7.32%
Life insurance companies	2.32%	5.07%	5.52%	5.92%
ETFs	0.00%	0.37%	1.52%	4.05%
Property-casualty insurance companies	2.26%	1.09%	0.94%	1.00%
Federal govt retirement funds	0.01%	0.32%	0.55%	0.60%
Security brokers and dealers	0.27%	0.44%	0.77%	0.49%
Closed-end funds	0.46%	0.21%	0.49%	0.39%
U.S. depository institutions	0.31%	0.25%	0.31%	0.32%
State & local govt x/ employee retirement funds	0.13%	0.53%	0.39%	0.28%
Federal govt	0.00%	0.00%	0.00%	0.16%
Total Market Value (\$ billions) *	3,531	17,575	22,535	25,826
% of U.S. GDP	60.9%	176.6%	171.2%	163.3%
Market Value of U.S. Domestic Corporations	3,217	15,308	17,787	19,698
% of U.S. GDP	55.5%	153.8%	132.4%	124.6%

* Includes holdings of foreign issues and ADRs by U.S. residents.
Data Source: Federal Reserve, Flow of Funds

Global Macro Monitor
macromon.wordpress.com

Figure 1

Much of this is as a result of the growth of corporate and state pension schemes. This has meant that the way in which investors become shareholders has changed dramatically. In §§ 6.1.1-6.1.3 I describe how such institutional investors also buy shares differently than private investors.

6.1.1 Index Funds

In the last twenty years there has been a large increase in Index funds and Exchange Traded Funds, which trade in a very similar fashion. This trend can be seen below in figure 2.

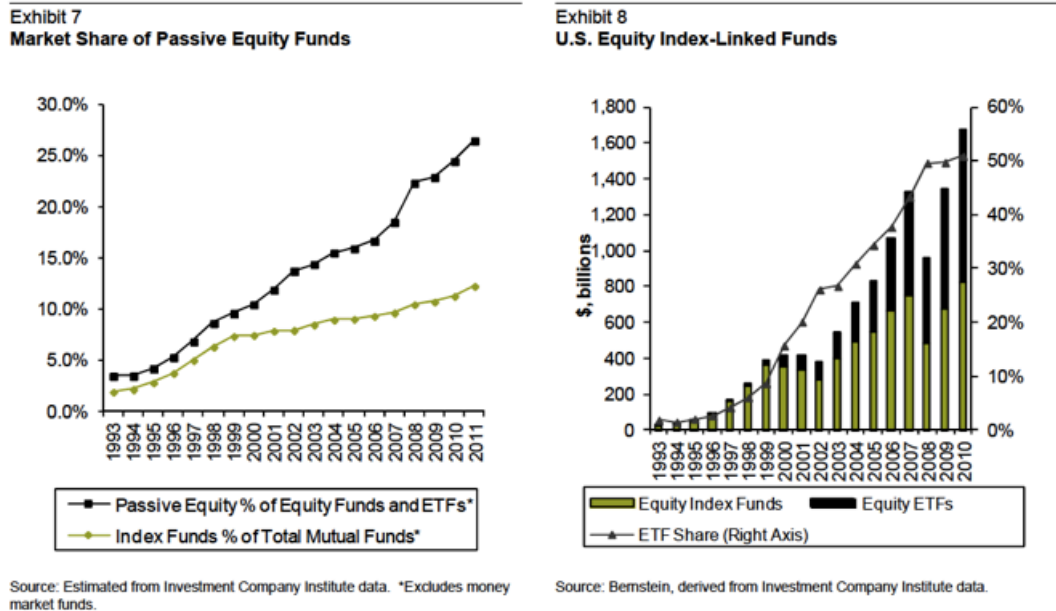


Figure 2.

When buying shares index investors do not buy one particular share, but rather a wider collection of shares as defined by the rules of the index. They are incapable of excluding any specific company shares if they wish to participate in the index. In this case it is questionable if the holder of such index funds bought shares in a given corporation voluntarily or involuntarily. Aristotle provides us with a strict interpretation of 'involuntary' (French 1991:25). For an action to be considered involuntary, according to Aristotle, compulsion or ignorance is needed, for the act has to be such that 'no one would choose such an act in itself' (French 1991:25). Furthermore such an acts need to come with unacceptable costs and pain. On an Aristotelian conception, shareowners have the choice not to participate in the index, and so they do not become owners of given corporations involuntarily. Only actions performed involuntarily come free from responsibility. Kutz does not make it clear whether he supports such a strict interpretation of 'involuntarily' or not. But he would need to in order to claim that shareholders voluntarily bought a given stock. However this alone would

not suffice for intentional participation, as Kutz would also need to show that when buying the shares investors acted on the conception that they are doing their part in the collective end of the corporation. I look further at this in § 7.

6.1.2 Fund managers and other intermediates

What if individuals did not directly invest in the index, but did so through a wealth manager or pension fund? Kutz claims that such managers are the chosen representatives of the individuals, and as such the individuals take responsibility for what is done on their behalf (2000: 246).

But what about the cases where the individual lacks the freedom to choose a fund manager? This is a position that many find themselves in when trustees choose a fund manager for a pension scheme. In these instances it may even be that the individual is unable to find out a) who the specific fund manager is and b) what she is investing in on their behalf, since many fund managers are not required to publish their entire funds holdings.

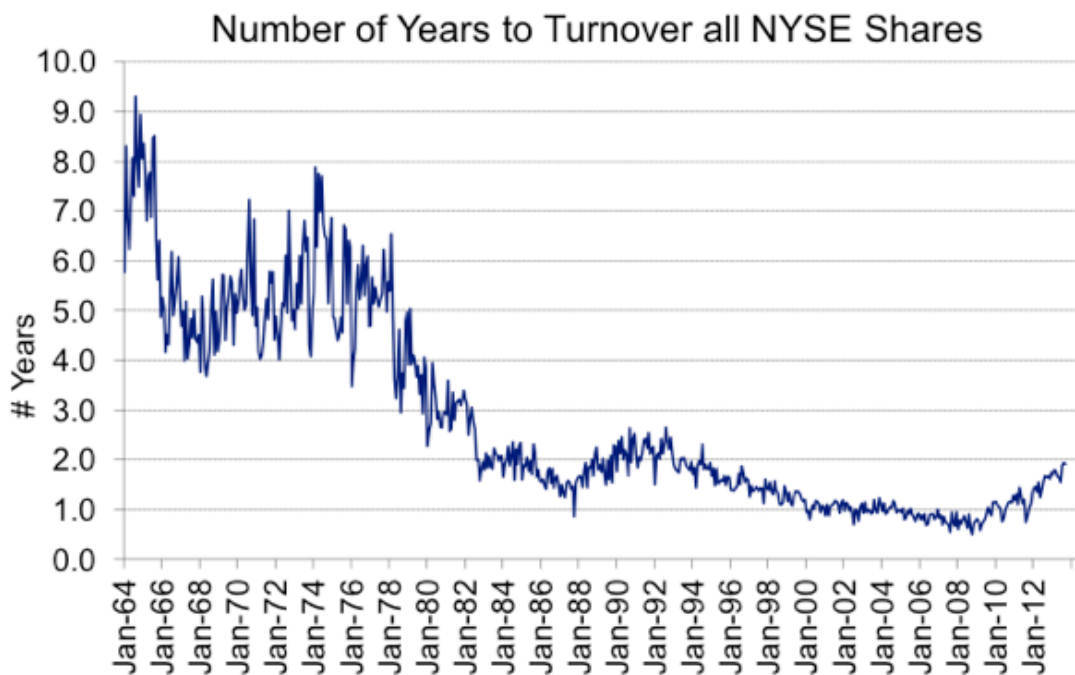
6.1.3 Sovereign funds

The case for sovereign funds is even more complicated. Singapore, for example makes it a legal requirement for citizens to invest a fixed proportion of their salary in the Government Investment Corporation, which mainly invests in indexes but is not required to disclose investments to unit holders. There are numerous similar sovereign funds and legal requirements in other parts of the world. Kutz cannot claim that such shareowners have acted on the conception that they are doing their part in a collective end of a specific corporation, nor that their actions are voluntary. Such situations should instead be compared to situations involving duress.

I have shown above that it is a complex matter how shareholders become shareholders of one given corporation. Another important issue is that an agent's intentional participation must also involve their reasons for participation. An example of such reasons could involve underlying motivations. Motivation for becoming a shareholder in a given corporation will be discussed in § 7.

7. WHY DO SHAREHOLDERS INVEST IN A GIVEN SHARE?

There are vast numbers of motives, which lead investors to buy shares. For example, a government might consider national interests when owning shares in defense companies or utilities. Or again an investor might buy a share in a company to make their voice heard. Perhaps the investor simply hopes to save money for their retirement. The duration that investors will invest in a given corporation depends on their motive. The chart below shows how turnover of stocks has changed since 1964. This significant increase in turnover is interesting to consider, for such a significant reduction in holding periods may well reflect the lack of investors' commitment to corporations and their goals.



Source: Haver Analytics and Citi Research – US Equity Strategy

Figure 3.

For simplicity's sake, I am assuming that the majority of shareholders invest in shares in order to make a profit, either through share price increases, dividends or the combination thereof. The extensional overlap shareholders have with corporations is therefore their mutual interest in growing profits. This is an assumption I do not think that Kutz would object to. Yet even this simple assumption causes complications, especially when one looks at how investors value shares and how a given share fits into the larger investment picture.

6.1 Economic theory of the firm

Under economic theory a firm is valued at the discounted value of its future net cash receipts. The rate at which the cash flows are discounted is called the discount rate (DR). The firm value should therefore go up if the numerator (cash flows) increases or the denominator (discount rate) decreases.

The DR, also called the cost of capital, is the rate of return the investors demand in compensation for making their funds available to the firm. The DR depends on perceived risk and is mainly impacted by macro-economic assumptions. The share price is very sensitive to these assumptions, more so than to changes in the numerator.

6.2 Alternatives to the economic theory of the firm

I have shown that a large proportion of shareholders do not directly invest in a share but rather in some collective vehicle like an index fund. Further, there are large proportions of investors that do not reason in the fashion expressed above when directly investing in shares. These investors trade on criteria not directly linked to the valuation of a corporation. Some investors simply buy shares for risk and diversification purposes. Such a scenario would be consistent with our assumption that shareholders are motivated by growing returns but at the portfolio level rather than at the level of the individual corporation. We can include macro investors here. Macro Investors often buy into long-term trends such as demographics. What matters to them is the economic sensitivity of the share to their theme or in insuring against the situation that they may be wrong in their views. We also have the technical investor who looks to exploit patterns and behaviours. It is in this group that you will find day traders and high frequency traders, which are now a significant part of the market.

A further problem with the economic theory of the firm is that it presupposes rational behaviour. We know from episodes such as 1999-2000 that investors suffer from crowding behavior, following the last buyer in the hope of making money. The recent financial crisis can also be seen as the result of crowding but

for the opposite reasons. Investors were selling shares in 2008 and early 2009 fearing the collapse of the financial system.

As a result of all these groups we might altogether be left with under a quarter of investors who try to evaluate the company plans and therefore be said to intentionally participate in the corporation. This is true when looking at how and why investors buy shares. But are there any other criteria that Kutz could be focusing on when attributing shareholders intentional participation?

7. OTHER POTENTIAL CRITERIA FOR INTENTIONAL PARTICIPATION

According to Kutz:

The defining characteristics of a participatory intention, then, lies in the form of relationship between individual act performed and the group act or outcome that rationalizes the part. (Kutz 2007:82)

He goes on to introduce three types of relationships; expressive, contributory and normative. Expressive relationships are when an individual explicitly shows participation through membership in a group. Take the example of party members; they might express a relationship to a political party by becoming members. However the same individual may be attributed participation by having a contributory relationship to the party. A contributory relationship holds if what one does helps cause the collective outcome. The individual may be seen as having a contributory relationship to the party by voting for it in a general election. And normative relationships are when one performs one's part because of norms internal to some group or institution that demand certain behavior. Take the example of a labour MP not wearing a blue tie while representing the party, as a blue tie is associated to the conservative party.

Shareholders may behave in a given way because this is expected of them, such as raise their hand when voting rather than hand in their vote in a secret ballot. But does such behavior imply that they are intentionally participating in corporations to the extent that they should be held responsible for their

wrongdoing. If anything it should be fact that they vote, and not in what fashion that attribute shareholders responsibilities. Instead we should focus on exploring whether shareowners can claimed to have an expressive or contributitional relationship to corporations.

7.1 Expressive relationship

Shareholders could be said to have an expressive relationship to a corporation by virtue of buying shares in a corporation. This was discussed in §§ 5 and 6 and claimed to be an insufficient reason. But is it possible to hold an expressive relationship in virtue of being a shareholder rather than a buyer?

Kutz might argue that it is irrelevant how shareholders acquire the shares. The fact remains that in virtue of owning such shares they have acquired the rights and obligations, which comes with ownership of the firm, the role of principal, voting rights and being the main beneficiary

The above are all attributes that Kutz refers to when speaking about shareholders. One can claim that it is by such rights and obligations shareholders become engaged in an expressive relationship with the corporation. For it is through rights and obligations that one acquires membership, and not through the acquisition process.

7.1.1 Ownership of the firm:

Many assume that shareholders are owners of the firm. But this is false. Corporations are legal agents, and as such they own themselves, just as a human would (Stout 2012: 37). Shareholders are owners of shares, an ownership that gives them limited rights, such as the right to vote in shareholder resolutions and the right to a dividend, should the board decide to pay one.

What then does it mean to own a firm? In his 'Distributive Justice and Ownership' Christman proposes that the concept of ownership should be divided into the right to control the asset and the rights to trade and gain income from it (1994: 240). §§ 7.1.2 and 7.1.3 below will focus on the issue of control, while §7.1.4 discusses the right to gain income from shares.

7.1.2 The role of Principal:

The idea that shareholders are principals and managers are their agents was adopted by many after Jensen and Meckling published their 1976 paper. The legal term 'principal' refers to a person who empowers another to act as his or her representative. For example, shareholders may choose and empower a director to act on their behalf. In order to issue shares a corporation must first exist, which presumes there being a board of directors. It is then the directors who facilitate the issuance of shares. Nor do boards of directors act on investors' behalf alone. Instead they are legally obliged to act on behalf of the corporations as a whole. Unless one wants to claim that shareholders are the corporation, shareholders do not hold the role of principal. However, in his review of Kutz, Larry May (2002:486) introduces the idea that this is in fact what Kutz attempts to do when saying that 'Corporations are constituted by their shareholders' (Kutz 2000:252). This could imply that Kutz does indeed claim that shareholders are the corporation.

7.1.3 Voting rights:

Shareholders of common stock have the right to vote on shareholder resolutions. But boards of directors in the US are not legally obliged to act in accordance with such votes. Exactly what is covered in such shareholder resolutions depends to a great deal on the bylaws of the corporations. Furthermore, only a minority of shareholders seem to value this right to vote or its effectiveness, as few choose to vote in shareholder resolutions.

Additional complications occur when looking at institutional investors. In these circumstances it is not the shareowner that possesses voting rights but the institutional investors. Nor is it legally required for institutional investors to report on how they vote on individual issues. This is something that is about to change with new regulations entering in the UK over the next couple of years. Institutional investors will in the future need to declare their votes. The current lack of knowledge that one even is a shareowner undermines Kutz's claim that shareowners hold the *belief* that they are doing their part towards a collective end, and the *attitude* that this is the right way to act

Furthermore, a growing number of institutional investors outsource their voting decisions to intermediate consultants such as for example the Institutional Shareholder Services (ISS). The investors using such services do not decide on how to vote, but simply vote according to ISS recommendations. This is true for a majority of institutional investors in the US. In these circumstances the decision on how to vote is further removed from the shareowners. This makes an expressive relationship between shareowners and corporations on the basis of voting rights even less likely.

7.1.4 Main beneficiary:

Kutz argues that shareholders are the main beneficiaries of corporations' actions (2007:251). Bondholders or banks get a set interest rate on their investment, while shareholders' have unlimited upside. Kutz seems to ignore the fact that stockholders are more likely to lose their full, or part of, their investment in a given investment than other lenders. A company does not have to be in financial trouble or be unable to honour its debts in order for a share price to fall. The only time that shareholders can truly be said to be main beneficiaries is in their role as residual claimants (Stout 2012, p.39). Even such residual claims in public corporations only apply after all other legal and contractual obligations have been met.

Based on the points above I do not agree that shareholders can be said to have an expressive relationship to a corporation by virtue of owning shares in a corporation to the extent needed to attribute them intentional participation in line with Kutz's theory.

7.2 Contributitional Relationship

There are at least three ways in which shareholders may help the collective outcome: shareholders as lenders may help facilitate projects; shareholders may condone management behaviour; and shareholders may facilitate mergers and acquisitions through keeping share prices high.

7.2.1 Shareholders as lenders help facilitate projects

In his paper Sandbu (2012) discusses whether we should look at shareowners as lenders that not only facilitate projects, but in addition do not require to be paid back at a given time, or inflict restrictions on how the loan ought to be used by the corporation. But how can Sandbu be talking of shareowners as lenders, when the only time that money goes from shareowners to corporations is at the point of a new issue. No shares traded in the secondary market provide corporations with cash. Furthermore an increasing number of initial public offerings are not done for the purpose of raising cash for future projects, but for the purpose of allowing founders to 'cash out'. Cashing out means that the founders make the corporation public not because it is in need of funds for further investments, but because the founders want to benefit from current valuations and expectations on the corporations.

7.2.2 Shareholders condoning management behavior

Another argument for why shareowners have a contributonal relationship to corporations may be that through investing in shares shareholders condone management actions and plans, thereby providing a sense of legitimization and encouragement. This might be the case if investors invested according to net present value theories. But as we have seen in §3, this is not the case for the majority of shareholders. Neither do most managers think that share prices are a reflection of them doing a good job.

7.2.3 Shareholders facilitate M&A through keeping share prices high.

Facilitating M&A might be the one thing that shareholders could justifiably be judged to be guilty of. When demand outstrips supply for stock, share prices increase. If shareholders on mass choose to sell stock, they would through their actions reduce the share price. The same applies when investors buy on mass, this causes the share price to increase. With higher share prices corporations can issue new stock at these higher prices in order to, for example, acquire other companies or simply to get a favorable proportion in a merger due to their high valuation. A high valuation may also stop them from being acquired, allowing management to continue acting in the same fashion. A shareholder wants a

higher price, which in turn would provide management with a potential advantage. Without wanting to undermine the responsibility shareholders may play in this, M&A activity is not what determines the majority of corporations' actions on a regular basis. This is not to say that there are not sectors that are more prone to M&A activity being part of their business model than others. Rather, I claim that this type of contributory relationship is insufficient to attribute shareholders participatory intentions, if intentional participation requires shareowners' doing their part in a collective end of a specific corporation. The same can be concluded from §§ 7.2.1 and 7.2.2.

In this paper I have shown that we are not justified in attributing intentional participation in corporations to shareowners. Now I will propose that we can instead attribute to shareowners intentional participation in the equities market.

8. ATTRIBUTING SHAREHOLDERS INTENTIONAL PARTICIPATION IN THE EQUITIES MARKET.

When criticizing Kutz's application of his theory, I have not been criticizing his theory of complicity, nor his requirements for what it means to intentionally participate as such. Instead I object to the claim that shareholders intentionally participate in corporations in which they invest. Therefore I cannot support his conclusion that shareholders are accountable in the domain of repair for the company's accidents.

Instead I want to propose the following, while utilizing Kutz's theory of complicity in wrongdoing.

Intentional participation means implication. It is the basis of accountability for what others do. What makes my behavior participatory is that my conception of what I do is related to the group act, whether that conception is explicit in my deliberations, or functionally implicit in my actual or counterfactual behavior.. Shareholders intentionally participate in equity markets when they invest in shares in accordance with the last statement. Equity markets reward profits, whether those profits have been gained through moral actions or not. What

matters to the equity market is that the profits are sustainable. Enjoying a tainted benefit puts one in an ongoing relationship with a wrongful act. It forces the realization that one has been willing to trade principles for benefits. Therefore shareholders are morally tainted when they benefit from wrongful acts, and are accountable for rectifying the situation.

It is clear that shareholders have an expressive relationship to the equity market, which is stipulated by membership in a group, as I go on to show below.

8.1 Difference between entering the equity market and individual shares.

To determine whether investors intentionally participate in the equity market I must first explain how shareowners voluntarily enter the equity market. Shareowners buy into the equity market in a similar fashion as they buy into individual shares. This includes direct participation in the equity market, as well as indirect investment methods such as index funds, fund managers and other intermediates and sovereign funds. But how can investors voluntarily buy into the equity market, when it is questionable whether they voluntarily buy into individual shares? The difference would involve how much control and knowledge investors possess in relation to the final outcome. If investors choose to enter the equity market through index funds or through other intermediates, knowledge of whether they enter the equity market is clear. This, as I have shown in §6, is not the same for individual shares. The options to act do not differ between participating in a give corporation and the equity market, nor does the potential cost of that choice. For whether investors invest in the market or in individual shares, the two options open to them are either to invest or not. Furthermore this decision has to be made at the same stage of the investment process, namely at the point of deciding whether to invest in the market or not. This is because, even though there are more steps in the chain of events when investing in individual shares, there are no further points at which investors have a choice. Control then comes down to the issue of numbers of chains of events between the point at which investors take an active decision to invest and the final outcome. Increased control and knowledge thereby results from a lower number of chains of events, and thereby a lower number of unknown outcomes.

Furthermore, it is this increase of control and knowledge of the consequences of one's actions that I claim provides investors with a stronger intention to participate in the equity market than in individual shares. Obviously, more deserves to be said on this topic, but it will not be said in this paper.

The circumstances surrounding sovereign funds remains the same in both scenarios, for investors still do not have the choice as to whether they want to participate in the equity market or not. Furthermore the valuation grounds on which investor chose to invest in individual investment options, as presented in §6, become irrelevant as all that matters is participation in the equity market.

8.2 Equity market participants and 'playing their role' in the end goal.

The end goal of the equity market is to provide a structured and liquid environment to buy and sell stocks. Investors play a role in achieving this end goal by simply buying and selling stocks in accordance with the market's legal structure. Therefore the requirement for intentional participation, that shareowners acts on the conception that they are doing their part in a collective end (Kutz 2000:108) is satisfied is achieved

8.3 For what would the shareholders be responsible?

If shareholders' accountability is justified by their intentional participation in the equity market, then shareholders cannot take responsibility for the individual actions of a corporation. Instead they are solely responsible for the benefits they gain from holding shares if these are a result of moral or legal wrongdoing. Even though such wrong doings are a result of what we unintentionally do together as a group, with we have no sense of togetherness, and where our individual 'actions reach beyond intentions' (Williams 2002:206).

What might such an instance mean in practice? In the case of the recent financial crisis, for example, shareholders that benefitted from banks' wrongdoing would be required to compensate taxpayers for having to bail out the banks up to and including the benefits they had gained during the banks' wrongdoing. This would not reduce the responsibilities that individual corporations have for their

wrongdoing, nor the corporations' representatives, either in their official roles or as private individuals. Instead shareowners' responsibilities would be independent of those.

9. SUMMARY

Even though I acknowledge that it is morally wrong when shareowners benefit from the harm that corporations cause while simultaneously being exempt from personal accountability, I argue that we cannot attribute such individual shareowners responsibilities for corporations' actions on the basis of Kutz's participatory model of joint action. We must find another way in order to justify our judgments and our demands for responsibility and accountability. For as I have shown in this paper, there is very little in shareowners' behaviour that makes it possible to attribute to them participatory intentions, where intentional participation is based on the conception that shareowners are doing their part in a collective end of a specific corporation.

Instead it is possible, using Kutz's participatory model of joint action, to attribute shareholders responsibility and accountability as a result of their intentional participation in equity markets. Equity markets in their own right are amoral, to the extent that it is irrelevant to the market as to whether profit is the result of a moral wrongdoing or not. Investors however, are moral agents, and as such cannot expect to behave in an amoral fashion without consequently being reproached. As a result of this, shareowners have to take responsibility for becoming morally tainted when they benefit from wrongful acts by intentionally participating in equity markets, and are accountable for rectifying the situation.

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