The Concept of Shareholders’ Duties: Keeping a Grasp on a Paradigm Shift

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Abstract

It has been observed, that a paradigm shift is taking place, from discussing shareholders’ relationship to companies in terms of rights, towards including their duties. This article provides a terminological foothold for the emerging discussion on shareholders’ duties, by analysing the concept of duty, and how it applies to shareholders.

By application of moral philosophical theories, the concept of shareholders’ duties is subjected to classification which provides a framework for further discourse. Thereby, this article provides not only guidelines to what should be considered a shareholder’s duty, but furthermore what should be kept out of that group.

Introduction

The recently published book, Shareholders’ Duties,1 gives a good account of the duties to which European shareholders are subject. This book was much needed, not just because of the insights given in the individual contributions, but because the book as a whole substantiates the argument that a paradigm-shift is taking place in European company law, from a regime focusing on shareholders’ rights to a more nuanced regime focusing on both the rights and duties of shareholders.

Shareholders’ Duties proposes a number of classifications of shareholders’ duties, depending on types of shareholders and types of companies, as well as the interests protected by the legal rule imposing a shareholders’ duty. This article is intended to add to that excellent work and to address the concept of ‘shareholders’ duties’ as an abstract term, rather than the individual duties. Among other things, the purpose of this exercise is to establish an understanding of what is meant by a shareholders’ duty by applying a taxonomy of the concept of duties.

This may prove useful for future analyses. One such future analysis is the possibility of an economics and or efficiency based analysis of shareholder duties. It may however be stated that the purpose of this article is more retrospective, in order to solidify a basis from where future engagement with the issue is dealt. It is probable that this is indeed needed, given that Shareholders’ Duties shows that there is a clear trend towards consideration of shareholders’ duties.

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When there is such a paradigm shift, it is of paramount importance to establish and to take account of the fundamental concepts used in the current discourse, so that future analysis is not hampered by terminological inaccuracy. To do this, guidance should be sought in the field of studies that has hitherto been most familiar with the concept of duties, i.e. moral philosophy. Seeking guidance from moral philosophy on legal questions should not be controversial. There is an inextricable link between law and moral philosophy, as can be seen in one of the most important legal principles, that similar cases should be treated similarly and dissimilar cases should be treated differently. This principle of equal treatment can be traced back to Aristotle.

Furthermore, as will be seen section 2 of this article, there is a close link between legal and moral duties.

1. Some Relevant Ideas and Concepts of Moral Philosophy

The modern English word ‘duty’ is derived from the medieval concept of something being ‘due’ to a feudal lord. At that time there was a rigid social order and a person born into a certain role was also ‘born into’ their duties. As the duties were usually owed upwards in the social hierarchy, their enforcement was somewhat coercive in nature. These duties differed, depending on whether the person owing the duty belonged to the peasant class, where the duties may have included payment by delivery of crops or the provision of labour, or whether the person owing the duty belonged to a higher feudal rank and had the duty to provide weapons, horses and troops (which were often the peasants whose duty was to serve and risk being killed or maimed). While this social structure is hardly enviable, the duties and those to whom they were owed were at least predictable. In the post-feudal world, for many duties, perhaps especially those of societal nature, there is no clear contract with or obligation to an identifiable person. There is thus less transparency about those to whom duties are owed. Where it is more difficult to identify the existence of a duty, the nature of the duty and to whom it is owed, it becomes correspondingly difficult to identify corresponding rights – if they exist. For this reason it is useful to analyse rights and duties, and to see whether traditional moral philosophy can help clarify or provide a useful structured approach to the issue of rights and duties.

A more recent philosopher than Aristotle is Joel Feinberg who has been the major source of inspiration for this article. Feinberg wrote extensively on duties and did so in a way that is accessible to the legal mind. Discussing duties, he stated that: ‘A duty, whatever else it is be, is something required of one.’

2 The language of duties is to a large extent intertwined with the language of moral philosophy, as will be addressed infra. In order to engage meaningfully in the attempt at a further analysis e.g. an efficiency based analysis, it is necessary to ensure that there is a consensus, or at least relatively common ground for the terms applied.

3 Aristotle, Nicomachean Ethics, 1131 a32-33.

4 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 140.

5 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 140.
insight into the alliance of the idea of duty with the idea of coercion – something imposed on our inclinations, something that must be done regardless of whether or not we want to do it. He also said that there is an implied liability in a duty, as it is something that must be done or else the person owing the duty must face the consequences.6

‘Liberty’, as understood by Feinberg, does not mean the absence of all constraints, but rather the absence of constraints imposed by rules or commands.7 While social norms often impose constraints, for the sake of clarity it is easier to discuss the issue of liberty in terms of state intervention, i.e. predominantly framed as a legal issue. When the state prohibits its citizens from doing certain acts on pain of a penalty, they are no longer at liberty to do such acts. Conversely, when the state requires its citizens to perform certain acts, on pain of the imposition of a penalty for failing to perform the acts, the state has imposed duty. Between these two poles there is a zone of liberty, i.e. freedom from coercion by the state.8

Since there is little to add to the definition of this elusive yet familiar concept of a duty, it will be helpful to look at Feinberg’s insightful analysis of the concept in order to get a better understanding of what may be meant by the narrower concept of ‘shareholders’ duties’. This is what this article attempts by exploring the taxonomy of duties proposed by Feinberg and seeing how shareholders’ duties fit into this taxonomy. However, this article does not attempt to explore the justifications for imposing specific shareholders’ duties, as that is for a different inquiry.

Before going on, it is necessary to introduce briefly a few core concepts of moral philosophy, as well as to delimit the concept of duty.

First, while obligations are inherently central to the social role of the law and while duty and obligation may be called ‘near-synonyms’, there is a nuanced difference.9 As is often the case with nuanced differences, illustrating them may be prohibitively voluminous. So for the sake of brevity it is simply stated that this article is primarily concerned with examining duties rather than obligations.10

Unlike obligations, the distinction between duties and responsibilities has been framed in a credible manner, so it can be stated that they are not the same. However, both can be discussed in terms of being liabilities. As put by Feinberg: ‘A responsibility, like a duty, is both a burden and a liability; but unlike a duty it carries considerable discretion (sometimes called “authority”).’ Responsibilities may also be recognised by the fact that the liability arising from the performance or non-perfor-

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6 There can be various consequences, loss of one’s job, feelings of guilt, or punishment in a criminal law sense.
10 Furthermore, the way in which duties are analysed in this article does not depend on the successful negative definition of obligations.
mance of responsibilities is often stricter than in the case of mere duties. This means that trying one’s best but failing is probably more likely to be met with acceptance in the case of duties than in the case of responsibilities. Again, this article is primarily concerned with duties.

Duties may also be divided into perfect and imperfect duties. In this context the maxim of ought implies can is relevant. This means, roughly, that: While a person ought to act in a certain manner, if, in the circumstances, that person is unable to do so, then their failure to do so must be seen as excusable. Many duties are thus ‘imperfect’ because of the inability fulfilling them. In other words they are conditional upon ability. J.S. Mill gives an example of an imperfect duty – where there are more persons to be assisted than resources to help them. However, a perfect duty is not similarly conditional.

In the context of shareholders’ duties, the application of the ought implies can maxim would be highly relevant to the suspension of voting rights. If a shareholder is refused the right to vote or if their vote does not count at a shareholder referendum, they will have no duty to vote one way or the other.

For the sake of convenience, duties may be divided into positive duties and negative duties. Briefly, positive duties require some action to be taken while negative duties require some action to be refrained from. A truly positive duty cannot be fulfilled by inaction. Paying taxes is a prime example of an unquestionably positive legal duty. The law does not simply prohibit the non-payment of taxes, it lays out complex procedures for how taxes should be assessed and how they should be paid.

Similarly, there is a difference between duties and conditions that must be fulfilled in order to exercise or enjoy a right. This might be self-evident, but the lines between duties and conditions that must be fulfilled tend to be blurred in argument. As has been pointed out, not all rules which seem to imply a duty actually do so. A requirement that wills must be signed does not create a duty to make a will. It does not even impose a duty to have a will signed; it simply lays down a condition for a will to be valid. An example of this in the context of shareholders’ duties is the commonly applied rule that dividends may only be paid once a certain conditions have been met. Such conditions are not duties.

Another noted moral philosopher, Marcus Singer, made the point that it is commonly believed that there is a great difference between the ethics of prohibitions and ethics of positive injunctions – between what ought to be done and what ought not to be done.19 However, perhaps the distinction between negative and positive duties – at least moral duties – is not as clear as might appear at first glance. In many cases affirmative duties, like informing the authorities of a crime, calling an ambulance or helping a person in peril without gravely risking oneself, are probably no more restrictive of personal liberty than many prohibitions. ‘Some affirmative duties can be very intrusive; others hardly intrusive at all. Some prohibitions may be very onerous; others hardly at all.’20

The distinction between positive and negative duties may be relevant, for example, to how a duty is articulated or framed in the process of transposing it into a legal rule. Attention must be paid to the core message which a rule expresses. The precise wording of a rule, in either positive or negative terms, can be purely fortuitous – a function of grammar, idiom or circumstance21 – but the substance is rarely so simple. There can be an important difference in how a rule is phrased, i.e. whether the wording expresses a positive or negative duty. For example, one should not tell a lie. It does not follow from this that one should tell the truth; staying silent is also an option. Thus it is not irrelevant whether a rule is expressed in positive or negative terms.22

Singer argues that an element of negative duties can be found in positive duties – in terms that place restrictions on the desire to engage in an activity. In the context of negative duties, this is rather obvious. But in the context of positive duties, there can be a restriction on a desire not to do something or a restriction on a desire to do something else that is incompatible with the proscribed activity.23 However, a rule expressed as a positive duty may have a corresponding rule expressed as a negative duty, and the form of wording matters little. An example of that is that one ought to obey the laws of one’s own community. The corresponding negative duty would be that one ought not to break the laws of one’s own community.24 Singer points out that not every negative rule must have a corresponding positive rule. In other words, there is not always freedom to choose whether to express a rule either positively or negatively.25

Singer therefore concluded, very carefully and not without reservations, that positive rules – not just positively worded rules – can be sui generis and may be more prone to exceptions and open to defences, and somewhat less definite. From this he

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22 Marcus G Singer, Negative and Positive Duties 15 The Philosophical Quarterly 97 (1965), p 98.
concluded that positive duties which do not have corresponding negative duties are relatively less determinate than negative duties.26

2. On Duties and Rights

Just as positive duties and negative duties often correspond to each other, duties and rights also tend to be correlative. The following sections will give a brief overview of the key issues that are relevant to a discussion of shareholders’ duties.

2.1. The Connection between Moral Rights and Interests

In his 1966 article, *Duties, Rights and Claims*, Feinberg wrote that, among the questions that had divided philosophers concerned with the problems of rights, was whether statements of duties necessarily entail statements of other people’s rights, and whether statements of rights necessarily entail statements of other people’s duties.27 The notion that duties and rights are correlative was widely held, and was often expressed as saying that the difference between A’s right against B and B’s duty towards A is largely the difference between the passive and active. Feinberg has been credited with being instrumental in debunking this.28 According to Feinberg, not all duties are necessarily correlated to rights.29

In his article, he illustrated that while there are indeed correlations between many rights and many duties, this is not an absolute. He did this by proposing a taxonomy of duties in which he identified ten classes of duties, illustrating that not all of these were correlative to rights. He said that a duty can be described as a normative relationship. He then extrapolated this by discussing the different classes of duties.30 These will be further discussed in section 3 of this article. Feinberg’s analysis is primarily focused on moral duties, without making a special case for a distinction between moral and legal duties. This will be addressed in section 2.3 of this article.

Since one of the issues explored in this article is the correlation or non-correlation between duties and rights in the context of shareholders, the concept of rights must be elaborated a little further. Rights are generally discussed as belonging to individuals, and such rights can hardly be separated from the interests of such individuals.

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27 His wording of the question was: ‘(1) whether, or to what extent rights and duties are logically correlative, and (2) whether it is theoretically illuminating generally, and in particular, whether in considering question (1) it is strategically useful to treat rights as claims.’ Joel Feinberg, *Duties, Rights and Claims* 3 American Philosophical Quarterly 137 (1966), p 137.
It therefore seems that a moral right\(^\text{31}\) arises from an interest. This means that there cannot be a right without an interest, but this does not exclude the possibility of there being an interest without there being a right.\(^\text{32}\) This means that when rights are infringed, interests are correspondingly curbed.

Whether or not a duty has a correlative right can be crystallised in the difference between charity and benevolence. In a corporate context this might be illustrated as follows:

According to this author’s reading of Feinberg, an initiative to teach underprivileged children in Greenland to swim\(^\text{33}\) would not be a corporate charity in purest sense. It would rather be a ‘Good Samaritan’ duty, or benevolence. The company is not directly to blame for the children not having been taught to swim before and the company has no prior special relationship with them. But it seems that Feinberg would give the children reason to complain about the company for not helping them. They have a right to be taught to swim, but not a right that they can claim directly against the company in question. On the other hand, the company does have an imperfect duty to help someone if it can, even though there is no claim against it. It could well be that these children get the help. According to Feinberg, the children would not owe gratitude, because this was their right.\(^\text{34}\) A charitable duty is probably more related to supporting middle-class continental European youths attend an expensive liberal arts-education in New York, for example. Here there is hardly a claim of right to assistance, and consequently gratitude is in order.

It is thus clear that the justification for these two duties is substantially different, even though this might not be obvious at first sight. This becomes particularly relevant to shareholders’ duties because, by examining whether shareholders’ duties have cor-

\(^{31}\) See Raymond Frey, *Interests and Rights: The Case against Animals*, 7 (Oxford: Clarendon 1980) : ‘a right which is not the product of community legislation or social practice, which persists even in the face of contrary legislation or practice, and which prescribes the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends.’ According to Feinberg, there is little point in trying to improve Frey’s definition of a moral right; see Joel Feinberg, *Problems at the Roots of Law: Essays in Legal and Political Theory*, 39 (Oxford University Press, 2003) . But it must be added for sake of clarity that legal rights and moral rights can easily overlap and that in this context ‘moral rights’ does not referring to some weaker code of ‘conventional morality’ of peoples’ communities, those would be the aforementioned ‘social practices’.

\(^{32}\) It is precisely on this point that legal rights and interests should be distinguished from moral rights and interests. It can be argued that legal rights can be present without legal interests. See the Court of Justice of the European Union Case C-237/07 *Dieter Janecek*. ECR 2008 I-06221.

\(^{33}\) This example is given because for people living in coastal communities, the ability to swim can be a matter of life or death.

\(^{34}\) On the other hand, this author, thinks that in such circumstances gratitude is not unexpected, but that it is perhaps more correctly directed at the choice made to help them and not someone else out of the multitude of other people in need rather than gratitude for the actual assistance.
relative rights, future research may build on whether duties are to some extent justified by reference to other peoples’ rights.

2.2. Individual and Public Interests, and Rights

Given that Feinberg only illustrated that rights and duties are often but not always correlative, it becomes important to get a better understanding of rights in the context of shareholders’ duties.

The importance of introducing interests into the discussion is to some extent terminological. For example, it is more usual to discuss public interests than public rights. The purpose of discussing this is simply to illustrate the wide array of rights that are potentially correlative to duties, and in particular to shareholders’ duties. From the perspective of moral philosophy it is quite acceptable that legislative intervention is used for dealing not with specific harms caused to a specific person or group, but rather hard to define subjects such as the economy, the public, the environment, climate etc. which are less specific but which are deserving of protection. Such harms are then labelled public harms as opposed to private harms, bearing in mind that the public is a collection of private individuals. For example, tax-evasion causes only diluted and barely noticeable harm to an individual, but it weakens public institutions in whose wealth all citizens have a stake.

It is a common characteristic of public harms that they often tend to be cumulative. A single instance may not constitute a threat to the public interest. For example, if a stone is thrown at one’s window and the glass is broken it is the window that is harmed, but it is the interest in the window remaining intact that is the ultimate interest of the window’s owner. Similarly, the integrity of healthy and transparent market conditions is a cumulative interest, as it is ultimately individuals who reap the benefit or suffer harm when market conditions are affected. The relevance of this to shareholders’ duties is that a shareholder’s duty can have a correlative right which is a public interest. As Birkmose and Mösl ein point out in their discussion of the sources of shareholders’ duties, such duties may often be implemented by reference to public

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35 Feinberg treats public interest as being more or less of two types. The first concept of the public interest is that it is a collection of specific interests, all of which are more or less similar and could belong to anyone. For example, Person A has his own interest in X, while Person B has her own interest in X etc. Harm to such interests are generally caused by dangerous activities that do not threaten specific persons but rather everybody who might be in a position to be affected. Poisoning the water supply is an example of this. Not everybody is at risk, but everybody could be. The second concept of the public interest is that it is a specific interest, which is shared by many or most. This means that Persons A, B and many more have the same interest in X. This would be something like economic prosperity, avoiding war, preventing pollution, and preventing the spread of social distrust and incivility. Less dramatically this can include things like street lighting and waste collection. Joel Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, 224 (Oxford University Press, 1987).


interests, such as transparent and efficient market conditions, perhaps especially so in the case of duties that do not originate in company law, but rather in capital markets law or corporate governance oriented legal fields or guidelines.38

2.3. Moral Rights and Duties, Legal Rights And Duties

To prevent misunderstanding, the term ‘rights’, as used here, refers to moral rights. This meaning is wider than legal rights but does not necessarily exclude legal rights.

As noted by Feinberg, the term ‘moral rights’ is not some esoteric construction of otherworldly philosophers, but rather part of most people’s conceptual apparatus when they make moral and political judgements.39 He argued that such moral rights include not only what people think ought to be codified as legal rights, but – rather that people recoil at the violation of such moral rights. An excellent example of this is women’s right to vote. Technically this right may be withheld, but that makes it no less a moral right – it is just being violated. In other words a moral right exists prior to and independently of legislation ensuring it.40

Feinberg also gave examples of what he considered to be true morality rules, such as the right not to be killed or having what one is promised. True moral rights are moral rights, regardless of whether the law upholds them, is silent about them or explicitly denies them.41 Moral rights can also be categorised according to whether or not they can be exercised prior to their legal recognition.42

However, Feinberg made it clear that legal validity and moral legitimacy are not to be conflated.43 This means that it is not inconceivable that a right may be given legal validity, even though it might contravene the conventional morality of a place and time.44 Thus something which might be morally frowned upon might not be prohibited by law – i.e. lawful but awful.

The difference between legal rights and moral rights depends on the kind of norm from which they derive their validity. This also applies to duties. Duties created by law are validated by law and are invoked in legal claims.45 Put simply, a right as it

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39 There will always be deviations; there are surprisingly few things that are common to all human beings.
44 unfortunately the right to own slaves is not foreign to human history – even in a legal form.
is known in modern western society is a claim which a person can direct on the one hand against specific individuals for specific act or to all the world at large, to non-interference. On the other hand a person may make a claim of right against the state for rights analogous to the foregoing, and that the state also ensures the legal enforcement of valid claims which one person may have against other persons – including both the active enforcement of claims and protection from unwarranted interference from others. All such double claims which involve the state are legal rights.46

Claims that are supported by reason and directed against other persons or even against the state, but which are not legally valid claims which the state can be called upon to enforce, are what can be called moral rights merely.47 In addition to being supported by reason, a moral right is addressed to the conscience of the claimee or to the public opinion. When moral rights are also enforceable by law, they are simultaneously legal and moral rights. Lastly, there are rights that are legal rights merely. Historically this category has included such unpalatable rights as the right to own, beat and starve a slave.48

This article focuses on the legal duties to which shareholders are subject, not on duties imposed by soft law instruments, i.e. moral duties. This does not mean soft law and moral duties are irrelevant to corporate behaviour, but soft law and moral duties are implemented and enforced by other means than more traditional legal duties which may ultimately be enforced by the judicial system. One of the most important changes that take place when a duty moves from being moral to legal is its enforcement and the consequences of its breach. According to Singer, a system of ethics that is completely permissive so that it at most only consists of benevolent non-mandatory advice is a contradiction in terms – an absurdity.49 Breaches of moral duties can very well have serious consequences which affect behaviour. For example, JS Mill argued that extra-legal coercion is more persuasive and insidious than legal penalties since it leaves fewer means of escape and penetrates more deeply into the details of life.50 On the other hand, as Feinberg put it, if a wicked person has no ulterior interest in having a good character and their other interests are not meaningfully served by having such a character, they will not be harmed by being deprived of their character. Even if such a person’s conduct becomes worse, they will not necessarily be worse off.51 This is an eloquent way of saying that there is no point in naming and shaming someone who is shameless. If the intention is to influence someone who only responds to financial

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47 An example of this would be the right to vote. If a minority group is not given a legal right to vote they would still have a claim to a right to vote. This claim would be backed by reason and addressed to the state. However, it would still not be legally valid.
50 CL Ten, Mills on Liberty, 2 (Oxford Clarendon Press 1980) the original source is J.S., Mill, On Liberty, Ch. 1, para. 5.
persuasion, then affecting their wealth will be the only effective measure. Sometimes diminished goodwill or public repute may affect the wealth of a person, but if it does not or if it is more than set off by the financial advantage of a shameful act, that person will not change their behaviour for the better.

3. Classes of Duties

Before exploring Feinberg’s taxonomy of classes of duties, the relatively obvious fact must be pointed out that every shareholder can be subject to a number of simultaneous duties. The following is an introduction to such classes of duties. Since examples of these shareholders’ duties are identified in the book, Shareholders’ Duties, they will be fitted into the classification as appropriate.

The purpose of the following examination of the ten classes of duties is based on the idea that they may help give a better understanding of what precisely is meant when different types of duties are discussed. As moral agents, people often have a rough idea of what they mean, but sometimes a taxonomy such as Feinberg’s classes can help communicate meaning to others in a structured way. This can also be of help introspectively, to help keeping track of internal deliberations of duties. The corollary purpose is to examine how such a taxonomy may be used when dealing with shareholders’ duties. The examination will be based on Shareholders’ Duties by fitting the shareholders’ duties identified there into Feinberg’s taxonomy. Not all of Feinberg’s classes will necessarily be used, as shareholders’ legal duties are presumably a narrower category than moral duties in general. However, future developments may alter this perception. Another limitation of the scope of the term ‘shareholders’ duties’, as used in the following, is that they are characterised as pertaining to shareholders in their capacities as shareholders. Naturally, a person who is a shareholder has a myriad of duties, most of which are not directly linked to their status as a shareholder. Such duties are excluded from the concept of shareholders’ duties.

Arguably, Feinberg only seemed to have had moral duties in mind, or at least he did not distinguish between legal and moral duties. This does not mean that his classes are irrelevant for an analysis of legal duties; they still apply mutatis mutandis. As discussed in preceding sections, legal duties are often transposed moral duties. A moral duty does not cease to exist by becoming a legal duty, though certain aspects of the duty may be affected. Furthermore, as stated previously, obedience to the law

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54 Furthermore, ‘shareholders’ duties’, as the term is applied in this article, refers only to direct shareholdings. This means that where a person has invested in an investment fund, it is the investment fund, not the capital contributor, that is under a shareholder’s duty. For a further elaboration on the moral implications of such capital contributors and the investment fund paradigm, see: Earl W Spurgin, Do Shareholders Have Obligations to Stakeholders? 33 Journal of Business Ethics 287 (2001).
is in itself a moral duty, so that even where a legal duty is not a moral duty, complying with the law is still a moral duty.

3.1. Duties of Indebtedness

The first class of duties Feinberg mentioned is duties of indebtedness. A good example of one person’s duty that is obviously correlated to another person’s right is the relationship between a debtor and their creditor. Indebtedness is the clearest example of one person owing something to another. In this relationship, when one party owes something to another, the latter has a right to what is owed. This is an in personam right, i.e. a right that can be asserted against another person who is required to perform a positive act – not a mere omission.55

In the case of shareholders’ duties, Payne classified the duty of shareholders to pay up the subscription price of their shares as a shareholders’ duty.56 While this is undoubtedly a duty of indebtedness, it is debatable whether it is a shareholder’s duty as understood in this article. At the very least, the duty to pay for shares subscribed to at the time of the formation of a company would not be a shareholder’s duty, as the person paying would not yet be a shareholder at the time of subscription. On the other hand, it cannot be denied that the duty to pay subscribed capital can in some instances be seen as a duty imposed upon shareholders in their capacity as shareholders.57

3.2. Duties of Commitment

This second class of duties is based on promises. Feinberg called it duties of commitment.58

Feinberg started by making a distinction between the person to whom the obligation is owed, i.e. the person who can claim it as their due, and the person who is the intended beneficiary of the duty. He referred to this as the distinct offices that a person can hold. However, very often the same person holds both offices.59

57 See Section 33 of the Danish Companies Act which provides e.g. for a system where, under certain circumstances, only 25 % of the capital has to be paid until called for by the board. Should the board request payment of the outstanding capital, the duty to pay falls on the shareholders, including those who did not subscribe to the initial capital during the formation of the company but who acquired shares by a subsequent transaction. However the original subscriber is not relieved of the duty to pay, leaving open the question of whether this is in fact a shareholders’ duty. Were the subscriber relieved of this duty, it would be a shareholders’ duty.
Feinberg gave the example of Abel who promises Baker to meet him at a certain time. Baker is then both the claimant and the intended beneficiary of Abel’s duty. It is not hard to imagine that the two offices can be held by different persons, with beneficiary being someone other than the promisee. These types of transactions can be further subdivided. In some cases only the promisee is the right-holder, i.e. the claimant, while in other cases both the promisee and the third-party beneficiary can have a right to the promisor’s performance. Feinberg gave examples of these two types of subdivision. In the first situation, only the promisee is right holder. If Abel promises Baker to look after his dog, the dog is the direct beneficiary of the promise, and Baker is the claimant right-holder. In the second situation, in which both the promisee and the third-party beneficiary can be seen as the right-holder claimant, Feinberg gave the example of Baker designating his wife as the beneficiary of his life insurance policy. In this case, Baker is very much the promisee, but his wife the right-holding claimant.

To make it absolutely clear; it always follows necessarily that a promisee has a right to claim fulfilment of the promise, but it does not always follow necessarily that a beneficiary has a right to claim fulfilment of a promise. The point here is that the right to which the duty correlates, is not necessarily always held by the beneficiary. This is very important in the corporate context where there are often three or more parties (or offices) involved; the legal person, the management team, the shareholders and one or more types of stakeholders.

The situations in which a contractual promise is expressed either in a shareholders’ agreement or a company’s Articles of Association (Articles) are equally relevant. However, as has been pointed out, the Articles are a hybrid document consisting of a contractual agreement that is modified by law to some extent. In other words the Articles are a peculiar form of contract, as they derive their authority not only from contract law but also from company law, under which some of the contractual elements are mandatory. In contrast, as Payne noted, shareholders’ agreements derive

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61 This should not be confused with the ‘third party beneficiaries’ of situations in which the claimant and beneficiary are the same person. They may very well benefit, but their profit will be minimal and remote.
64 One can speculate that Feinberg chose a dog and not a child in order to avoid the argument that a child could be seen as the beneficiary and also a claimant right-holder. However, this author does not believe Feinberg supported such interpretation but that he went with the dog to avoid splitting hairs even further.
65 Presumably Feinberg admitted that Baker is dead but that the insurance company still has a duty to him to pay the beneficiary.
their authority from the principles of contract law rather than from company law.\textsuperscript{69} An example of a duty under a shareholders’ agreement is the duty of one party to a joint venture to buy out the other party at a certain stage.\textsuperscript{70} This does not make it any less a shareholders’ duty, as it is in the capacity of a shareholder that the duty is undertaken.

Feinberg warned that in this class of duties there is a temptation to create a correlation between a promisor’s duty and a third party beneficiary on the grounds of an implied promise, for example if the content of a promise is made known to the third party beneficiary who then acts in reliance on the performance of the promise.\textsuperscript{71} This situation does not fall within the class of duties of commitment since no commitment has been given and no right of this kind has been created. At least not such paradigm case of indebtedness as is being discussed. This can be relevant if a person who is neither a promisee nor the intended beneficiary under a shareholders’ agreement nonetheless claims that a shareholder has a duty towards them. However, the situation is a bit more nuanced in the case of Articles, as those who transact with the company may have a legitimate expectation that the Articles represent an accurate statement of the company’s internal regulations. Nonetheless, a third party who is not an explicit beneficiary of either a shareholders’ agreement or Articles cannot invoke a duty against a shareholder under this class of duties.

3.3. \textit{Duties of Reparation}

\textit{Duties of reparation} are duties that arise when a loss is caused by some ‘fault’, e.g. negligence, recklessness, impulsiveness, carelessness, dishonesty, malevolence or the like. In such circumstances, the person causing the loss ‘owes’ reparation. The duty is to return what a person has been deprived of or, when that is impossible, something of equivalent value. There is also the correlative in personam right to positive services.\textsuperscript{72}

With duties like these, no commitment or promise is made by the person who is subject to the duty. Where there are such duties there will often be a class of persons who are involuntary creditors. Such duties undoubtedly involve both a duty and a right.

In a corporate context, limited shareholder liability and the fact that companies are usually regarded as separate legal entities, \textit{usually}\textsuperscript{73} means that shareholders do not have legal duties towards their companies’ involuntary creditors. However, as noted by Pierre-Henri Conac, there is no reason why a shareholder could not be subject to


\textsuperscript{73} The exceptions to this general rule are not discussed in this article. However, this author is well aware of such potential exemptions.
civil liability if they abuse their rights in their companies so as to cause damage either to the company or to other shareholders. Clarke, too, suggests that there is duty of reparation, for example, in the Irish Companies Act 2014 which requires a related company, including a parent company, to contribute to the debts of a subsidiary that is being wound up if the High Court considers it just and equitable to do so.

Clarke discusses duties imposed upon parent companies. Unsurprisingly, this is not a separate class of duties in Feinberg’s classification and, equally unsurprising, the classification of a parent company’s duties will differ, depending on the types of duties to which it is subject. One of such situation is where a legal statute imposes on a parent company the liability (i.e. duty) to which their subsidiary is subject. In this case the duty remains the same, but the party owing the duty has been changed. Where a parent company has vicarious liability, this is simply a duty of reparation. The legal means by which vicarious liability is established does not affect the type of duty.

3.4. Duties of Need-Fulfilment

Feinberg named the fourth class duties of need-fulfilment. These also give rights to claimants, including in personam rights. The origin or basis of the duty differs from those discussed above. This duty is not based on a promise or on returning or restoring something.

An example of such a moral duty given by Feinberg is of a person who possesses something that would benefit others and of which they do not feel a need for exclusive possession. Possessing useful knowledge is a good example of this ‘something’. A right-holder claimant under such a duty is not necessarily an identifiable person or group of persons; the duty can be owed to an undefined set of people, even to humanity as a whole. An elderly person may feel they have a duty at large to share their knowledge gained over a long lifetime.

On the face of it, this clearly seems to be a moral duty. However, as this article concerns legal duties, it is interesting to consider how this could be a legal duty and how such a legal duty might be manifested. The first step is to recognise that this class would probably mainly include positive duties. Second, if such a duty becomes a legal duty it will no longer be a voluntary duty (and probably lose some of its altruistic character).

75 Irish Companies Act 2014, Section 599.
78 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 139.
In the light of this, it seems that this class of duties encompasses duties of disclosure. As pointed out by Sørensen, the 2004 Transparency Directive requires shareholders who acquire or dispose of listed shares to which voting rights are attached to notify the company of the proportion of voting rights held by them as a result of acquisition or disposal. Similarly, Article 22 of the Accounting Directive requires a parent undertaking to prepare a consolidated financial statement. Sørensen classifies this as one of a shareholders’ duties of disclosure, and rightly so, even though the rule is not *sensu strictu* part of company law. Sørensen also refers to the Takeover Directive (2004/25/EC), Article 6 of which requires a bidder to disclose their intentions. This applies to all potential investors, regardless of whether they are already a shareholder at the time of making a bid. Thus, this duty is not imposed exclusively on shareholders in their capacity as shareholders. As such, in the opinion of this author this is not a shareholders’ duty. Lastly, in relation to Danish company law, Sørensen mentions the rule which states that, once a company gains sufficient control over another company as to be considered its parent company, it is required to inform the other company that it now has a subsidiary status.

Staying with the domestic legislation, Christoph Van der Elst points out that, depending on the jurisdiction, shareholders who are considered to be ‘related parties’ may have a duty to disclose both that they are a related party and the nature of their transactions. However Van der Elst also notes that, in the current framework, related party transactions are dealt with in different ways in different EU Member States. One of these ways is a duty to refrain from voting on the transaction in question. This will not amount to a ‘duty’ unless the shareholder is otherwise permitted to vote under the regulatory framework. Again, *ought implies can*, and if a related party’s votes are not counted, there is no duty not cast them. At the EU level, Van der Elst


81 or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 %, 10 %, 15 %, 20 %, 25 %, 30 % (or one-third of the voting rights), 50 % and 75 % (or two-thirds of the voting rights). See Art. 9(1) of Directive 2004/109/EC.


84 Danish Companies Act, Section 134.


86 It must also be noted that any approval procedure for a related party transaction to be enacted is not a duty. It is not a duty on the related party to suffer the procedure, it is simply a condition for
notes that the current EU accounting legislation, and the currently proposed EU rules on related party transactions in the proposed amendment to the Shareholders’ Rights Directive, do not seem to impose a positive duty on shareholders who are related parties. However, this is not the case with the EU regulatory framework for short-selling; those who hold a short position of a certain volume must disclose this.

Chiu and Katelouzou point out that the proposed amendment to the Shareholders’ Rights Directive will introduce a requirement for all institutional investors and asset managers to have an engagement policy. If adopted, this will introduce a new duty to publicly disclose engagement policies and a comply-or-explain rule in the event of non-disclosure. However, Chiu and Katelouzou are very careful in their use of the concept ‘duty’, and rightly so. They nonetheless point out that it is ‘rather anomalous to uphold soft law in the wrapper of a legislative text’, from which they surmise that it is at least a normative expectation of institutional investors that there should be shareholder engagement by investment managers. In the light of the discussions in the previous sections, it seems that this disclosure is in fact a duty, despite the comply-or-explain rule because the duty is to comply or to explain.

3.5. Duties of Reciprocation

The fifth class of duties covers what Feinberg called duties of reciprocation. This applies to a situation in which a benefactor has freely given their services when they were needed but at a time when they could not be paid for. Now the former benefac-
tor needs help and the former beneficiary is in a position to help. The former beneficiary can be considered to owe their services now, and the former benefactor would be entitled to resent failure to come through. In other words, the former benefactor has an in personam right to help now, and the former beneficiary has a correlative duty to help.94

What sort of duties could correspond to this in the corporate context? As of now, it doesn’t seem possible to identify a shareholder duty that belongs here. If such a duty were to be developed, it could be a duty towards stakeholders, such as the company’s employees. However, as is often the case with such Corporate Social Responsibility (CSR) related issues, such a duty is more likely to be imposed on the company than on the shareholders.

3.6. Duties of Respect

The first five classes of duties discussed above are based on something being owed, where there is some form of moral indebtedness. The following classes of duties are not owed to the same extent, but they are duties nonetheless, and not entirely without rights.95

The first class of these non-owing duties is labelled duties of respect.96 An example of this is the duty to keep off the property of a landowner. In not interfering with another’s property, respect is shown for the interest of exclusive possession and control.97 Rights that correlate to duties of respect are usually negative rights, i.e. the rights of others to non-interference. These rights are furthermore so-called rights in rem – in contrast to the rights in personam discussed above. A right in rem is held, not just against a specific identifiable person, but against the world at large.98

While this type of right is not obviously applicable in the corporate context, one potential correlative duty is that of parent companies not to utilise subsidiaries to externalise their production costs upon involuntary creditors, as this may infringe on the property rights of others. Conversely, this might very well suit the wishes of shareholders who would prefer to stop others interfering with how they exercise the rights pertaining to their shares.

3.7. Duties of Community Membership

Some liberty has to be taken in defining this class of duties and in labelling it. This is because Feinberg never mentioned a seventh class, though he did mention both a sixth and an eighth class. However Feinberg did discuss positive duties in rem, using

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94 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 139.
95 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 139.
96 However, Feinberg notes that the law does not hesitate to use the language of ‘owing’ when duties in this class are codified.
97 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 139.
98 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 139.
their correlative rights as an identifier. He called these ‘rights of community membership’. Thus, the label community membership duties seems apt for the seventh class.99

Duties in rem are not necessarily negative. They can be positive, such as the duty of care which all citizens must have towards those who might be injured by their negligence. There is also duty to come to the aid of victims of accidents.100

Those who are in a position to help the victims of accidents should consider themselves under a duty which stems from the victim’s right to assistance. More than anything it is recognition of this right that is responsible for moulding society into a cohesive community.101 Conversely, a negative duty of community membership would require people not to act to the detriment of the community.

In relation to shareholders’ duties, this is most probably the class of duties which encompasses interactions between shareholders and the effects one shareholder’s acts has upon another shareholder’s interests. In this context, Pierre-Henri Conac mentions both abuse of voting to the detriment of other shareholders and the company, and abuse of the right to information.102 There can be abuse of the right to information by trying to tease out information that is better kept close due to its valuable nature or by choking the operations of the company’s organs by submitting hundreds or even thousands of inquiries in the run up to or at a general meeting. The duty to refrain from doing so is a negative duty. These duties are imperfect as they only become duties once a shareholder is in a position to act in this way. Andreas Cahn notes that the Articles can probably never foresee all potential issues that might arise within a company, but that this may be off-set by laying down a fiduciary duty dictating that shareholders may not exercise their membership rights in a way that would be detrimental to the interests of the company or of other shareholders.103

One of the stronger arguments for categorising these as ‘duties of community membership’ rather than as ‘duties of reciprocation’ is the distinction that in duties of community membership nothing is owed. One shareholder does not owe anything to another shareholder.

3.8. Duties of Status

The eighth class of duties is called duties of status. While these are derived from the original medieval concept of duty, duties of status have become less about something owed to anyone. However, there is still a hint of coercion and it still commonly suggests the idea of sharing burdens fairly, as Feinberg put it, for the promotion of

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100 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 139-140.
socially shared interests. Feinberg gives the example of a group undertaking in which it is often said that everyone should pitch in and do their share so the job will get done. ‘Doing one’s share’ is the same as fulfilling a duty, and the duty will be greater for the rich than the poor, and lesser for the weak than the strong. 104

Duties of status are peculiar in that it can be difficult to identify to whom the duty is attributed. These are duties imposed upon a person due to their status in an institution, – which can mean a variety of things such as a football team, a university or a company etc.105 A duty that pertains to status in a company is related to what is expected of one due to one’s status in the organisation. This is more relevant to workers and managers, who obviously have different duties, than to shareholders. As to whether there is a legal duty on a shareholder towards the company, due solely to the fact that this person serves the purpose within the organisation as a shareholder, the choice of answers is slim. There might be a moral duty for shareholders to attend general meetings and vote, but this far this is not legally mandatory. This is obviously closely allied to the duty not to abuse voting power, but that duty does not belong in this class. The best example of a shareholder being subject to a duty of status is that offered by Clarke, who gives the example from US law106 of a duty of parent companies to monitor the activities of their subsidiaries.107 By holding such a unique status within the organisation, i.e. being a parent company, it triggers the duty.

3.8.1. Duties of Systemic Integrity

Pierre-Henri Conac discusses general principles of law which are uncodified but which may nonetheless impose legal duties on shareholders. There are certainly advantages in not having all the rules written down, as this allows the flexibility which may be needed for the courts to deal with borderline cases.108 For example, it is notoriously hard to draft a legal text capable of dealing with the free-rider problem. However, the courts could apply general legal principles and rationales to deal with cases of free-rider problems.

While the Shareholders’ Duties book does not mention any specific examples of this duty,109 this section of the article is devoted to exploring whether this type of duty can be further defined so that, when it is met, it can be properly identified for what it is.

104 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 140.
105 Joel Feinberg, Duties, Rights and Claims 3 American Philosophical Quarterly 137 (1966), p 140.
This duty is a well-known corporate governance issue, and consequently a potential shareholder’s duty. As useful as Feinberg’s categorisation is, this author struggles to see where to place it, other than as a subcategory of the duties of status. Perhaps this points towards Feinberg’s categorisation not functioning as intended. Or perhaps the categorisation is not exhaustive and nuances may still be added. The latter two options are more likely, since Feinberg himself did not appear to claim that the list is exhaustive or perfect.

In a world characterised by the ever-increasing interconnectedness of interests, it becomes ever more pressing to address the free-rider problem. In its simplest form it may be described in terms of a car-ride: A passenger who does not contribute to fuel costs, even though his weight is taxing on the vehicle is a free-rider. He being there does not reduce the final result for the others in the car who have contributed to the costs, i.e. they all get to their destination, including the free-rider.

The proposal in this article is to add a new sub-class of duties to the categorisation called duties of systemic integrity. The label of a ‘duty not to free-ride’ did come to mind, but there are several reasons why it was not chosen. One reason is that such a label is expressed as a negative duty, while the duty is probably more often a positive one, i.e. it requires participation in efforts to achieve a shared goal rather than removing oneself from participation. Another reason is that free-riding is already a well-known and value-laden term. This would invite arguments about the meaning of ‘free riding’ which would not be very constructive. Therefore another label has been chosen, one which covers at least one meaning that can cover free-riding.

For some act to be in breach of the duty of systemic integrity there must be a state which could be called ‘non-integrity’. The example given above shows that, certain characteristic of this is that the person (the free rider) is an element or part of the problem/situation, which effort is being made to avert or that the presence of this person is not neutral but somehow taxing on others who seek to improve a situation. Therefore the free rider benefits from the other peoples’ efforts. This is the sort of unworthiness that smacks of lack of integrity and which earns a person the label of ‘free-rider’. Free-riding does not consists of taking credit for the hard work of others; that is simply a kind of theft since the person who did the work will not reap the whole reward of their labour, if any (depending on the amount of credit stolen). In the situation where there is a free-rider, those who do contribute their efforts do enjoy their share of the yield of their labour. A person who is neutral but whose interests are advanced as a side-effect of others advancing their interests, i.e. the person neither taxing nor part of the problem, is not a free-rider they are just lucky, like a boat that is lifted by the tide.

As previously mentioned, the concept of ‘free-riding’ describes circumstances that may not correspond entirely to how this term is defined in this article. According to the Stanford Encyclopedia of Philosophy, both Hart and Rawls deliberated on a theory of fair play. This could be sought in the idea that, by accepting a fair scheme

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of cooperation, people have a duty to play their allotted part under that scheme. Thus, if others comply with the duty, we owe them a duty not to free-ride on their compliance.\textsuperscript{112}

There is a difference between this sort of scenario, also labelled \textit{free-riding}, and the definition given above in this article. This can affect how we categorise the duty involved. According to the Encyclopedia, there is \textit{acceptance} of a scheme of cooperation. If one accepts participation in such a scheme, one has willingly accepted the norm which imposes such a duty. This is thus a norm that indicates when there is a breach of duty. It seems here that there is a duty not to go back on a promise. That duty could be categorised as a duty of commitment (class No 2). The consequence of this is not trivial, because when a willingly accepted obligation is a legal duty it will be dealt with as a breach of a contractual obligation under contract law. In the case of free-riding, labelled here as a duty of systemic integrity, there is not an explicit binding acceptance of the norm. In other words, the duty to play one’s expected role or make one’s expected contribution is connected with the status of the non-compliant actor within an institution, whether it is to pay for fuel as a passenger or to reduce emissions as a member of a group of emitters. This means that if it is translated into a \textit{legal} duty, a duty of systemic integrity could not be subject to contract law in the same way as the non-free-rider duty mentioned in the Encyclopedia.

Having thus defined a free-rider rule under the heading of a \textit{duty of systemic integrity}, and since by its nature it is not likely to be codified into a legal statute, one can keep an eye out for a case-law that fits the description of the duty as given above.

\subsection{Duties of Compelling Appropriateness}

\textit{Duties of compelling appropriateness} are those duties which Feinberg described as being duties only in an extended sense. He conceded that they may be included in the classification of duties mainly on the basis that it does no harm to mention them. This class includes duties such as duties of love, of self-sacrifice and of vicarious gratitude. Such duties are often such as not to be considered as being ‘owed’ to anyone.\textsuperscript{113} While these are philosophically interesting, they have little to do with corporate affairs.

\subsection{Duties of Obedience}

According to Feinberg, \textit{duties of obedience} are characterised by the fact that the \textit{authority} to which the duty is owed is not a creditor-like claimant. The example given

\begin{footnotesize}
\begin{enumerate}
\item[112] Leslie Green, \textit{Legal Obligation and Authority} in \textit{The Stanford Encyclopedia of Philosophy} (Winter 2012 Edition), available at plato.stanford.edu/archives/win2012/entries/legal-obligation. Similarly, Philips offers a definition of fairness concerning free-riding which also indicates voluntary acceptance of participation in a scheme: ‘whenever persons or groups of persons voluntarily accept the benefits of a mutually beneficial scheme of co-operation requiring sacrifice or contribution on the parts of the participant and there exists the possibility of free-riding, obligations of fairness are created among the participants in the co-operative scheme in proportion to the benefits accepted.’ R Phillips, \textit{Stakeholder Theory and A Principle of Fairness} 7 Business Ethics Quarterly 51 (1997), p 57.
\end{enumerate}
\end{footnotesize}
is of the duty of a citizen to obey a policeman who orders them to stop their car. This duty is rather to the authority which the policeman represents than to the policeman. The policeman has no correlative right that the citizen should obey and stop their car.114

According to Feinberg, this type of duty is a duty owed to ‘the law’, without there being an identifiable person who can be said to have a claim-to or claim-against the person under the duty. Thus, the duty ‘to the law’ seems to be a duty which does not have a corresponding right,115 so it is not necessary to identify a person who has a claim and thus the right that others obey the law. However, the law that serves as the basis for the duty can be justified by a claim, like e.g. the claim to the protection of property.

In his later writings Feinberg plainly argued that there simply is a moral duty to obey the law.116 This would be derivative duty of the primary duty which indicates what action should be taken or refrained from. In a sense, this is simply the duty to comply with the law, irrespective of whether it involves a prohibition, a responsibility or other obligations – negative or positive – such as the shareholders’ duties mentioned in previous sections. But, as presented by Feinberg, this is a moral duty rather than a legal one.117

4. Conclusions

This article sets out to gain an understanding of what is meant by a shareholder’s duty by applying a taxonomy on the concept of duties. The following is a summary of the findings.

The scope of the duties concerned in this article is limited to legal duties. The discussion of a correlation between legal and moral duties, as set out by Feinberg, proves surprisingly useful. Apart from describing how a moral duty may become a legal as well as a moral duty, light has been shed on the distinction between a moral duty and a legal duty, and why some moral duties are ill-suited to become legal duties. This notion provides a certain frame of reference for discussing shareholders’ duties that may certainly be present and morally binding in an intra-shareholder context, as well as between shareholders and other stakeholders, while not amounting to shareholders’ legal duties of shareholders, at least not yet. By distinguishing between moral and legal duties, it is possible to analyse a breach of duty more thoroughly. This means that when a duty, which is both moral and legal, is breached, there is a twofold breach of duty taking place; and subsequently also the third layer, which is the breach of the moral duty to obey the law.

117 It is not the intention, nor is it necessary, to discuss here the extent to which there is some sort of an inherent legal duty – legal, not just moral – ingrained in the law itself.
Another issue highlighted is the correlation between rights and duties or, more importantly, the fact that duties, including shareholders’ duties, are not by default correlated with rights. However, as seen above, the shareholders’ duties that were identified all had correlative rights. This is a notable finding, since this provides an ideological stepping-stone for further research into and analysis of the justifications for imposing shareholders’ duties. Where there are correlative interests or rights, a justification for imposing a duty ought to be with reference to relevant interests or rights. The utility of this finding should be equally important irrespective of whether such examination takes place within the academic world, during deliberations at the political level or in legal practice. In this context, Feinberg’s writings on public or cumulative interests and rights become a valuable source of reference.

The last point that should be mentioned here is the scope of the concept ‘duty’ itself. By analysing shareholders’ duties with reference to moral philosophy, for example categorising duties according to Feinberg’s classes, it is possible to better identify which restrictions on shareholders’ liberties are in fact duties and which are simply preconditions for exercising rights. This should facilitate the analysis of current legal rules and case law, as well as contribute to the better drafting of legal rules and judicial decisions in the current paradigm-shift from solely dealing with shareholders’ rights towards considering both shareholders’ rights and duties.