

Which Right is Right?
- an analytical dialogue

Abstract

In this paper, we strive to analytically debate through dialogue, the question of positive rights and whether or not positive rights are the preferable way to interpret and practically implement rights. We present our own definition of rights influenced by Wesley Newcomb Hohfelds idea of relational rights. And use it as a base for discussion in the second half of the paper. The discussion is centered on two arguments which are discussed back and forth between the authors where one side takes a position for positive rights and the other takes a more defensive stance against them. The first argument regards the enforcement of rights and is based I an argument of Henry Shue that claims that positive rights are required through enforcement. The second argument regards the values and purposes of rights. We find that these arguments offer no significant argument that something other than the opinions of the debaters to decide the worth of positive rights. In conclusion, the issue seems difficult based on the initial argument presented within but further discussion based on more normative approach may yield better results.

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Index

1. Introduction.....	4
1.2 Issue and Method.....	4
2. Background	5
2.1 What is meant by a right?	5
2.1.1 Framework	5
2.1.2 Rights & Duties	7
2.1.3 Rights: the minimal definition.....	8
2.1.4 The definition of duties	9
2.2 Rights proper.....	10
2.2.1 Rights proper: legal and moral	10
2.2.2 Rights Proper: Active / Passive vs. Positive / Negative.....	11
3. Dialogue	13
3.1 Rights: Values and Purpose	20
3.1.1 Democracy and the purpose of rights	21
5. References:	25

1. Introduction

To use a perhaps gross understatement, the nature of rights is not simple. There are a multitude of reasons – chief among them being a muddling of terms and inconsistencies in terminology, not to mention the use of rights as a rhetorical tool to sway opinion.

The underlying motivation for this essay stems from the fact that the topic is a returning issue for both authors who have, in discussions aplenty, again and again stumbled upon the question if it would be possible to derive the preferability of what is commonly known as *positive rights* from some general premise about how rights work, i.e. their very nature. The purpose of this text has partially, because of this, been to establish an explorative discussion regarding the nature of rights. The reason for why positive rights is allowed to establish a starting position, is due to the opinion of the authors that much of the discussion regarding rights and implementations thereof exhibits a somewhat tedious tendency to discuss rights as if they were to exist in vacuum or an very narrow context. As an effect it can often seem devoid of considerations to social contexts and realities, something we believe is not necessary.

1.2 Issue and Method

The issue that we have chosen to discuss is whether or not it is possible to advocate positive rights as preferable when formulating practical applications of rights, based solely on the nature and structure of rights.

The text is focused on an explorative debate concerning rights which, initially, is based on deductive reasoning where two sides, represented by either author, debate the question from two separate points of view. Daniel Strömholm will debate *for* the idea that positive rights are the most desirable way to formulate rights whereas Edvin Bergqvist will debate *against* this position. The essay as a whole is co-edited, albeit certain sections were initially written by separate authors to later be re-written cooperatively. Of special note is the framework definition of part 2.1 which can largely be attributed to Bergqvist, and 2.2 “Rights Proper” which likewise can be attributed to Strömholm.

2. Background

In this chapter, we will set about to formulate a basic terminology which consists of several definitions, firstly defining the framework of rights in general and thereafter of several different kinds of rights in a more developed way. This will later become some of the groundwork upon which later discussion will be built (*see* 3).

2.1 What is meant by a right?

In order to establish this terminology we begin with the question of the meaning of the term rights and attempt a manner of conceptual deconstruction. First off we will differentiate between two understandings of what is meant by a right. That is, between rights as a very *basic term*, or the minimal definition, and actual, more substantial rights, which we will denote *rights-proper*. Rights-proper are, as it were, what we refer to, in common every-day language, when we speak of a right. Rights-proper must, as a necessity, be discussed in terms of both the basic term and its *content*, since rights-proper are partially defined by what understanding of the basic term one has as it would be quite difficult and excessively abstract to attempt to conceive of the specifics of individual rights as an utterly separate component, or as if in a vacuum, without any connection to the basic term.

2.1.1 Framework

It is not unproblematic to define the framework, or to use another analogy, the skeleton of our definition. Mostly this is because the concept of *a right* usually is used with a specific right such as *a human right* or *a right to life* in mind.¹ This can cause some confusion since it can lead to generalizations about rights that are poorly or not at all supported by our general usage of the term *a right*. The place where the term *a right* seems to contain the most analytical clarity is within the legal realm and legal scholars would seem to have carried the notion of a legal right some distance. From the legal realm we can therefore also find uses of statements such as “X has a right to...” that can also be useful outside the legal context (Hart, 1997: 321). Therefore it is not surprising that that we find that one of the most wide-spread formal categorizing of rights is created of rights is created by a legal theorist.

In the beginning of the 20th century, Wesley Newcomb Hohfeld formulated a categorization of rights based upon how they were used in the American legal system. Hohfeld argues that all rights are relational, meaning that if **A** has a right to something, then there is a corresponding duty, or non-duty, on the part of **B**. A central idea in Hohfelds conception of rights is therefore that a right is an advantage relative to a person or a group of people. According to Hohfeld there are four basic types of rights that each correlate in some way to other people than the right holder (Hoffman & Graham, 2006: 444). The first category of right is that of claims. A claim, or more precisely a claim-right, is a position where the right holder is enabled to make legitimate demands of something or some service from another person, or persons. In return, that other person is obligated to fulfill the demand. For example if **A** has a claim-

¹ For example see Plant, 1991: 258; Dworkin, 1997: 328.

right to a certain chair in the room, **B** and **C** have an obligation to make said chair available to **A** if he/she requests it. The correlation of this right type is therefore a duty to fulfill the claim (Hoffman & Graham, 2006: 445).

Hohfeld's second category is *privileges*. Privilege-rights are often also referred to as liberties, since they, if viewed casually, easily could be understood as being similar to the concept of positive freedom. This interpretation can generally be understood from the fact that privileges often are explained as being the same thing as the absence of duty, or a no-duty on the part of the right-holder. meaning that a privilege should be understood as a liberty to do whatever you are not under duty not to do (Hart: 321f). This understanding is close to Hohfeld's use of the word, but does not seem accurate since it would entail that privilege rights are non-relational. To clarify: if **A** were to have a privilege-right to a chair, this would mean that **A** is under no obligation not to use the chair, but this in turn does not reflect upon any duties or obligations on the part of **B** and **C** to make the chair available or to refrain from restricting **A** in making use of the right, which surely couldn't be understood as the right being relational. This common misunderstanding of Hohfeld is likely due to not paying close attention to the fact that his right categories are correlative, and in the case of privileges, the correlation to the privilege is not simply a no-duty but rather a *no-claim*. Meaning that **A**'s privilege to the chair is correlative to a no-claim or no-right on the part of **B**. In other words **A**'s privilege to the chair means that **B** has no *right* that invokes a *duty* on **A**'s part not to sit in the chair (Cook, 1923: 7).

The correlation of privilege-rights to the no-right can also easily be misunderstood as a duty on **B**'s part not to interfere with **A**'s privilege. This demonstrates the ease of confusing privileges with Hohfeld's third rights-category, namely *immunities*. An immunity-right is the right not to be interfered with; as such it correlates to a duty of *disability*. The correlation to disability derives from the definition of immunity as the protection from the powers of others, meaning that no one has the right to alter or remove your immunity-right. To exemplify: **A** having an immunity-right to a chair would entail that **B** is under a duty not to interfere or prevent **A** from using the right to the chair (Hoffman & Graham, 2006: 445).

Lastly, we have the fourth right category, *powers*. We have already mentioned powers in the description of immunities and, perhaps unsurprisingly, it is tied to the ability to alter rights.² Through a power-right one has the ability to change certain rights of others, either granting or removing them, or to change their shape and scope. To return to our example with **A**, **B** and the chair, a power-right on account of **A** gives the right to decide whether **B** should have rights concerning the chair and in what way. The description of powers should also provide us with further understanding of what immunities are. Since immunities are formally defined as **B**'s disability to invoke powers to change **A**'s immunity-rights. According to Hohfeld, powers correlate to *liabilities*, meaning that for the usage of a power right a liability is created. We find this problematic considering the possibility of the right-holder of a power-right to use the right to unconditionally and wholly transfer the power-right to another person and thereby negating any possibility of a liability to occur.

² In Hohfeld's case, powers are described as "the power to change legal relationships" which we reflect upon as being based in Hohfeld's legal background. We believe that the transcription from legal- to right- can be made with ease since we feel that it still captures the spirit of Hohfeld's conception.

2.1.2 Rights & Duties

What is, then, the connection between rights and duties? These two terms often spring up together, but their relation is not as clear as one could wish. Perhaps the most important question to ask is, are rights and duties correlative? If this was true it would mean that for each statement of the kind “A has a right to...” there would be a corresponding statement of “B has a duty (not) to...”. This is a question that H.L.A. Hart has provided a negative answer to. His conclusion is reached by means of a proof stating that there is no necessity of correlations, since there are possible rights statements without a correlating duty, namely privileges (Hart, 1997: 321f). We wish to claim that this *particular* argument is wrong, though. As we have discussed earlier regarding privileges, there is a correlation to duties. An important understanding of privileges, as stated, is the absence of duties which in turn means that there is a negative correlation between duties and privileges. This negative correlation we feel disproves the core of Hart’s argument, which meant to show that there is an existence of rights that is unconnected to duties.

A more suitable argument of Hart’s kind seems instead to be in regard of powers. The reason for this is that since a correlation between power-rights and duties is established due to the rights correlation to liabilities, the appearance of power-rights without a correlation to a liability would strengthen Hart’s thesis. It is also the case that an example of such a power-right could be quite easily constructed. If **A** has a power-right regarding claim-rights to a chair, it might very well be the case that **A** chooses to give/transfer claim-rights to **B**, unconditionally. This in turn implies that **B**’s claim-right does not give **B** any liability towards **A** and thusly it seems that no correlation to duty exists. There is a second level of reply to this argument though. Although the existence of uncorrelative power rights can be said to prove that there seems not to be a direct correlation between rights and duties, it is still the case that the use of power rights creates other rights which in turn correlates to various duties. In this sense we can still see that the concept of rights and duties seems closely, albeit not necessarily, linked.

Despite Hart’s argumentation, the general academic dispute on this subject seems not to be about whether rights and duties are correlative, but rather in which *way* they are. This discussion can, in turn, mainly be divided into two general questions. The first is whether the correlation of rights and duties is symmetrical i.e. if there, as with rights, is for each conceivable duty a correlating right. The second question concerns the primacy of rights or duties. Primacy, in this sense, is to be understood as the idea that that either rights, or duties is to be considered more important in the defining or describing of the other. Alternatively, this could generally be described in terms of either rights or duties bearing primacy. That is, either a conception that rights have primacy, meaning that there are duties *because* there are rights. A primacy of rights would entail that what rights exist in turn would determine what duties there are. This question further divides into three general standpoints, two which each proclaim the primacy of either rights or duties as well as a third, that denies the primacy of either.³

³ This division of symmetry and primacy of rights was although not directly gathered from, heavily influenced by the discussion regarding rights and duties presented by Hugh Upton in his article *Right-based Morality and Hohfeld’s Relations* (2000), where he argues for a symmetrical view of rights and duties.

For the first discussion, regarding symmetry, our own discussion concludes that symmetry is mainly dependant on the definition of rights-holders. Since we can describe duties towards both inanimate objects and living beings, the existence of duties-rights correlations seems to be dependent upon whether all these objects can be said to be capable of being right-holders. Much time can however be devoted to the discussion about the primacy of rights or duties and we will therefore refrain from giving an extensive account of this discussion here, but rather return to this further along in our analysis where it becomes relevant. Something that is worth pointing out, however, is that viewing a theory of rights with primacy in mind is very fruitful since primacy often originates in the logical structure of rights and therefore gives a good account for it. This structure is often unaccounted for, unfortunately even within the discussion of primacy and is understandably one of many reasons for some of the confusion in the debate of rights.

2.1.3 Rights: the minimal definition

After some discussion we finally settled on the following definition of what is to be considered a right:

A right is a relational property of a *right-holder*, which specifies certain duties that duty-holders have towards the right-holder.

The definition is partly constructed from things we have already discussed earlier such as the correlation to duties and Hohfeldian rights-categories. To make our definition clearer and more convincing, we believe there is a need to present a short description and discussion of some of the other parts of the definition. First off, we have an ontological statement about what a right is. In our view a right is a *property* and therefore it is necessarily linked to an object. In other words, this implies that rights only exists as long as there are rights holders, since they require a right holder to whom the right can be considered a property of. This description also includes an account of rights in terms of *what kind of property* they are. Our definition is, as previously mentioned, strongly influenced by Hohfeld, and it furthermore states that rights are relational properties. The fact that rights are relational properties in turn indicates that a right is a property held only *in relation to something else*. A right holder existing in some a vacuum would therefore in this sense not really be a right holder at all since there is nothing that the holder's right would stand in relation to.

Secondly, we have a description of what rights do which returns us to the discussion about the correlative relation between rights and duties. We gathered earlier that rights and duties seem to be correlative and so in a non-symmetrical manner but were left with the problem of deciding the primacy of either rights or duties. As also stated previously, deciding primacy seems to be intimately linked with the constitutive logic behind the right-duty correlation. In other words we are left with the question of *how* do rights correlate to duties? In our opinion rights are best understood as pointers in the sense that a right points toward certain duties. They can be said to *specify* certain duties. This, on the other hand, leaves us with a primacy dilemma. If rights are the deciding fact on which duties that are relevant then one is inclined to grant rights primacy, but on the other hand, rights are only acknowledged on the basis that there are duties that the right can describe. What this means is that duties may possibly have

primacy since they seem to have a stronger independent existence whereas rights require these duties to exist. Exactly duties are we will further discuss in the following part.

It is also of some value to mention some of the things that our definition leaves out. First off is the *identity* of right- and duty-holders. Depending on the definition of a specific right or a system of rights, i.e. rights-proper, the answer to this question of who or what could be considered a right-holder seems to vary bit and we therefore fell that such identities are more a part of a specific right-proper rather than rights in general. Moreover we have, although we hold a conviction of its existence, not included the normative element of rights directly into the definition. The reason for this is, mainly, that the normative element concerning rights in our view primarily is actualized through the connection to duties. As will be discussed in further detail later, it is because duties are normative that also rights are normative since rights per definition correlate to duties.

We have also omitted any specification of the purpose of rights. The reason is quite simple. Just as with identities of right-holders, the purpose of rights can vary quite a lot. Some arguments are reoccurring though and two of the most common are firstly that rights provide a foundation for regulating human behavior, in particular towards other humans (Dworkin, 1997: 328; Plant, 1991: 259) and secondly that rights stand for a general equality between right holders (Dworkin, 1997: 336; Young, 1978: 71). In our view this is partly reflected through the relational qualities of our definition and that further specifications on the subject would infringe our ambitions to supply a suiting definition of rights in general. The primary reason for this is that all motivations of rights are value laden, and since it seems hard to find values that are to be considered generally accepted for all, or at least most, rights-proper, the inclusion of such values would seem counterproductive.

2.1.4 The definition of duties

Lastly, before approaching the subject of rights-proper, we will explain what is meant by duties. Drawing from our previous discussions we can see that duties obviously are important for the definition of rights and that depending on how duties are defined there are large implications on the meaning of rights.

Defining duties is not an entirely carefree task, but thankfully easier than defining rights. Although there is a clear notion in general about the meaning of the word and how it is used, there is a certain difficulty in specifying the exactly what is meant by duties. At the core there seems to be two themes that are reoccurring through most definitions of duties. The first is *obligation* and the second is *action*. Confusingly enough obligation is described in similar terms to duty, “A personal relation where one is indebted; A legal agreement specifying a payment or action and the penalty of failure to comply; An action that is required of one” and so on (Blackburn 2005: 107, 258; wordnet.princeton.edu). To give a more precise description of duty, the following definition of duty will be used throughout this work:

A duty is a property of objects that specifies certain normative expectations of action or non-action on part of the property holder.

Differently than in the somewhat vague definitions found above we have used the wording “normative expectations” to give the word a more precise meaning. Furthermore we distinguish two primary types of duties relevant for our discussion, positive duties that put expectations on actions or negative duties which puts expectations upon non-action or forbearance. This difference can be exemplified by comparing the duty to do what is right, a positive duty, on the one hand and the duty to avoid doing wrong, a negative duty.

2.2 Rights proper

Rights-proper can maybe a bit crudely, but fairly effectively, be graphically likened to that of a parcel: a right, as the basic term or minimal definition discussed above, should be understood as a linguistic and conceptual container having certain common characteristics. Those characteristics which are *not* common are what “create” specific rights, such as to freedom, life, et cetera, and are to be understood as the contents of the parcel. Rights proper then, are a reference to the entirety, container and content, together which form what we commonly denote when we say a “right”.

Rights proper can in turn be further categorized. As a matter of practicality, we have chosen to primarily use Hohfeld’s categorizations instead of constantly naming specific rights-proper. For sake of ease, we will therefore mainly, but not exclusively, discuss *rights-categories*.

2.2.1 Rights proper: legal and moral

Another important distinction we wish to make is between legal and moral rights. It is noteworthy that no unclimbable walls, so to speak, separate these categories. In particular, rights with a legal basis are often possible to trace to moral rights or moral values and traditions. Perhaps not all together surprisingly, by a legal right we refer to rights that are tied to, and practically actualized in formal legal regulations, such as through law. By asking what rights someone has, in this meaning, is to ask a question which is answered by legal system (Plant, 1991: 254) in which the right is established.

A moral right however, does not necessarily imply any formal establishment. Moral rights are primarily of normative character and are therefore likely to be more abstract, more general and harder to define because of it. Discussing moral rights is a somewhat different animal to discussing legal rights since questions about moral rights more often pertain to what *should be* and legal more often to what *is*. In regard to Hohfelds categories, both these types of rights cover the full spectrum he puts forward, claims, immunities, privileges and power. In fact, rights-proper can often be understood as a mixed set of Hohfeldian rights categories (Hart, 1991: 446)

Common for both legal and moral types is ultimately, the question of how an individual or a group of individuals should be treated (Plant, 1991: 259).

2.2.2 Rights Proper: Active / Passive vs. Positive / Negative

As we move on from differentiating between legal and moral rights-proper we now feel obliged to address the issue of active and passive rights contra positive and negative rights. Positive, negative, active and passive should all be understood as different *viewpoints* regarding the practical or theoretical formulation or usage of rights. Active rights are understood as “**A** has a right to ϕ ”, whereas passive rights are understood as “**A** has a right that **B** ϕ ” (where ϕ is an active verb) (plato.stanford.edu). Positive and negative rights spring from the liberal vernacular and positive rights entail that **A** is entitled to something, be it object or service. Negative rights, entails that **A** has a right to non-interference (Narveson, 2002).

A problem with this is that it is rather difficult to fit all Hohfeldian categories within the constraints of negative and positive rights. Applying the positive/negative perspective to Hohfelds categories yields the following results:

- Claims-rights can be said to be positive rights, as they do entail that **A** is entitled to something.
- Privilege-rights are neither positive nor negative rights, as a privilege does not entail entitlement to something nor non-interference.
- Power-rights entail the ability to alter rights and the positive negative dichotomy is not *directly* applicable to power-rights per se, although it may be applicable to rights arising by proxy from the usage of a power-right..
- Immunity-rights entail a right to non-interference, and therefore a negative right.

As we can see, only claims-rights and immunity-rights fit in. However, if we instead were to utilize the passive/active framework to sort Hohfeldian categories, the result is all the more satisfactory.

- Claims-rights and immunity-rights are **passive**: “**A** has right (claim) to ϕ ” and “**B** has the right (immunity) that **A** not ϕ ” – To clarify, if **A** lacks the legitimate ability to exercise power over **B**, then **B** has the right to immunity. *They involve the person having the right enjoying it, or receiving something.*
- Privileges and power-rights are **active**: A privilege is “**A** has a right to ϕ , *if and only if*, **A** does not have a duty not to ϕ ” (plato.stanford.edu) which in our opinion rather more accurately should be expressed as “**A** has a right to ϕ , *if and only if*, **B** has no such right as to make it a duty on **A**’s part not to ϕ ” (Cook, 1920: 7). Typically, a privilege denies a claim on **B**’s part and therefore it’s sometimes referred to as correlating to a no-claim (Hoffman & Graham, 2006 445): **B** has no claim to establish a duty that **A** not ϕ . If **A** has a privilege-right to the chair, **B** has no legitimate claim that **A** not use the chair, in the same manner that **B** can be said to possess a similar privilege. Powers

are “A has a right to ϕ ”, that is the ability to (power to) change other Hohfeldian rights relationships. *Active rights entail action in some shape, manner or form.*

As we can see, passive rights are the same as negative and positive rights in the respect that immunity rights represent the classical liberal notion of freedom and claim rights are legitimate claims on government resources (plato.stanford.edu). A passive right, a claim in other words, might in practicality entail legitimate claims to provision of a number of goods or services, whatever they may be. An active right, conversely, might pertain to someone’s privileges or power-rights, which, as previously stated, one *only* has if one lacks the duty not to ϕ . This corresponds with B’s no-claim: B has no claim to establish a duty with A, that A not ϕ .

3. Dialogue

To reiterate the method through we will present our analysis, Strömholm will hold and argue *for* the position that positive rights are the most desirable way to formulate rights whereas Bergqvist will hold a position *against* this position, albeit not exclusively for negative rights. The method of argumentation will simply be that one first posits an argument, followed by the counter-argument, and so forth.

Daniel:

In my experience- or rather, my interpretation, many who adhere to or prefer solely negative rights formulations seem to hold the viewpoint, that rights-proper only *should* be formulated in negative terms and furthermore, that this formulation is in fact a value neutral (Plant, 1991: 221) one. I as have interpreted it, this is based upon an assumption that non-interference, an immunity-right, as you no doubt recall, is the sole legitimate form of a right. This is indeed in line with the idea that enforcement of those rights which on occasion is referred to as “social rights“ are a deprivation of freedom or coercion from the side of the state and as such, less than desirable. As such, negative rights depend upon an understanding of all non-action, deliberative as well as non-deliberative, as neutral from a normative standpoint. This idea is premised upon the, in my view not entirely correct, understanding of *doing* versus *allowing* as not being morally comparable. The matter is usually then matter-of-factly laid to rest, with negative rights held as the amoral and thus, the neutral and preferable option (Plant, 1991: 222). This is not a formulation I believe I can agree with. In fact, I believe that I can, with some soundness, argue to the opposite. First, I wish to attempt a weakening of the argument that negative rights are value neutral, followed by an attempt to lay forth the argument to why the nature of rights require that positive rights be the preferred formulation, if you will, to implement and frame rights for actual use.

To start off, as I see it, the debate regarding positive and negative rights can be interpreted to, partly, be based on the much-debated problem of doing versus allowing – that is, whether or not one perceives *non-action* as active and deliberative choice and as such, as a type of action, or not. The classic argument, as you know, is typically presented in terms of doing versus allowing harm. An oft-used example is a scenario of the uncle either drowning his nephew while the child is in the bathtub, or alternatively, allowing him to drown by not intervening while the child drowns by accident. In the first scenario, the uncle decides to murder his nephew by holding his head under the water. In the second scenario, the uncle finds the boy already drowning and, *decides* not to act. The issue presents itself more clearly when we consider the moral value of these two courses of action: are they morally the same, or not? In regards to the nature of the action being performed, I doubt that I could commit to such an equation. The physical acts themselves are undoubtedly different, however, in both instances I believe it correct to assert the uncle’s relevance to the consequences, that is, having a role in the child’s death. Non-action being deliberate, we can establish that the uncle not acting is not neutral in value of it being a conscious choice with negative consequences as a result. The child would not have died had the uncle intervened. A practical formulation of rights based upon the premise that non-action *is* neutral does not seem to hold much water. This may seem to be jumping to conclusions but please, bear with me a bit further.

The claim, or point, I wish to make is that most, or all attempts to formulate rights with a constructive ambition or with the desire to utilize them in real-world applications require a slight re-understanding of the action vs. non-action dilemma and as such, of the nature of a rights themselves beyond the purely abstract theorizing. Henry Shue, whom I believe you are familiar with, contests the distinction between positive and negative rights in saying that any right *must* impose enforceable positive duties. I do not agree to much of his arguments in *Basic Rights*, but I do concede this point. Shue posits, in his text, that rights are toothless (Shue, 1997) when not backed up back up by social guarantees – that is to say, unless they are reinforced - and again, I agree with him on this particular point and I believe his point is reinforced if we can justly claim that negative rights possess no inherent neutrality. If one cannot perform or realize the thing that the right pertains to, any right, is does not seem particularly of worth. To quote Oppenheim: “Being free to do what one cannot do is usually of no value to the actor; but having a freedom is not the same as valuing a freedom one *has*” (my emphasis) (after Plant, 1991: 225). I will also concede that while a negative right to life does involve a *freedom* in the basest (and negative) sense, lacking anything to uphold it, what real use does this statement have beyond rhetorical posturing? Is it even legitimate to speak of a *right*, in such a scenario?

Edvin:

I feel the need to slightly clarify my own position, my claim is not directly opposite yours – I would not say that negative rights would be the only justifiable kind of right. My position is rather more moderate, in fact. What I rather would say is that rights *can* be formulated and motivated in negative terms and that these can still have worth. Furthermore, I view rights as inherently moral, since they are largely dependant on normative expectations regarding duties.

Because of this, I mean that your argument seems rather ill devised to unhinge my position, at it were. You make a substantive claim I would like to object to. Let me explain. You presented, subsequent to the part about action and non-action, an argument based on a text by Henry Shue. That rights “must impose enforceable positive duties” is supposed to raise some question regarding the distinction between negative and positive rights. I cannot agree with this: the argument is based on the opinion that rights that lack enforcement are not useful and therefore not really relevant as rights at all. Ignoring the obvious ontological response to this statement, it still seems to forget something. Social rights are, to be effective, inherently understood as universal, meaning that in some sense a right in the social interpretation must imply a universal duty towards the right-holder. To further explain this reasoning, what I am trying to say is that even if I conceded to Shue’s idea that rights require enforcements, this does not evolve into a positive duty for all members of society, and therefore a right holder cannot be said to hold a universal positive right on a societal basis.

Since we are discussing practical application, it is straightforward to see how Shue’s thesis does not necessarily hold true to negative rights. Let me exemplify by using the example of the negative right to life. Shue claims that a negative right to life does not have any worth unless there is some sort of enforcement of the right. For simplicity’s sake, let us for now continue to assume that this holds true. I mean that what Shue fails to mention is on *whose* part enforcement should be introduced. Most practical

applications of the right to life raise, in current day, positive duties for only a select few such as police, firemen and so forth. Even though rights in some sense are creating a necessity of positive duties this necessity is not universal and thusly do not create any positive duties on the part of the average citizen. To formulate negative rights is therefore highly possible since the regular rights holder will in general hold a negative right versus most other members of society. Shue's argument amounts to little if used as an attempt to prove the futility of formulating such varieties of rights proper.

Secondly, beyond meaning that Shue's argument is incorrect, I also will attempt to prove something very contrary to your intention, based on the very same argument as you have provided. What I shall try and debate is that negative rights are not just *possible*, but *more important* as well. Let us return to the doing vs. allowing, or action vs. non-action. Now, as already stated, there is a notable difference in doing harm and allowing harm. Both could be considered being morally wrong, but we can still easily see that the moral *value* of each action is different indeed. To clarify this point for the reader, the doing/allowing issue is closely linked with that of positive and negative rights in the sense that the alternatives of positive and negative, respectively doing and allowing in many cases are closely connected. Doing harm symbolized failure to uphold a negative right, an immunity right in Hohfelds terms, and allowing harm in the same manner symbolizes failure to uphold a positive right, or a claim right. Given what we now have before us, that is the moral difference of these two alternatives of wrong-doing, we clearly can see that there exists a moral difference between positive and negative rights. We can also determine the higher importance of negative rights from this since it is almost universally acclaimed that doing wrong is to be considered a *larger* wrong than allowing wrong.

Daniel:

To answer your counter-argument: I do not recall having claimed that rights absolutely *cannot* be formulated as negative and I therefore feel this to be a somewhat odd criticism. However, I agree with you on the point that rights are not, and cannot be *amoral*, i.e. be value neutral. However, I would still hold that negative rights often are claimed or used in as such a manner as if just that were the case. Clearly, then, this is a practice we both can find objectionable. Furthermore, to answer the main line of your input: it would seem that I may be to blame for a certain lack of clarity. I do not contest the possibility of drawing a distinction between positive and negative rights, rather, the contestation pertains to the meaningfulness of such a distinction. Again, discussing rights in a somewhat practical sense, what *part* of society that has a duty to perform some service or provide something, to realize a claim-right is dependant on the nature of the claim-right. Claiming that such duties are not universal seems to be a misunderstanding the circumstances of how duties come to be. A claim-right does not immediately blanket every individual with an obligation to say, provide me with something, in the same manner an immunity-right to the same thing does (nobody is allowed to kill me). Surely, duties that a claim-right to life would give rise to varying *relevant* social organizations or instances will hold that duty.

An interesting term to bring up again is "social guarantee", a term that Shue uses, which I have come to interpret as systematically organized and institutionalized implementation and enforcement of certain rights or rather, those aspects of such rights that require enforcement in order for the right as a whole to become practically mean-

ingful. Rights proper, as you recall, are essentially bundles of Hohfeldian categories. Our frequently used example, the right to life, can indeed account for a immunity-rights to life and would by this argument, be necessarily associated or entail a claim-right to life. The enforcement that this entails, in order to use a somewhat out of place word, realize the *spirit* of a right or the *worth* of the right, a reference back to the Oppenheim quote I used previously. For what use is a right to life without the possibility to live? This, to me, indicates the relationship between positive and negative rights in order to realize the right as a whole, where rights have *value* for the people they are intended to protect.

Edvin:

I wonder if we here haven't stumbled upon a disagreement over the meaning of meaningful in your original argument. From my understanding your argument is a generalization about rights, meaning that it is should be interpreted as a truth about all conceivable *practical* rights proper. Thusly my line of argument is to prove this generalization wrong from proving that there are cases where it is meaningful to talk about negative rights in a sense that does not necessitate positive rights in the manner you have.

With some consideration I find that my previous argument about universalization seems a bit weaker than I first envisioned, and although the subject, in my opinion, is still important to discuss I will for now instead pursue an argument that in my opinion is stronger. To describe my argument we need to return to yours, since my argument is not as much a counter-argument to yours as a reference to something that seems to be a large inconsistency in the argument. For clarity's sake I will first attempt break down the logical structure of your argument. Your argument is currently based upon the following reasoning:

1. Rights are meaningful if and only if (IFF) they are effective. (A are B IFF A are C)
2. Rights are effective IFF they are enforced. (A are C IFF A are D)
3. If rights are enforced then they require positive duties (If A are D then A are E)
4. If a right requires a positive duty it is considered a positive right (If A are E then A are F)

5. Thus all meaningful rights are positive. (All A that are B are F)⁴

As presented this argument is cogent. But there are some problems with one of its premises. The reason is that premise four seems to be grounded on a misconception about the relation between rights and duties. Embedded in the premise is another premise that I for now will call 4.1, premise 4.1 is stated as follows:

4.1 All duties correlate to rights

⁴ The formal layout of this breakdown is heavily influenced by the forms presented by Richard Feldman in his work *Reason & Argument* (Feldman 1999: 414-420)

As we stated earlier, based upon our definition of rights, rights and duties aren't correlative in a symmetrical sense. That means that 4.1 isn't true and this is what I find lacking in your line of argument.

To exemplify this in a more practical sense let's return to my previous example. If I have a negative right to life there seems to be a need for some sort of enforcement of this right for it to be considered effective. This in turn creates the positive duty of enforcement on some part of society and so far, your argument is strong. What it fails to recognize is that *the creation of a positive duty does not in turn create a claim on part of the holder of the negative right for such enforcement*, meaning that if I have a negative right to life it is not necessary for me to have a claim-right to life for my right to be considered effective.

Since my argument shows that there is a possibility that negative rights can exist in an efficient manner, the argument fails to give a convincing explanation to how your broader thesis about positive rights should be considered convincing. The reason is that, as stated in the beginning, the generalization necessitates that for each conceivable rights proper there must be created a claim right and as my counter-argument shows this is not the case.

I feel that there is more to say about the values of rights which you seem very appreciative to use to strengthen your points, but right now I feel that making a further statement about this would just muddle the clarity I've tried to construct with this reply and will therefore reserve it for a later stage of our discussion.

Daniel:

At first glance, I would agree with your logical formulation of my argument, it would seem to represent my line of thought quite well, were it not for one detail: it does not specify whether you are speaking about legal- or moral rights, which I perceive to be a rather significant detail. Let us recall that rights-proper can be distinguished as both legal and moral. We can furthermore ask ourselves, are the kinds of right-duty relationships that these give rise to always exactly of the same nature?

I put it to you here, that it is a certain *grouping* of rights-duties that *can* (and more often than not tends to be) be asymmetrical but not necessarily always is. I do not believe this to be the case regarding legal rights- the sort I have mainly been discussing (kindly note the practicality aspect that I emphasize). Again, like our discussion earlier on whom the duty-holder was concerning the enforcement of positive rights, it does not do well to roughly generalize. Moral rights and duties are often of a more vague, abstract and generally normative character. They may be of cultural or religious origin and be of the format to imbue objects with certain duties that do not correspond directly to obviously *tangible* rights. I would however say that there are rights that even such vaguely aimed duties correlate to. And does not a duty without some such rationalizing element behind appear exceptionally peculiar? Though I would hesitate, of course, to deny some hypothetical "irrational" moral duty along the character of "act according this duty because" where motivating factor could be anything, such as the sky being blue or the grass green.

I should also like to try and clarify my understanding of *meaningful*. The very idea of rights is, in my view, to encourage or *ensure* certain treatment. A legal right to life, to use the popular example, establishes a right-duty relationship between an arm of the state and its citizens. It does involve an immunity-right, but it also involves the claim-right: you are imbued with the right to *enjoy* or receive a certain service. It may be said that the claim-right in regards to law enforcement is somewhat instrumental to the immunity-right: in this particular case, the worth of the immunity right is protected by the fact that you are socially guaranteed assistance. Why should this be any different concerning other facets of one's right to life, such as in medical emergencies? Or pertaining to something different altogether, such as basic sustenance. Establishing a right as two-fold in this manner, realizes the equal enjoyment of the right to all, and ensures that a right is truly a right of worth and not merely a *plea* to those not strong or able to protect their own interests in the manner of purely negative rights. I regret to say that this is unfortunately a claim I do not feel with any certainty that I can debate any further than I already have. I feel slightly compelled to fall back slightly whether distinctions between rights and their guarantees are important or not.

The distinction is not, perhaps, utterly meaningless. However, from my point of view, the distinction is not very *interesting*. Stating that the distinction between positive and negative rights is achievable does not seem to severely cripple the idea that a right may be of unreliable value to people *without* guarantees. I must, obviously, concede that social or positive rights indeed *are* rights even lacking guarantees, something not everyone seems to agree with.⁵ As argued earlier: I strongly disagree with any difference in priority concerning positive and negative rights and that, I will not cede. That this is a largely normative argument is true, and I believe our previous discussion will be of use still.

However, a small interlude might be in order. Shall I summarize what I believe has come to light so far?

Edvin:

Before that happens, I wish to make some final comments and clarifications regarding your last counter argument. Seemingly ad-hoc at first glance, your argument, based in the defense of a symmetrical relation between duties and rights in the realm of legal rights, does in fact have a certain merit. I feel this merit needs to be explained to the readers since it both comes a bit unexpected this late in the text and because it gives an opening for a further clarification of the mainstay of my argument.

First off, the reason that grants this argument merit is found in our original mentioning of the symmetry problem. The reason why we chose an asymmetrical viewpoint was largely based upon the logical conclusion that there are duties towards objects that cannot reasonably be argued to have rights. What your argument points out is that these objects seem to be of a largely abstract and most of all moral character. In turn legal duties seem in a more concrete way directed at tangible objects that most importantly is conceivable as of having rights. As such it therefore seems to be true that it is correct to state that legal rights are in a symmetrical correlation to legal duties.

⁵ The argument appears to go as such that if a social right lacks guarantees they are not rights at all, which presumingly means they are of less importance? (Ferrajoli, 2001: 20f)

You also seem to want to spread this symmetry into the moral realm, contrary to our previous discussion but, as I do not wish to sidetrack our discussion further, I will not divulge in that part of the argument further than to comment that it seems to invite some unintuitive metaphysical presumptions.

What I feel is worth discussion though, is that your symmetry argument is indeed a good response to my premise 4.1 returning some of the cogency to your line of reasoning. But what it fails to do is to give a description of how the positive duty transforms into a claim on part of the original right holder. To summarize so far the argument has carried us to the conclusion that within the legal realm it seems true that even a negative right to life entails, in practical application, the creation of a positive duty of upholding said right and that this positive duty in turn creates a claim right.

Let us return to our example of a right to life. From our discussion we can draw the conclusion that me having a negative right to life seems to lead to that my right to life needs to be protected by someone, for example the police, and that the protector of my right has a positive duty to do so. Furthermore we have also concluded that to the extent that this is considered a legal duty of the police, there is someone that has a right to expect the police to do its job. What the argument fails to prove then is that I am the one that has the right to expect this.⁶ Although it is easy to make that assumption it is not a very good assumption to make. It is just as, or perhaps even more, likely that this claim is attributed to the one who is the employer of the police, in this case the state. This in turn means that even though I most likely can expect the police to protect my life, I do not in fact have the right to demand it from them since I do not have a claim right (Hart 1997:324).

This in turn returns us to my earlier argument about universality. The reason why this argument amounts to this conclusion, is that it does not acknowledge that for rights to be general and positive in the sense that each right holder can make a claim to them, there must be an universal duty to uphold said right. Meaning that the duty must be considered to be towards all rights holders, something my argument proves that negative rights does not necessitate. In essence the argument therefore very much relies upon what it seeks to prove to make its point, that to be able to demand certain rights, we need rights that allows us to demand it.

I feel that I also wish to reply to your comments about morality and values of rights, but it is another subject altogether and I particularly feel that we at this point have a certain need to untangle us from some of the previous discussion to keep consistency, I therefore abstain from doing so until after you have summarized the discussion so far.

Daniel:

I would say it highly likely that such a claim-right would be imbued the citizen via the state, as a sort of middleman. Arguing in terms of correctly expecting a positive duty

⁶ Note here the difference between "Having a right to expect that..." and "Being right in expecting that...". The first statement is one having the ability to *demand* something whereas the second is a statement about being *correct* in an assumption.

seems quite disingenuous, to be frank, but I shall attempt to reveal a line of reasoning regarding this, all the same.

It seems that in regards to my initial argument, where I draw comparison between the notion of neutral non-action and negative rights, we are in agreement, or at least partially so - that non-action, upon which the idea of neutrality attached to negative rights can be argued to trace from, is in fact, not neutral at all. We agree that they are, in fact, an issue for morality. What we, in essence, cannot seem to agree on is the problem of the relative moral value of action, non-action, positive and negative rights. I believe this to be a certain strong point of this discussion so far, to demonstrate the difficulty of the task of proving that formulating rights in positive light is preferable by method of deductive reasoning. That is to say, the matter of *why* someone would actually have a claim-right and thusly both having a right to expect an upholding of positive duty as *well* as being right in expecting it to be upheld, why, as you phrase it, I would have the right to expect such enforcement.

I shall return to you on this matter shortly. First, though, in regards to Shue's argument concerning the difficulty of differentiating between negative and positive rights, I will agree that they indeed *can* be separated. According to the position I wish to take, this is not in itself all that interesting. The idea of meaningfulness or *worth*, as shown, has not proven excessively fruitful even though the concept may find use later on. I digress: it is to the realm of the normative we take our leave, at least for a short while.

3.1 Rights: Values and Purpose

Daniel:

As my last point of argumentation, I would like to take this opportunity to say that rights and duties have a purpose. This purpose involves, primarily, to encourage and ensure certain types of behaviors towards and between people or peoples (Plant, 1991: 255) and this would, in my interpretation, hold valid for all distinctions we have previously made: legal or moral, different Hohfeldian categories and all. The goal of rights theories must, when one is attempting to formulate a cohesive system of rights duties or individual ones, surely be to create guidelines for how people ought to be treated (Plant, 1991: 254). Be it then via moral rights theories or perhaps more practically through law. At the time of writing, unfortunately, I cannot further pursue a purely logical and deductive line of reasoning, cannot find any purely logical reason, inherent of the very nature of rights which would require a positive formulation. A normative component requires introduction. That is to say, that rights *ought* to be formulated in such a fashion that they imbue all actors with appropriate claim-rights. In light of our previous discussion, I believe that this mode of argumentation could lend more credence to the notion of rights requiring worth for the right-holder – in this case, members of society - in order to be said to be meaningful.

3.1.1 Democracy and the purpose of rights

This argument is contingent on certain notions of what is required for full and equal participation as well as a view of human dignity compatible with basic tenants of the democratic state. I wish to make use of a quote from Dahl: "Every citizen should have adequate and equal possibilities to discover and contemplate what choice best serves his or her interests." (Dahl, 1989: 126, my translation). This is by no means a simple requirement. I wish to emphasize the role of positive social rights in the realization of such democratic ideals. Truly fair and equal democratic participation depends on several things, chief of these beings access to some modicum of political resource (Hague & Haropp, 2004: 123), assets of the type which enable political engagement. Political resources are associated with, amongst other things, education, communication skills, money and status. But political resources and participation is not the only aspect of the notion of the democratic state that benefits from positive implementations of positive rights, such rights should not only be viewed as instrumentally good for the purpose of political participation, even if this is a very relevant consequence and a desirable goal. The right to education as specified in Article 13 in the U.N International Covenant on Economic, Social and Cultural Rights does not merely state the immunity-right of a person to educate himself although to be sure, that is important as well, initially. Rather, it states as such about both general and higher education: "education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education." (http://www.unhchr.ch/html/menu3/b/a_cescr.htm). The benefit and value of realizing this goal, and in a legal sense making it so, is part in the aid in equalizing access to the knowledge resources that are necessary for participation in democratic society. In addition to that, again to quote Article 13: "They [The States Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms". Is this applicable to other rights? I believe so: the right to life, for instance, when formulated as in guaranteed access to healthcare ensures the possibility of any human activity at all: democratic participation and otherwise. Common for most social rights it that they ensure the goal of a right even for those who otherwise could not possibly benefit from negatively formulated legalization: in short having value for *all* in society. In other words: the purpose of right ought to bear value for every member of society and because of this fact be legalized in such a manner that this, is in fact, the case. Still, in light of this, the negative formulation may be understandable in phases of society where any other formulation would be impossible from the standpoint of resources – the fact does not, however, grant negative rights any special recognition. It merely indicates that this is how it has *been*, but does nothing to implicate how things *can*, or *ought to be*.

To cite again one last time from Article 13: the ideal of free human beings enjoying freedom from fear and want can only be achieved "*if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights*". I interpret this to mean that enjoyment of rights should be socially guaranteed. Furthermore, I have here and previously chosen to argue in terms of positive rights loosely based on an extremely inclusive idea of what a right should entail, and now, in this last statement with some inspiration from the U.N International

Covenant (ibid.) for specific positive rights formulation. However, I would like to add as a disclaimer that what specific rights that should constitute social, economic and civil rights is a issue all by itself worthy of discussion, even more so if one considers oneself in opposition of traditional separations of the private and political spheres. With this, however, I would like to rest my case.

Edvin:

Even though I find it highly compelling, there are a few things in your just stated argument that I feel needs to be addressed more critically. Especially I think we need to consider the connection between rights and values more closely.

For the unfamiliar reader the transgression of your argument from its title, ‘values’, to the talk about worth and meaning can seem a bit perplexing. A value is generally understood as something desirable or sought after, which in turn can be linked to a general notion of it as being something ‘good’ and also upon up for comparing it to other things as ‘better’ or ‘worse’ (Blackburn 2006: 378f ; Bergström 1992: 8). A good way of identifying values is therefore to ask for the purpose of something. As I interpret your argument it is mainly centered on the idea of rights each having values they promote, so to speak the reasons for the rights. This can also be expressed as rights being instrumental to values in contrary to them being intrinsic or, in other words, be seen as values in themselves. What your argument therefore mainly is getting at is that positive rights to a further extent realize the particular values of rights rather than negative rights. I agree with you in the view of rights being instrumental but I don’t buy into the second part of the argument regarding positive rights. Most of all this is because of some parts of the argument being a bit vague and therefore not as clearly indicating that which you interpret it to.

The first vagueness regards the extent of values and rights, more explicitly I don not find any clarification about what is concerned as values of rights in general and what is considered as values of certain rights proper.

The second vagueness is that, as I see it, the argument is at face value divided into two main arguments. One well stated about rights and democracy presenting democracy as a value that rights, if constructed in positive terms, can be said to promote and a second more obscured after referring about the UN declaration of social rights that states that positive rights lead to a more equal division of the benefits of rights. What it fails to clearly present is though the main logical connection between rights and equality that makes the true strength of the argument as whole.

The reason is in large part because of the both instances of vagueness in unison. Firstly since it does not include a clear distinction between general and specific values of rights it is easy to have the misconception that you present three arguments when in fact you only present one. Secondly the actual logical construction of the argument is easily lost since it is not stated explicitly. The construction is in my interpretation as follows:

The purpose of rights, in general, is to regulate people’s behavior against each other and in turn to ensure a certain treatment of humans. This treatment in turn is to be considered equal for all persons regardless of social position resting on a value of per-

sonal equality between all individuals. Rights proper then are required to be positive to make this value a reality since only positive rights ensure that people are entitled to equal treatment regardless of social position, which is proved by using democracy and the UN rights as examples.

Now, to properly contest this argument I will mainly contest the both examples. In simplicity my counter argument is that your argument does not reflect the idea of equality in a convincing way. In the case of democracy equality is primarily to be considered as *equality of interest* i.e. that each citizens voice is considered as equal as anyone else's (Brettschneider, 2006: 270f). What this idea of democratic equality ultimately reflects is the idea of anyone being as good a judge of what is preferred as anyone else. Therefore social position is not necessarily a very strong argument for positive rights since every citizen, first off, have the right to be an idiot, secondly if I am truly to be considered equal then my social position should not interfere with my ability to make up my own opinion. Instead the argument seems to imply that there is certain political truth obtainable through political resources making some voters better voters than others which do not seem to support the idea of equality of interest.

In regards of the benefit division argument for social rights my response is even more concise. In reality positive rights, such as a right to life, does *not* bear value for all value for all members of society. This is because the practical enjoyment of such a claim right is only available when there is a *need* for it. Since need isn't universal, the right cannot possibly to be said to be enjoyed by all parts of society. Rather a negative right is to a larger extent true to this statement since a protection is always in force regardless of the risk factor.

Lastly I would also present a critique that your argument seem to rely very much of the interpretation of values in a sense that promotes positive rights. The value of the right of life is in your interpretation for example that life should be promoted, or to use an economic term, maximized. Another very plausible value of the right to life could be that its *control* of life that is valued, in this case one's own, which in turn would leave us with a negative right formulation. Therefore it seems to me that the importance of this argument is to show that depending on your values rights can have different significances and that it opens up to a larger discussion about values in general, which then right are determined from. Such a discussion is much too large to present here and I therefore think this is the point to call it quits.

4. Concluding Thoughts

The idea to write the analysis as a discussion came quite late in the process of writing this text. It is a format and method of working that is very since the scrutiny posed by the opposing side offers a great way to clarify and precise the description of the arguments and issues involved. Inspired by Robert Dahl's "Democracy and its Critics" we also hope this way of presentation is more enjoyable to the reader and given time would have liked to present the whole paper in this way. This essay is merely a small contribution to the discourse of rights, but we hope it will prove an interesting read. The strength of it, in our opinion, is that we attempt to approach the rights debate from a more fundamental starting point of what rights are, or at least should be considered as, which hopefully provides some deeper insight into the actual issues in the rights debate.

Something we have continuously stressed in our work is to provide explanation to the themes presented in our text and this is a process that has covered a lot of space. Therefore some interesting, but not vital, subjects have unfortunately been left out and we have not been able to carry out the discussion as thoroughly as wished in terms of examining all possible arguments. Presumably to satisfy us in this regard would probably require twice the space available. Most of all we've found that the initial line of argument does not present us with as concrete an answer as we could have hoped and the secondary, normative argument really needs an essay of its own to do it justice. It's interesting but definitively not surprising to note that what preconceptions and values one finds most reasonable greatly determines what formulations of rights proper one finds acceptable. Aside from the normative argument, this is also reflected in our discussion regarding action/non-action although, unfortunately, not explicitly discussed.

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