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Reviving the Distinction between Positive and Negative Human Rights

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Abstract. Increasingly firm rejections of the distinction between positive and negative human rights as incoherent have created a gap between theory and practice, as well as tensions within legal doctrinal and philosophical literature. This article argues that the distinction can be preserved by means of a structural account of the interaction of duties within human rights, anchored in case law on the right to freedom of assembly in Article 11, the right to free elections in Article 3 of Protocol 1, and the right to security as enshrined in Articles 2, 3, 5, and 8 of the European Convention on Human Rights.

1. Introduction

Once a staple of legal and moral theory, the distinction between positive and negative human rights is on life support. The key turning point came in 1980, with the publication of Henry Shue's *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Shue 1996). In this seminal work, Shue points out, rightly, that states must honour both duties of commission and of omission in order to adequately fulfil a human right, hindering a binary classification of the right as wholly positive or negative (ibid., 37, 53). Four decades on, this commentary on the nature of composite rights has evolved into a broader rejection of the positive/negative distinction, where attempts to demarcate rights by their associated positive or negative duties are described as conceptually inadequate, artificial, futile, and incoherent (Fredman 2008, 65, 92, 100; Klatt 2015, 354; Koch 2005, 83; Palmer 2009, 408). I use the word *evolved* because this modern take on the distinction relies on a piece of conceptual argument that, as I will demonstrate, is not contained in Shue's original treatise.

Something has been lost in the process. First, the increasingly firm rejections of the distinction translate into a growing tension between the theory and practice of rights. This tension is most evident in the literature on rights within the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR). No other human rights court has gone further in mapping out the content of positive duties for signatory states, or drawn more criticism for the way it reviews the fulfilment of those duties (Lavrysen 2016, 3; Stoyanova 2020,

634). This detailed jurisprudence and scholarship combine to make a fitting setting in which to evaluate the case against the positive/negative distinction. As a starting observation, the court, rather than heeding the call to abandon its differential treatment of duties (Lavrysen 2013, 166; Pitkänen 2012, 541; Warbrick 1998, 43) or fulfilling predictions that the distinction would lose its practical relevance (Van Dijk 1998, 27), has continued to actively rely on the language of positive and negative duties. After decades of sustained pressure from legal scholars, the gap can no longer be explained as a delay in the translation of theory into practice. It is perhaps time to seek a more charitable reconstruction of the court's approach, rather than continuing to treat it as a mistake to be rectified. Second, there is a tension within the literature itself. The allegedly incoherent distinction continues to be actively employed by scholars seeking to capture nuances in how the ECtHR assesses the applicability of ECHR provisions, judges proportionality, and determines margins of appreciation. This approach to doctrinal analysis, relying as it does on distinguishing positive and negative duties, is at odds with the growing reservations about the distinction's coherence. Third, criticism of the positive/negative distinction impacts normative discourse. In order to assign a higher value to either positive or negative rights, or to point out that such an asymmetry has shaped human rights law, it is first necessary to keep the two categories apart. A weakened distinction can no longer bear the weight of normative theory that is premised on it.

For these reasons, it is worth asking whether the positive/negative distinction can be salvaged, if necessary in a revised form. As a leading light of the sceptics, Shue would normally be considered a hostile interlocutor to the attempt. Yet his account actually contains two of the necessary ingredients: a cognisance that the positive and negative components of human rights are substantively interdependent, and an awareness of the value in upholding the analytical distinction between the two sets. The problem is that these two insights seem to pull in opposite directions. Further conceptual support is needed to keep them in balance. I will argue that such support can take the form of a structural account of the interaction of duties within human rights.

The article proceeds as follows. I first set out the main themes of Shue's account, focusing in particular on the boundaries in his chosen scope (Section 2.1). Next I demonstrate how those boundaries have subsequently been crossed, with implications for legal doctrinal analysis (Section 2.2) and normative discourse (Section 2.3). Having defined the challenge facing those who would make use of the positive/negative distinction, Section 3 offers a tentative response. This takes the form of an account of the interaction of duties within human rights (Section 3.1), illustrated with an in-depth analysis of the right to freedom of assembly in Article 11 ECHR as interpreted by the ECtHR (Section 3.2). The analysis of Article 11 is then briefly compared with that of the right to free elections in Article 3 of Protocol 1 ECHR and the right to security as enshrined in Articles 2, 3, 5, and 8 ECHR (Section 3.3). In Section 4, I address two likely objections to a structural analysis of human rights. These are that it reverts to the kind of rigid thinking about human rights that Shue rejects, and that it does not track the stated methodology of the ECtHR. Section 5 concludes.

2. The Evolving View of the Distinction between Positive and Negative Rights

2.1. Shue on the Substantive Interdependence of Duties

A positive right entitles the right-holder to have the duty-bearer *do* some act, while a negative right entitles the right-holder to have the duty-bearer *refrain* from doing an act (Mowbray 2004, 2; Shue 1996, 37). In broad strokes, Shue argues that a strict positive/negative dichotomy does not reflect the reality of human rights fulfilment. The argument is constructed around the rights to security, to subsistence, and to liberty, all of which are considered "basic" in the sense of being "essential to the enjoyment of all other rights" (ibid., 19–20). After surveying the duties that a state as duty-bearer must fulfil in order to make these rights a reality, Shue finds that each of them requires both acts and omissions. The supposedly positive right to subsistence, for instance, would clearly be diluted without limits on interference with property rights, and the supposedly negative right to security would be substantially weakened if the state did not actively protect its citizens from the predations of third parties. Hence his conclusion that a rigid division of these human rights into a binary, positive/negative framework "can only breed confusion" (ibid., 36–40; see also 53, 60).

Forty years after it was first published, this commentary on the substantive interdependence of duties within human rights remains hugely influential. Although the argument is framed in terms of basic rights, Shue suggests that it seems to fit "all the standard cases of moral rights" and subsequently applies it to other human rights (ibid., 55; see also 155). Human rights lawyers and theorists have gone a step further, relying on the account of substantive interdependence to explain the rapid emergence of positive legal duties in human rights adjudication, particularly within the context of the ECHR (Fredman 2008, 30; Mowbray 2004, 222–5; Tasioulas 2007, 89–90). In order to evaluate this secondary literature I will adopt the same basic assumptions—that his argument is applicable to human rights law generally and to the rights provisions of the ECHR more specifically. I use *duties* to denote the content of human rights more broadly, and *legal duties* when referring to the various duties that have been identified by the ECtHR as incumbent on signatory states. I also endorse Shue's central claim: Human rights *are* too complicated to fit easily under the single heading of "positive" or "negative," and it is worthwhile to acknowledge, and approach with nuance, their composite nature. This is why my chief aim is not to critique Shue's argument, but rather to examine how it has come to be understood. For this purpose, I wish to highlight three boundaries in the scope of his original account.

The first boundary is that the ultimate target of Shue's criticism is a normative rather than an analytical claim: that negative security rights have priority over positive subsistence rights (Shue 1996, 36). I will refer to the generalised version of this claim—that positive human rights are subordinate to negative human rights—as the priority claim. As this claim is key to understanding his argument, and, I believe, continues to inform perceptions of the positive/negative distinction, it is important to be clear about what it entails.

Basic Rights was written in a time of sweeping, libertarian theories asserting that positive welfare (or social and economic) claims are not deserving of the same rights-status as negative civil and political claims (Cranston 1967, 51–2; Nozick 1974, 167). It would be too easy, however, to ascribe such vulnerable views to all proponents of the

priority claim. Nor is the priority claim to be equated with the profoundly mistaken view that positive rights are universally subordinate. Clearly, some positive rights, such as a right to be provided with clean drinking water, are more important than some negative rights, such as a right to freely consume alcohol. Instead the priority claim can be seen as a rule of thumb: Negative duties are more stringent than positive duties when what is at stake for all concerned is held constant (Pogge 2005, 34–5).

The priority claim can also be justified in different ways. One need not subscribe to the belief that some human rights have priority *because* of their properties as negative rights, although it is certainly possible to do so (e.g., Nagel 1995, 87–93; O'Neill 2000, 105). A priority claim can instead be based on empirical observation of the practical difficulties of fulfilling positive rights, including familiar and contested claims that positive rights are more demanding in terms of cost, or, as the ECtHR noted in *Pretty*,[1] that the steps appropriate to discharging positive duties are more judgmental and prone to variation (Fredman 2008, 92; Klatt 2015, 358; Möller 2012, 179).

Lastly, and most importantly, the priority claim depends on, but is not implied by, the antecedent distinction between positive and negative rights. The dependence is clear: To prioritise one set of rights over another, the two sets must be distinguishable. The lack of implication should be equally clear: By drawing a line between two sets of rights, I do not automatically commit to the belief that rights on one side of the distinction are more important than those on the other—I could be upholding the distinction purely for its analytical and explanatory power. This latter position is, essentially, the one I adopt here. I thus allow for the possibility that normative hierarchies founded on the positive/negative distinction ultimately fail, examining only the instances where Shue's account has been used to argue that the distinction, regardless of its normative import, is *analytically* incoherent.

It is one thing, then, to argue against the priority claim and another to reject the analytical distinction between positive and negative rights that the priority claim depends on. The two kinds of claims can be decoupled (Alexy 2009, 109, 42; Tasioulas 2007, 89–90), as Shue (1996, 36) does when listing the premises for the priority claim:

> The alleged lack of priority for subsistence rights compared to security rights assumes:
>
> 1. The distinction between subsistence rights and security rights is (a) sharp and (b) significant.
> 2. The distinction between positive rights and negative rights is (a) sharp and (b) significant.
> 3. Subsistence rights are positive.
> 4. Security rights are negative.

Shue does not directly address premise 1. Premises 3 and 4 he finds misleading, as he is right to do, if they are taken to mean that subsistence rights are *wholly* positive and security rights *wholly* negative. This is because both rights are composites (Scanlon 2003, 28; Wenar 2005, 234); their names are shorthand for a diverse and evolving set of right-duty relations that includes duties of commission as well as of omission. This is not a controversial proposition. After the successful dissemination of Shue's account, and helped by continuing reminders about the dangers of treating human rights as uniformly positive or negative (Ashford 2009, 94; Wesson 2012, 225), one would be hard pressed to find a modern rights theorist who subscribes to such a rigid view.

[1] *Pretty v United Kingdom* (2002) 35 EHRR 1 par. 15.

It follows that the key item on Shue's checklist is premise 2, which holds that the distinction between positive and negative rights is "sharp" and "significant." So what does he write about this premise that has led so many to reject the distinction in his name? Only that the inaccuracy of premises 3 and 4 casts "considerable doubt" on premise 2 (Shue 1996, 36). This is not a strong assertion. Moreover, later sections of *Basic Rights* are characterised by a similar restraint. The upshot, and second boundary in scope, is that Shue never articulates a direct objection to the analytical distinction between positive and negative duties within a complex human right. In fact, he demonstrates a sensitivity to the possible significance of the asymmetry between the two sets:

> Still, it is true that sometimes fulfilling a right does involve transferring commodities to the person with the right and sometimes it merely involves not taking commodities away. Is there not some grain of truth obscured by the dichotomy between negative and positive rights? Are there not distinctions here that it is useful to make? The answer, I believe, is yes, there are distinctions, but they are not distinctions between rights. The useful distinctions are among duties, and there are no one-to-one pairings between kinds of duties and kinds of rights. (Shue 1996, 51–2)

This passage is notable for the clear acknowledgment that it can be useful to distinguish positive and negative duties, as long as we do not make the mistake of treating their parent rights as wholly positive or negative. The passage also marks a point of departure, for Shue only deems the distinction useful for the study of *duties*, and not for *rights*. In response to his severance of duties from rights, one might point out that human rights are composites, that they *contain* simpler rights, and that these simpler rights can be subject to one-to-one pairings with simpler duties even if the whole complex right cannot. In other words, disassembly of a complex human right reveals many lesser rights (Fabre 1998, 274; Pogge 2009, 128). A right to freedom of assembly contains, amongst countless other duties, a duty for riot police not to arbitrarily assault protesters. This duty is fulfilled by the restraint of individuals, and is hard to make sense of if not as a duty towards individual protesters who, in turn, carry attendant claim-rights not to be assaulted (Hohfeld 1964, 39, 60). Whittle a composite right all the way down, and we find a legal relation governing one action that is capable of being solely positive or negative. Within the right to a fair trial, for instance, is a claim to be informed of the nature and cause of a criminal charge in Article 6(3)(a) ECHR, which, stripped of all adjoining rules, requires an act and nothing more. Within the right to vote is a claim to not be struck off voting rolls, requiring only an omission.

Following this line of reasoning, it is hard to maintain, as Shue does, that there are useful distinctions to be made between the positive and negative duties of a human right without admitting that the same distinctions apply to its constituent, lesser rights. To do so, one would have to either argue against the correlativity of duties and rights, or argue that complex rights cannot be disassembled into component rights without loss. Let us examine these potential responses in turn.

The first line of argument, that of rejecting correlativity, faces an uphill climb. In surveying the literature, there seems to be general agreement that the content of a human right can be identified by specifying the duties that need to be discharged in order to fulfil the right, and vice versa; rights and duties are two perspectives on the same relation between right-bearer and duty-holder (Alexy 2009, 296; Brems and Gerards 2013, 173–4; Hurd and Moore 2018, 329; Mowbray 2004, 224). To sever this link would be to jettison a crucial part of the normative concept of a right (O'Neill 2005, 430; Tasioulas 2015, 47). Notably, correlativity is also endorsed by some of the most prominent critics of the positive/negative distinction (Fredman 2008, 88; Nussbaum 2006, 281). Shue likewise acknowledges the correlativity of "particular" duties and rights while remaining silent about whether many such particular rights can be combined into one complex right (Shue 1996, 155).

Rejecting correlativity therefore does not seem to explain why the positive/negative distinction should be considered useful only for duties and not for rights. What of the second potential response, that of claiming human rights cannot be disassembled without loss? If such a response is possible, it is not fully developed in *Basic Rights*. Here is the third and most crucial boundary in the scope of Shue's account. He posits that if people are to be provided with a basic right, it is "analytically necessary" for their enjoyment of the substance of that right to be protected against typical major threats (ibid., 32–3, 183). He also refers to the "inseparable mixture of positive and negative elements" within rights (ibid., 192). There is a strong intuitive case for inseparability. Giving people rights that they are in fact unable to enjoy is, as Shue puts it, like furnishing them with meal tickets but providing no food (ibid., 69). To use another example, codifying a duty not to assault fellow citizens would be a hollow gesture without offering state protection against assault, or implementing a system that guarantees the effective investigation and prosecution of alleged offences. Yet it is one thing to claim that a real and effective human right must contain both positive and negative components, and another to claim that those components cannot be meaningfully distinguished. The right against assault, for instance, could be expressed as a negative right not to be assaulted, *and* a positive right to active protection, *and* a positive right to a legislative framework that guarantees the investigation and prosecution of violent offences, and so on. Hence, Shue's argument about meal tickets only speaks to the issue of *substantive* inseparability. The claim of *analytical* inseparability—meaning that the content of complex human rights cannot be expressed as distinct, lesser rights—requires a further justification which Shue does not provide (Payne 2008, 223; Woodward 2002, 663–5). Even if such a justification were provided, it is unclear how it can be made to apply to only one side of the right-duty equation. As Thomas Pogge asks, having noted the same absence of analytical support, "[w]hy should this 'mixture' be so inseparable on the basic-rights side, given that Shue has managed to separate things so neatly on the correlative-duties side?" (Pogge 2009, 128).

Following a conclusion that the analytical inseparability of human rights is only posited and not argued, is it possible to adopt a more cautious reading of Shue's argument? This reading would take the form of a methodological recommendation, or injunction, to treat human rights *as if* they were inseparable bundles, regardless of the formal scope for disassembly. While the present aim is to evaluate analytical objections and not methodological recommendations, it is worth noting some of the

problems that this interpretation raises. The first is that one must still account for Shue's acknowledgment of the particularity of duties within basic rights (Shue 1996, 155). The second problem has been convincingly set out by Cécile Fabre: By treating a human right as one, multifaceted demand we take away "the possibility of talking of the more specific rights in which these general rights can be broken down" (Fabre 1998, 275). It is only by admitting that general rights can be broken down into lesser rights, some of which are positive and others negative, that people are able to demand the fulfilment of distinct duties as a matter of right. The third problem with treating human rights as if they were joint bundles lies in determining when, exactly, protection and enforcement mechanisms are sufficient to constitute a human right in the intended sense (Rawls 2009, 179; Tasioulas 2007, 79–81, 92). This threshold problem is never fully addressed in *Basic Rights*, where Shue instead relies on the open-ended language of making "arrangements" for the "effective enjoyment" of rights (Beitz and Goodin 2011, 7–9).

2.2. From Substantive Interdependence to Analytical Incoherence

I have argued so far that Shue offers a convincing account of the substantive interdependence of positive and negative duties within human rights. Human rights cannot, and should not, be treated as wholly positive or negative. The account, however, falls short of explaining why it is not possible to distinguish the many component rights that make up an aggregate human right. This nuance in Shue's argument is not clearly reflected in the more recent literature. Over the course of the last two decades, attempts to demarcate rights by their associated positive or negative duties, particularly in the context of the ECHR, have been described as "artificial," "undemocratic and incoherent" (Fredman 2008, 65, 92, 100), "futile" (Klatt 2015, 354), and arising from a "misconception of human rights" (Koch 2005, 83). The inadequacy of the positive/negative distinction is treated as an established fact that does not need further elaboration (Palmer 2009, 424; Wesson 2012, 225). As we have seen, however, it is possible to acknowledge the substantive interdependence of duties within human rights while continuing to sort them into positive and negative categories. In particular, there is an unexplained gap between Shue's affirmation that the positive/negative distinction has its uses and a claim that it is incoherent to distinguish between rights on the basis of whether they give rise to either performative duties or duties of restraint (Fredman 2008, 67, 69; Lavrysen 2016, 305).

Part of the challenge lies in the ambiguity of the term *human right*, which is used both in reference to aggregate, multifaceted rights, such as the right against assault, and to the lesser rights that flow from this right, such as the right to an effective investigation of alleged violent offences. Theorists have rightly embraced Shue's warnings about a strict positive/negative dichotomy at the aggregate level. Yet somewhere along the way, this healthy scepticism has translated into a broader rejection of the positive/negative distinction at any level, including that of lesser rights and companion duties.

If references to Shue are not sufficient to justify a wholesale rejection of the distinction, are there other supporting arguments? One proposed reason to abandon the distinction is that it has been supplanted by superior typologies (Fredman 2008, 69). Tellingly, the waning popularity of the distinction coincides with endorsement of Shue's tripartite analysis, which sorts state duties into duties to "respect," "protect," and

"fulfil" rights (Shue 1996, 52). However, the tripartite analysis cannot be adopted without implicitly endorsing the positive/negative distinction. Ask "What are duties to 'respect' rights?" and the answer will be that they require states to "refrain from interfering" with rights.[2] If, as this answer suggests, duties to respect rights occupy the same conceptual space as negative duties, then the tripartite analysis has left the negative category intact while dividing the positive category into duties to protect and duties to fulfil. Such an act of fission turns a dichotomy into a trichotomy, but it fails to explain why the dichotomy is incoherent, or why we should stop at three categories—other suggestions include polychotomies of four, five, or more (van Hoof 1984, 106–8). To be clear, this is not to deny that the tripartite analysis can be a useful way of capturing the diversity of positive duties. What is ruled out is an argument that the positive/negative distinction is incoherent but a tripartite analysis is not. The latter analysis incorporates the former and must suffer from the same potential flaws.

Another potential recourse is to cite legal practice. If it could be shown that courts are abandoning the language of positive and negative duties, then the case against continued usage of the distinction would be strengthened. In the case of the ECtHR, however, the practice of rights does not line up with the literature. An example is disagreement over the term *interference* with private and family life in Article 8(2) ECHR, which has traditionally been understood to refer only to violations of negative duties. In his famous concurring opinion in *Stjerna*,[3] Judge Wildhaber argued that any positive duty can be rephrased so as to take the form of a negative duty, and vice versa. A state's refusal to modify its system of civil records could, so he argued, be framed either as an unlawful interference or as a violation of a positive duty to amend legislation. He therefore proposed that it was incoherent to limit *interference* to negative duties and that the term should be construed more broadly. The flaws in Wildhaber's linguistic analysis have been made clear (Fabre 1998, 271–3), and his lone opinion did not alter the trajectory of the court. It did, however, have a lasting influence on scholarship (Lavrysen 2016, 23; Mowbray 2004, 187; Van Dijk 1998, 24–5). The lopsided impact mirrors the reception of the analytical objection to the positive/negative distinction. Over time, repeated observations that human rights are jointly positive and negative can solidify into a perception that the two sets are indistinguishable. For those who subscribe to such a view, there would appear to be little value in limiting the scope of *interference* to only negative duties.

The broad rejection of the distinction has in turn led to unfair criticism of the ECtHR and its differential treatment of positive and negative legal duties. Judge Wildhaber claimed in *Stjerna* that it is incoherent for the court to recognise positive duties as "inherent" to an effective respect for private and family life in Article 8 ECHR while simultaneously subjecting those duties to a less rigorous standard of review. A related example is Frédéric Sudre's view, relayed by Laurens Lavrysen, that "it does not make sense to maintain on the one hand that positive obligations are 'inherently' part of the content of a right, and to apply, on the other hand, a different

[2] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 Jan. 1997), guideline 6, reissued in United Nations, Economic and Social Council, Committee on Economic Social and Cultural Rights (CESCR), 24th session, 2 Oct. 2000, UN doc. E/C.12/2000/13, pp. 16–24.

[3] *Stjerna v Finland* [1994] 24 EHRR 194.

legal approach" (Lavrysen 2013, 166). Similarly, Maija Pitkänen holds that there is "a close connection between negative and positive obligations and this is why the European Court should analyse them using the same proportionality principles" (Pitkänen 2012, 541; see also Warbrick 1998, 43). These are arguments from consistency. If both positive and negative duties are inherent to the same human right, so they argue, it does not make sense to treat the two sets of duties differently. I would counter that it is perfectly feasible for the ECtHR to treat positive and negative legal duties differently, because two sets of duties may have distinct analytical properties even if they are inherent to the same right. Substantive interdependence does not preclude differentiation.

Growing calls to abandon the positive/negative distinction have also created a tension within legal scholarship. Legal scholars claim that the ECtHR leaves member states a wider margin of appreciation when fulfilling positive duties, that alleged violations of positive duties are subjected to more relaxed proportionality assessments, and that its review of positive duties tends to merge the stages of applicability (whether a state of affairs falls under the remit of the ECHR) and review (whether there has been a violation) (Bilchitz 2014, 36, 38; Gerards and Senden 2009, 629–36; Lavrysen 2013, 165–6). Various explanations for the different standards of review have been put forward, including the subsidiary position of the ECtHR and the originally negative framing of the ECHR (Gardbaum 2017, 244; Gerards and Senden 2009, 650–1). Regardless of whether these doctrinal and institutional explanations for asymmetries in European human rights law are compelling, however, they do not address the underlying analytical tension. If the positive/negative distinction between rights and companion duties is at best unhelpful, and at worst incoherent, then it remains unclear what role the distinction can play in explaining patterns in judicial review.

2.3. The Normative Stakes for the Distinction

The previous section concerned the status of the positive/negative distinction in legal doctrinal discourse. There is also a wider, normative perspective to consider. Consider the following questions: Can the duty of rich nations to aid the global poor be strengthened by recasting them as duties of restitution for harm done in the past (Pogge 2004)? Do positive human rights pose a greater threat to democratic self-determination than negative human rights (Böckenförde 1990, 28; Klatt 2015, 354)? Is state interference with negative rights in need of a particular kind of moral justification (Scanlon 2018, 95–6)? Do negative human rights, unlike positive rights, retain their force even when institutions are missing or weak (O'Neill 2000, 105)?

Although questions like these branch out in very different directions, they are all rooted in the same premise. A normative comparison is being made between rights and duties on the basis of a positive and negative categorisation. In effect, they are versions of, and in part justifications for, the priority claim. They therefore face the same challenge. In order to make a rule of assigning more value to negative rights than to positive rights, it is necessary to maintain a robust distinction between the two sets. The critic, meanwhile, can object that all the rights being compared are complex rights, that they are jointly positive and negative, and that the positive/negative distinction is therefore unable to support the weight of a

normative argument. The result is to shift the contest of rights from the level of normative debate to the level of analytical premises. A possible compromise, perhaps, is to insist that priority claims should only be made at the level of granular, wholly positive or negative rights. Yet such rights would have to be very granular indeed. It is unlikely that normative theorists will commit themselves only to a study of the specific duty to inform people of the nature and cause of a criminal charge, or the duty not to arbitrarily purge voter rolls. Like their legal doctrinal counterparts, normative theories must deal with rights at a certain level of abstraction in order to be broadly applicable and relevant.

In these sections, I have argued that a wholesale rejection of the positive/negative distinction is both incompletely theorised and at odds with Shue's original account. It also seems that abandoning the distinction can have limiting effects on legal doctrinal analysis and normative discourse. All of this leaves an open question, however. In order to avoid the stricture of only engaging with granular rights and duties, it is necessary to find some way of using the positive/negative distinction to describe complex rights while also acknowledging the substantive interdependence of their component duties. Since so much of the criticism against overreliance on the distinction is directed at the ECtHR, I have chosen to use its case law as a testing ground for this question. More specifically, I will offer an explanation for how the court can refer to composite ECHR provisions as "imposing a primarily negative [or positive] obligation on States,"[4] a formulation that suggests a differentiation of rights at an aggregate level. To my knowledge, an analysis of this nature has not been previously attempted, and so the next sections will be somewhat more tentative than the preceding discussion.

3. The Structure of Positive and Negative Duties in the ECHR

3.1. The Inner Structure of Human Rights

Composite rights are not random assortments of Hohfeldian positions (Sumner 1987, 48–9). With this proposition, we commit to the notion that human rights have some form of inner logic and structure. The challenge is to map this structure in a way that explains and tracks the ECtHR's description of ECHR provisions as involving "primarily" positive or negative duties. The only conceivable way of doing this is to disassemble the human right in question and chart the interaction of its positive and negative components. The basic methodology has been signposted by Pogge. After rejecting the analytical inseparability of human rights, he suggests that disassembly of aggregate rights into their components will allow us to draw the positive/negative distinction in a way that is "orthogonal" to the way that Shue criticises. This move can, so he argues, resurrect the moral significance of the distinction between positive and negative rights (Pogge 2009, 128–9). Pogge is concerned with general moral rights and does not go into detail concerning the structure of component rights that emerges after disassembly. I

[4] See, e.g., *X and Y v The Netherlands* (1986) 8 EHRR 235 par. 23; *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1 par. 50; *Pretty v UK* par. 50; *Hudorovič and Others v Slovenia* [2020] ECHR 211 par. 139.

will therefore attempt to expand on this line of reasoning with an analytical disassembly of legally grounded human rights, anchored in case law. For clarity, I have chosen to focus on the example of the right to freedom of assembly under Article 11 ECHR.

I should stress from the outset that there are clear limits to how much work this framework can do. The end product is not an ontology of ECHR rights but rather a means of making the usage of the positive/negative distinction by the ECtHR legible. Whether the proposed framework is suitable outside the context of the ECHR depends on the analytical toolsets and language used to describe other human rights and by other courts. In describing patterns of interaction between the duties in ECHR provisions, I also do not commit to any claims about the relative importance of their constituent legal duties, nor do I claim that each provision has a single legal duty at its core. The balance of applicable positive and negative legal duties, both numerically and in terms of their significance, will always depend on the right in question and the context in which it is being applied. In this sense, the proposed account differs from the language of cores and margins that is currently used by scholars (Brems and Lavrysen 2015, 149; Gerards 2012, 191; Smet and Brems 2017, 47; Wellman 1985, 81) and the court itself.[5]

3.2. The Structure of the Right to Freedom of Assembly

Article 11(1) ECHR gives citizens "the right to freedom of peaceful assembly and to freedom of association with others." As Shue correctly predicts, a state must undertake a range of acts and omissions in order for this right to be fulfilled. Suppose that Carol is participating in a protest in support of reproductive rights. In addition to her liberty to protest, she has a claim-right against interference that is correlated with a state duty of noninterference. Next in disaggregating the right to freedom of assembly, we find the legal duty that is most likely to give the overall right a joint positive/negative label: the duty to protect her enjoyment of the liberty, for instance by erecting barricades or deploying riot police against violent counterprotesters.

The claim-rights against interference and to protection are linked. If security forces violate the duty of noninterference by arbitrarily detaining Carol, for instance, the issue of further protection would be moot. Her condition of being in need of active protection thus presupposes a continuing fulfilment of her negative claim-right (Gewirth 2001, 328).

Crucially, the positive duty of protection also differs from the negative duty in its mode of fulfilment. It would not be fitting to say that the state is called upon to fulfil its duty of abstention at a particular time. The state as duty-bearer is either in a state of passivity and continual fulfilment or in a state of active interference and potential breach. This contrasts with the positive duty. Authorities are not required to deploy barricades or riot police any time there is a protest. Only when Carol's liberty is under threat is the state called upon to act. Moreover, such a threat can only have two sources. Either it is attributable to actions of the state, in which case we are back in the negative duty of

[5] See, e.g., *Fernandez Martinez v Spain* (2015) 60 EHRR 3 par. 127; *Odièvre v France* (2004) 38 EHRR 43 dissenting opinion of Judge Wildhaber et al. par. 11.

noninterference, or it stems from a third party. Drawing on Jeff McMahan (1993), the relevant negative state duty can be described as the duty not to initiate the threat, whereas the positive state duty is not to allow a pre-existing threat to continue. Thus, the identification of a need for active protection silently introduces two background assumptions: the existence of counterprotesters, and their violation of duties of noninterference. Remove those assumptions, and, provided the state does not interfere, there can be no violation of Article 11 ECHR (Tasioulas 2007, 92).

The picture that emerges is of two constellations of the right to freedom of assembly. The first, and simpler, constellation consists of Carol's liberty to protest and her claim-right against interference. The claim-right and counterpart duty form a single relation between citizen and state that is not contingent on external circumstances. Upon including protective duties, the right is shown to be more complex. It is now a constellation with three agents and four active claim-rights. We still find (i) the state duty of noninterference towards Carol; the identification of protective duties does not absolve the state of other commitments. Tacked on are (ii) the counterprotesters' duty not to harm Carol (a duty which the state is required to impose through legislation); (iii) the state duty not to interfere with the counterprotesters; and, finally, (iv) the state duty to take active protective measures. All four relations can be independently legislated and litigated. Although fulfilment of the right to free assembly is possible by respecting (i) and without an active fulfilment of (ii)–(iv), fulfilment is impossible solely on the basis of (ii)–(iv).

One should not, I think, place too much weight on these abstract arguments about simplicity and contingency. Their ability to support a structural account depends on how they track, and thereby improve our understanding of, the reasoning of the ECtHR when interpreting the provisions of the convention. Article 1 ECHR requires the contracting parties to "secure" the rights and freedoms in Section I of the convention. In a dynamic mode of interpretation, and with the goal of securing real and effective rights, the court has used this provision to identify a number of positive duties within Article 11 ECHR. The circumstances of Carol's protest are most closely mirrored in the cases of *Plattform "Ärzte für das Leben"* and *Faber*. Both cases involved weighing duties to protect protesters against duties of noninterference towards counterprotesters. The court in both instances held that protesters "must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents."[6] Subsequently, the court in *Plattform* held that:

> Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals.[7]

[6] *Plattform "Ärzte für das Leben" v Austria* [1988] ECHR 15 par. 32; *Faber v Hungary* [2012] ECHR 1648 par. 38.
[7] *Plattform* par. 32.

This passage essentially demonstrates Shue's argument on substantive interdependence. It also showcases the court's persistent use of the positive/negative distinction. More interesting in this context, however, is how the court describes positive measures as only "sometimes" required by Article 11 ECHR. The court appears to recognise that while noninterference is necessarily in play whenever the provision is invoked, the need for active protective measures is timed with the existence of a threat. The layered nature of these positive duties ties in with the court's use of Article 1 ECHR as an interpretational anchor. For Article 1 to impose a duty to "secure" rights, there must be something to secure. Thus, the performative duties that arise from the interpretation of Article 11 ECHR in light of Article 1 are instrumental to preserving a condition—participation in an assembly—that presupposes noninterference.

The most likely objection at this junction is to point out, correctly, that in the real world, there will always be a risk of third-party interference. The threat that is presented here as a contingency is in some sense ubiquitous. From this observation, one could argue that the proposed differentiation of protective duties and duties of abstention within Article 11 ECHR is purely formal and theoretical. Since both duties are in play at all times, so the objection goes, it is artificial to treat the negative duties as contributing differently to the overall structure of the right to freedom of assembly.

There are three worries with this objection. First, it frames particular factual circumstances as the norm. Some protesters do need protection. Most protests, however, are carried out without incident, and in those cases the right to freedom of assembly has been fulfilled without any active operational measures. Second, the objection conflates the *infliction* of harm with the *sources* of harm. It is true that the harm Carol would suffer from repressive security forces is similar to the harm she would suffer at the hands of violent counterprotesters. However, even if these outcomes are evaluatively similar, there are still differences in the relevant legal duties that the ECtHR must assess in order to determine whether Carol's right to free assembly has been violated. The third and most serious problem is that the objection only works in one direction. Although it is fair to argue that protective duties are a necessary addition to duties of noninterference, there is, tellingly, no tradition for an argument that duties of noninterference are a necessary addition to protective duties. The court in *Plattform* rejects a "purely negative conception" of the right to freedom of assembly. As Shue affirms, a purely negative conception of the right to freedom of assembly would make for an ineffective right. Note, however, how odd it would be for the court to switch the order of statements around. A purely *positive* conception of Article 11(1) would make for not only an ineffective right but also a wholly inappropriate portrayal of the right. The positive duties within Article 11 are instrumental to preserving a state of noninterference, and not vice versa.

So far, the analysis indicates a kind of sequence in the fulfilment of duties. An important caveat here is that the chronology of duties is not a load-bearing feature of the structural account. This is because there are positive duties inherent to Article 11 ECHR to be fulfilled prior to an active protest. I am referring here to the many framework duties that compel the state to legislate against threats to the ability to enjoy the freedom of assembly. These include duties to adopt laws preventing, investigating, and sanctioning violent offences; to establish, fund, and

adequately train security forces; to facilitate participation in free assembly for the disabled; to allow and facilitate communication amongst protesters; and so on. Like protective duties, these framework duties are instrumental to preserving an uncompromised liberty. Their fulfilment does not coincide with that of duties of noninterference. Instead the events surrounding a protest serve to reveal whether framework positive duties have already been adequately fulfilled. If they have not, the state is compelled to address the failure. For these reasons, positive framework duties and the negative duty of noninterference are not on a structurally equal footing.

The findings so far suggest that disassembly of human rights, illustrated here with the freedom of assembly in Article 11 ECHR, can help explain the choice of the ECtHR to label rights as "primarily" positive or negative. Noninterference is a constant in discharging the duties under the provision and a prerequisite for the need of a state to take active measures. Having defended the court's approach as legible and coherent, the path is open to further doctrinal and institutional analysis which may explain why the court, after upholding the analytical distinction between positive and negative duties, has opted to subject the two sets to different standards of review (Gardbaum 2017, 244; Gerards and Senden 2009, 650–1).

I submit, furthermore, that designating Article 11 ECHR as "primarily negative" is more illuminating than being content to label it as "jointly positive and negative," as if the two sets of duties had equal roles to play in the overall architecture of the right. Typologies like the positive/negative distinction are tools to help us manage an overwhelmingly complex reality. They do this by emphasising certain properties and de-emphasising others. Inevitably, selective emphasis creates a degree of inaccuracy. In this instance, the inaccuracy is apparent both in the "primarily negative" label and in the "jointly positive/negative" label. One downplays the positive duties that are clearly inherent to the right to freedom of assembly, the other downplays how its positive and negative duties interact. By abandoning the positive/negative typology at the first sign of inaccuracy, we run the risk, so eloquently captured in the afterword to *Basic Rights*, of "drifting into unhelpfully saying merely that no right can be safely enjoyed unless numberless people perform innumerable duties" (Shue 1996, 157). As a means of imparting a degree of structure, the "primarily negative" label is not only legible but better able to capture the duties inherent to Article 11 ECHR.

3.3. Comparisons

Further examination is required to determine whether other provisions within the ECHR can be disassembled and structured in a similar manner. The convention was initially written and ratified not to dictate what states *must* do but what they must *not* do (Nicol 2005). As a result, the majority of its provisions guarantee civil and political freedoms that are likely to share the configuration of the right to freedom of assembly.[8] For an exception, we can look to the right to free elections in Article 3 of Protocol 1 ECHR. In the case of *Mathieu-Mohin and Clerfayt*, the ECtHR held that the "primary obligation" in holding elections is "not one of abstention or non-interference, as with the majority of the civil and political rights, but one of

[8] See, e.g., *Özgür Gündem v Turkey* (2001) 31 EHRR 49 pars. 42–3.

adoption by the State of positive measures to 'hold' democratic elections."[9] Besides affirming the primarily negative structure of other ECHR provisions, the court's approach to Article 3 of Protocol 1 ECHR fits with the structural account. Although it is true that the right to free and fair elections would be compromised by ballot tampering or other forms of interference, it is also evident that had the state not first created and maintained a system for holding elections, there would be nothing to interfere with. Negative duties under the provision cannot be fulfilled independently of its positive duties.

Another promising candidate for further analysis is the right to security. The right offers a range of possible conceptions (Lazarus 2015, 436), but for the purposes of this brief comparison, I will only note case law that deals with acts of physical and psychological violence or harm suffered by individuals as a result of human actions (Shue 1996, 20; Waldron 2011, 210–1). The titular right to security is located in Article 5 ECHR. Duties related to bodily integrity are also found in Articles 2, 3, and 8 (Lazarus 2015, 434; Ramsay 2012, 114–5). Article 8, in particular, has been a key battleground for scholars who object to the positive/negative distinction (Lavrysen 2013 166; Pitkänen 2012, 541; Warbrick 1998, 43).

The ECtHR has identified state duties to actively protect citizens from physical and sexual violence, as well as to maintain legal institutions and rules for the prevention, mitigation, and sanctioning of violations.[10] Nonetheless, the court seems to adopt a similar structural stance. In *Osman*, the court held that the right to life in Article 2 ECHR includes, in "certain well defined circumstances" and provided there is a "real and immediate risk" of harm, a requirement for active preventive and protective measures. In keeping with the subsidiary role of the court, these positive duties are both contingent on particular circumstances and qualified in scope, so as not to impose an "impossible or disproportionate burden" on authorities.[11] The duty not to inflict harm, meanwhile, is neither contingent on particular circumstances nor materially qualified. Most importantly from a structural perspective, fulfilment of the negative duty not to take life is a tangible precondition for there to be a life in need of protection. Liora Lazarus puts it more forcefully, stating that the positive duties within Article 2 ECHR are "implied" by the "pre-existing" duties of noninterference (Lazarus 2007, 341–2, 4). Likewise, the court held in *Pretty* that the prohibition on torture or inhuman or degrading treatment or punishment in Article 3 ECHR imposes a "primarily negative obligation on States to refrain from inflicting serious harm on persons," but also requires states to ensure that citizens are not ill-treated by third parties.[12] These protective duties are materially and epistemically qualified in a way that the state duty to abstain from torture is not. Finally, in *X and Y*, which concerned a teenager who had been sexually assaulted in a privately run home, the ECtHR held that "although the object of Article 8 ECHR is essentially that of protecting the individual against

[9] *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1 par. 50.
[10] *Z and Others v United Kingdom* (2002) 34 EHRR 97 pars. 69ff.; *O'Keeffe v Ireland* (2014) 59 EHRR 15 pars. 144–52; *İlhan v Turkey* (2000) 34 EHRR 36 par. 91.
[11] *Osman v United Kingdom* (1998) 29 EHRR 245 pars. 115–6. See also *Keenan v United Kingdom* (2001) 33 EHRR 38 par. 89.
[12] *Pretty* par. 50–1. See also *Z and Others* par. 73; *Keenan v United Kingdom* par. 111; *O'Keeffe v Ireland* par. 144.

arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life."[13] I draw attention to this passage in particular as it contains no less than five nods to the structural interplay between positive and negative duties.

4. Two Objections and Two Responses

A possible worry with the structural account is that it will encourage us to fall back into the kind of rigid thinking about human rights that Shue rejects. This is a slippery slope argument, and as such, it has the following three problems. First, it rests on an as yet unproven assumption that scholars will be unable to balance awareness of the complexity of human rights with cognisance of the inner structure of human rights. Second, it amounts to an all-or-nothing approach to the study of human rights. Either they are treated as jointly positive and negative, or they are treated as wholly positive or negative, with no room in between for structural differentiation. Such straightjacketing is not conducive to doctrinal or normative argument. Third, the slippery slope argument cuts both ways. Just as a structural account of human rights can revert back to overly rigid categorisations, I have argued here that the jointly positive and negative account has led scholars to fuse positive and negative duties and unjustly criticise the court for its differential approach to judicial review.

A second potential objection is that the structural account does not reflect the methodology of the ECtHR. When faced with a claim that the court is reacting to differences in the configuration of positive and negative duties within ECHR provisions, lawyers versed in its precedents will likely respond that the court appears to have made the opposite claim. There is an oft-repeated passage from *Hatton and Others* stating that "[w]hether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar."[14] The court has also stated repeatedly that "the boundaries between the State's positive and negative obligations […] do not lend themselves to precise definition."[15]

At first glance, these passages seem incompatible with the notion of a fixed architecture within the provisions of the ECHR. A closer reading, however, shows that the ECtHR is not making a conceptual point but rather explaining its methodology. Whenever tasked with finding a point of balance between competing positive and negative duties, the answer is unchanged by the court's chosen angle of approach (Wibye 2022). *Hatton*, for instance, concerned noise restrictions on night flights over Heathrow Airport for the protection of local inhabitants. The court could choose to frame this issue as one of determining the extent of duties

[13] *X and Y v The Netherlands* (1986) 8 EHRR 235 par. 23.
[14] *Hatton and Others v United Kingdom* (2003) 37 EHRR 28 par. 98. See also *SH and Others v Austria* (2011) ECHR 1878 par. 87; *Dickson v United Kingdom* (2008) 46 EHRR 41 pars. 70–1.
[15] *Gül v Switzerland* par. 38; *Von Hannover v Germany* (2005) 40 EHRR 1 par. 57; *White v Sweden* (2008) 46 EHRR 3 par. 20.

to protect private life, or one of determining the scope of noninterference with the commercial operation of the airport. The method of interpretation and point of fair balance would be the same. In this sense, the balancing act is akin to two players running towards a ball from opposite ends of a football field. As the court explains, the location of the ball will not be determined by the chosen direction of approach.

The same perspective is helpful when facing complex factual circumstances that threaten to blur the boundaries between state action and omission. In *Hatton*, the increase in noise disturbance around Heathrow could be described as the result of a failure to actively regulate air traffic, or of a failure to refrain from loosening the stricter regulations that were once in place. Rather than attempting to single out the one act or omission that constitutes a purported breach of convention rights, it is more efficient for the ECtHR to proceed directly to the issue of whether the state has struck the right balance between active measures and noninterference.[16] Once this balancing stage is reached, however, there is nothing in the cited statements to prevent the court from using different standards of review for the positive and negative duties in play.

5. Conclusion

Criticism of overly schematic dichotomies between positive and negative human rights has evolved into a deeper rejection of the distinction between positive and negative duties as incoherent. The costs are measured in a gap between the theory and practice of human rights, a loss of analytical clarity, and obstacles for normative discourse. Does the presence of both kinds of duties within human rights block all attempts to categorise them as "primarily" positive or negative? Not necessarily, because human rights can be disassembled, and once their elements are laid bare, they reveal an inner architecture to which the classification can apply. Even if the conceptual moves involved in this revised application of the distinction were wholly unfamiliar—and they are not—the stakes warrant the effort.

In his afterword to *Basic Rights*, Shue cautions against turning any categories into frozen abstractions. That warning was first directed at theorists who would argue that human rights can be usefully summed up as being wholly positive or negative. I have attempted here to convey a similar kind of warning. To dismiss the distinction between positive and negative duties without due regard for the inner structure of human rights is to take the correction that Shue sought too far.

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[16] *Broniowski v Poland* (2005) 40 EHRR 21 pars. 143–6; *Dickson* par. 71.

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