

Draft for inclusion in a book on the work of Henry Shue
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Are There Any Basic Rights?

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For a philosopher, writing a “timely” book is risky; chances are it will not age well, as philosophy is supposed to do. *Basic Rights* has aged very well (its author too, for that matter) despite its unfailing attention to real policy questions. In many respects the world as it was in 1980, when the book was published, seems a relic. Global population has increased by fifty percent, to more than 6.6 billion. Information technology not available to the richest people in rich countries in 1980 is available today to hundreds of millions in developing countries. In 1980 AIDS was just about to make its first public appearance. The 1979 takeover of the American Embassy in Tehran, toward the end of the Carter administration, now seems more an omen of things to come than something terrible in itself. Today the term “globalization”—suggesting a single humanity—is on everybody’s lips. Environmental problems such as global warming, which fail to respect boundaries, confirm our interconnectedness. Yet the central issues Henry Shue addressed have not changed except to become more pressing. More than twenty-five years after its publication, *Basic Rights* remains an influential work in political philosophy and a major contribution to the theory of human rights.

The central aim of the book is well-known. It is to show that subsistence rights—rights to a minimum level of well-being, sometimes called welfare rights or economic rights—are on a par with rights to physical security, rights “not to be subjected to murder,

torture, mayhem, rape, or assault” (20), whose reality is not in question.¹ The standard view, which Shue challenges, is that security rights are prior to or more important than subsistence rights—or even that the arguments establishing their priority imply that subsistence rights do not exist. Shue argues that the standard view rests on the claims that (a) security rights are negative in the sense that they involve only “refrainings”; (b) subsistence rights are positive—requiring positive actions and the allocation of resources; and (c) for these reasons, negative rights take priority over positive rights.² Shue attacks each of these claims.

I have always been deeply persuaded by Shue’s arguments. But rereading *Basic Rights* through after all these years, I now fear that Shue has succeeded too well. Yes, he has made a compelling case that the negative/positive distinction does not coincide with the distinction between security and subsistence rights: each kind of right has central “negative” as well as “positive” features.³ Yet his account of rights—security and subsistence—is so demanding that it forces us to ask whether there are *any* rights of the sort he is discussing. Parity arguments of the sort Shue makes are dangerously double-edged: if it is shown that A and B are relevantly alike, we can conclude either that if we accept A we must accept B, or that if we reject B we must reject A. One person’s *modus ponens*, as they say, is another’s *modus tollens*.

My aim in this essay is to explain the charge that basic rights are unacceptably demanding, and to see whether it stands up.

¹ *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 2d ed., published, with a new afterword, in 1996. Page numbers are the same for both editions, except for the afterword to the second edition (which replaces the last chapter of the first), and will be given in parentheses in the text.

² Or, more precisely, the negativity of negative rights makes them prior to would-be positive rights, whose positivity renders them inferior as rights or not rights at all.

³ To what extent the negative/positive distinction makes sense at all is a question I take up in section V.

I

Shue's subject is *basic* rights, of course. These concern "the morality of the depths...the line beneath which no one is to be allowed to sink" (18). Rights are basic "only if enjoyment of them is essential to the enjoyment of all other rights" (19). Basic rights may differ somewhat from human rights or from what others, such as H.L.A. Hart, have called natural rights.⁴ But basic, human, and natural rights are sufficiently similar that I will not distinguish them sharply, as I believe others have also not done. All concern fundamental moral rights that have a claim to be politicized or institutionalized in some way.

According to Shue, "A moral right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats" (13). The heart of a right is the duties that correlate with it, because "to have a right is to be in a position to make demands of others" (13). We know little of value about a right unless we know which duties it entails and on whom they fall; without these, rights amount to no more than aspirations.

One of Shue's distinctive contributions is that he makes explicit the view that rights must provide *social guarantees* against standard threats. Rights do not simply entail moral duties on the part of some others; the performance of these duties must be assured so that rights-holders can rely on enjoyment of the substance of their rights.

The claim of social guarantees points to a persistent ambiguity in the notion of a right. Abstractly, a person can have a right to another's action or forbearance without a guarantee of action or forbearance; philosophers, at least, often talk about rights in this

⁴ H.L.A. Hart, "Are There Any Natural Rights?," *Philosophical Review* 64 (1955).

way. In this sense a right implies a duty or duties, which a person is morally obligated to fulfill. But duties are, of course, sometimes ignored. Yet guarantees or enforcement are often implicit in discussions of rights, from John Stuart Mill to Robert Nozick.⁵ Despite the conditions he sets out for rights, Shue probably does not intend to make social guarantees essential to *all* moral rights; we typically think that, for one reason or another, some rights cannot or ought not be guaranteed. For example, we may agree that people have a right not to be lied to, implying a corresponding duty on the part of others not to lie. Yet few would argue that in general the right not to be lied to should be enforceable or socially guaranteed. How do we decide which rights should be enforceable or carry social guarantees? Perhaps this is the default position. After all, if rights are so important—the sorts of claims that by definition can be *demande*d—then they ought to carry guarantees unless there are good reasons why not. The invasions of privacy necessary to enforce truth-telling in all situations constitute one such reason.

But the moral rights Shue is concerned with—basic rights, human rights—must, to have teeth, include social guarantees. A full account of such rights will describe the various duties correlative to them, who bears the duties, and how they relate to the social guarantees.

⁵ Shue quotes Mill: “To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.” *Utilitarianism* (Indianapolis: Bobbs-Merrill, 1957), p. 66. The most obvious way to assure social guarantees is through law, whose agent is government. But Shue’s use of the concept is broader. Social institutions whose existence depends on custom or tradition rather than law can also assure the provision of duties corresponding to basic rights.

II

This brings us to Shue's tripartite analysis of duties corresponding to basic rights, which is where serious concerns about the demandingness of his account come in.

According to Shue, to every basic right three kinds of duties correspond:

I. Duties to *avoid* depriving.

II. Duties to *protect* from deprivation.

III. Duties to *aid* the deprived." (52)

What I am calling the traditional or standard view, according to which security rights are negative and (would-be) subsistence rights are positive, assumes that the duties corresponding to rights are exhausted by the first category. Thus, your right not to be killed or maimed is satisfied as long as others do not kill or maim you. The duties corresponding to such negative rights fall on everyone (although there may be exceptions for self-defense and the like). All that people must do to fulfill their duties is to refrain from killing or maiming—not an unreasonable demand, it seems. The question immediately arises for subsistence rights: on whom do the duties fall? The traditionalist suggests that the answer would also have to be “everyone,” as it is for negative security rights, or at least everyone who is able to act effectively. And then we immediately land into two kinds of problems. Most obvious is what may be called Singer-type problems of over-demandingness.⁶ How much does each person have to do? Does it depend partly on what others are doing—in particular, whether they are doing their duty? If not, a conscientious person might have to do so much that her life would be swallowed up; in any case she will have to do much more than most people actually do.

⁶ These problems have been much discussed ever since the publication of Peter Singer's famous article “Famine, Affluence, and Morality,” *Philosophy & Public Affairs* 1 (1972). Surprisingly, I find, no mention of Singer's essay in *Basic Rights*.

The second, related problem concerns the specification of duties. If people have duties, it is imperative that they know what these duties are. But exactly what the “duties to avoid depriving” are that correspond to subsistence rights is not clear in the way it is for security rights, where all a person has to know, it seems, is “Don’t!”

Shue offers two insights that address these problems. The first is that, because basic rights involve social guarantees, duties to avoid depriving do not exhaust the duties entailed by such rights. The second category of duties, duties to protect from deprivation, will necessarily require positive actions and investment of resources—such as police, courts, and a legal system—even for the supposedly negative security rights. Such duties are in fact so central that without them talk of basic or human rights makes no sense. To assert the existence of human rights is to insist not simply that it is wrong for people to violate fundamental human interests but that such interests must be *protected*.

The second insight is that when appropriate protections are in place, subsistence rights need not be so arduous, and in particular they need not involve some people transferring their own resources to others. As Shue puts it, “A demand for the fulfillment of rights to subsistence may involve not a demand to be provided with grants or commodities but merely a demand to be provided some opportunity for supporting oneself” (40). He expands on this point in the afterword to the second edition: the right to have x may entail

a duty to stay out of people’s way while they take x for themselves, or a duty to teach them to read so they can figure out how to make or grow x , or a duty to let them form a political party so that they can effectively demand that the

government stop exporting x (instead of having the CIA arm their police so that they can suppress all dissent) (164).

For this reason even the first kind of duty entailed by a basic right to subsistence, the duty to avoid depriving, may not be “positive” when the second kind of duty, the duty to protect from deprivation, is in place.

Of course, duties to protect from deprivation also often go unfulfilled. These duties would seem to fall primarily on governments, or at least collective bodies, not individuals—who, qua individuals, are rarely in a position to act effectively as protectors of rights. But many governments fail, whether through malice, negligence, or inability, leaving hundreds of millions of people with their basic rights unprotected and unfulfilled. Such failures trigger Shue’s third category of duty: duties to aid the deprived.

On whom do these duties fall? Presumably on all those able to aid the deprived. The governments of those in need of aid have in these cases already failed as protectors of rights, leaving individuals, other governments, and nongovernmental institutions to provide remedies. But this conclusion seems to land us back with the problem of over-demandingness that burdens Singer’s argument. Shue admits that “while it would be unhelpful to say merely that no right can be safely enjoyed unless numberless people perform innumerable duties, this is in fact the case” (157). But surely this must worry Shue, both because his argument for softening the line between security and subsistence rights is meant in part to allay the concern about over-demandingness, and because, more generally, he cares too much about improving people’s well-being to produce a theory that leaves everything as it is. “Institutional design,” he tells us, “must combine judgments about what it is fair to expect people to do, what it is efficient to ask people to

do, and what it is possible to motivate people to do” (170). Expecting some to do more because others have done less is unfair, and it would create perverse incentives.

Moreover, “prevention is always better than cure” (173), so it is preferable to avoid the stage where protecting people’s rights can be achieved only by fulfilling duties to “aid the deprived.”

Shue’s tripartite analysis of the duties corresponding to basic rights is in most respects convincing. If rights matter so much—if they represent those moral claims that a person may *demand*—then simply postulating moral duties corresponding to them seems insufficient. Such duties establish what people and institutions morally ought to do or not do, how they must act to act permissibly. But many people and many institutions fail to do what they ought; and if rights are so important it seems there ought to be compensations for such failures. We need *guarantees*. So we posit duties to protect people’s rights. Of course those entrusted with such duties may also fail, and so it seems we need further duties as back-ups. We need *guarantees*. So we posit duties to aid.

Now we have a glut of duties, perhaps even a regress of duties. And that raises concerns about whether Shue’s account is too demanding, whether it requires too much of too many people to be realistic or satisfiable. I shall return to this question. But another problem worth mentioning is that the quest for guarantees may represent a vain hope or even a category mistake—an expectation that moral rights do something that nothing like a moral right could do. Moral rights, after all, are simply principles about what people may rightly demand and what others must rightly do (or refrain from doing) to satisfy those demands. In this realm (as in some others) *there are no guarantees*. This does not mean we should not posit different kinds of duties, including back-ups for failures. But

moral rights alone are incapable of producing guarantees. For that what is needed is the incorporation of these rights into a functioning legal and social system.⁷

III

In attempting to wrestle with the problem of over-demandingness, a question that warrants closer attention is this: what sorts of entities, and who in particular, hold the duties corresponding to basic or human rights? It may seem natural to assume that individuals are among their main addressees (in James Nickel's term), and this explains much of the skepticism about welfare or subsistence rights, which seem to demand a great deal of mere mortals. But it is also a common view that individuals do not bear the primary duties corresponding to human rights. For example, Nickel writes that "Human rights are political norms dealing mainly with how people should be treated by their governments and institutions. *They are not ordinary moral norms applying mainly to interpersonal conduct* (such as prohibitions of lying and violence)."⁸ Similarly, Thomas Pogge argues that "human-rights violations, to count as such, must be in some sense official...human rights thus protect persons only against violations from certain sources."⁹

Pogge describes his view as an "institutional" understanding of human rights, which he contrasts with an "interactional" understanding according to which "each such right entails certain directly corresponding duties"—a view that, he implies, emphasizes

⁷ Of course even then we never get guarantees (nothing is certain but death and taxes); but credible assurances, with consequences for noncompliance, are possible.

⁸ James Nickel, "Human Rights," *Stanford Encyclopedia of Philosophy*, at <http://plato.stanford.edu/entries/rights-human/>, emphasis in original; see also James Nickel, *Making Sense of Human Rights*, 2d ed. (Oxford: Blackwell, 2007), p.10.

⁹ Thomas Pogge, "How Should Human Rights Be Conceived?," *Jahrbuch fur Recht und Ethik* 3 (1995); reprinted in Patrick Hayden, ed., *The Philosophy of Human Rights* (St. Paul: Paragon House, 2001), p. 192. A somewhat different version appears as chapter 3 of Pogge's *World Poverty and Human Rights* (Cambridge, UK: Polity Press, 2002).

individual duties. According to Pogge, Shue subscribes to an interactional account of human rights.¹⁰ Shue disagrees.

How well does the distinction between the duties of institutions, including government, and the duties of individuals, hold up? There are at least two reasons to believe it is exaggerated. The first is a conceptual point: the duties of institutions ultimately fall to individuals, because individuals working within institutions render institutions actors. Government neglect or abuse of human rights means the neglect or abuse of *human agents* within the government. Of course, the acts of institutions often depend on the aggregate or joint acts of individuals, not of individuals acting alone. And they are acts of individuals in their capacity as agents of government, not as private persons. So to say that human rights make demands of institutions and not individuals is to say that they make demands of individuals-in-their-roles-within-institutions, not individuals in their private capacity.

More important than this conceptual point is a moral argument. If human rights held solely against governments and other political institutions, then individuals outside government or in their nongovernmental capacities might be beyond the reach of criticism for failing to prevent, protest, or compensate for government violations of human rights. That seems implausible in itself, but it would in addition create perverse incentives, encouraging governments to continue in their bad ways in the expectation that they could get away with it. For human rights to be effective, then, they must impose burdens on individuals as well as institutions. And despite his institutional understanding

¹⁰ Ibid., pp. 199-200. Pogge also puts David Luban in this category: "A human right, then, will be a right whose beneficiaries are all human and whose obligors are all humans in a position to effect the right" (David Luban, "Just War and Human Rights," in Charles Beitz et al., eds., *International Ethics* (Princeton: Princeton University Press, 1985), p. 209.

of human rights, Pogge himself argues for the very strong view that “since citizens are collectively responsible for their society’s organization and its resulting human-rights record, human rights ultimately make demands upon (especially the more privileged) citizens.”¹¹

It is not clear, then, how Pogge’s supposedly institutional view differs from Shue’s. Shue certainly recognizes that the duties entailed by basic rights can be duties of governments and other institutions. Duties to protect against deprivation of citizens’ rights will fall primarily on those citizens’ governments. And Shue and Pogge agree that the duties entailed by basic or human rights place strong demands on individuals.

Even if we assume that the duties corresponding to human rights fall in the first instance on the governments of those who human rights they are, the claim that “Human rights are political norms dealing mainly with how people should be treated by their governments and institutions” is open to a variety of interpretations narrow and broad. The breadth of possible interpretations is reflected in the deep ambiguity of the phrase “how people should be treated by their governments...” Does it imply only government action, or can it encompass omissions as well? What constitutes “treatment”?

The U.S. Supreme Court asserted a narrow interpretation in 1989 in *Deshaney v. Winnebago County Social Services Department*. It held that a state’s failure to protect a boy who became profoundly retarded after he had been violently abused by his father over a long period did not violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.¹² Such conduct would presumably be covered by Articles 3 (asserting a right to the security of the person) and 5 (prohibiting torture and “cruel,

¹¹ Ibid., p. 200.

¹² 489 U.S. 189 (1989).

inhuman or degrading treatment or punishment”) of the *Universal Declaration of Human Rights*. The question is: when the acts have been committed by private persons, is the government implicated? The Supreme Court said no.

By contrast, consider Pogge’s account of the ways governments can disrespect human rights:

1. Governments can create or maintain “(unjust) laws that permit or require human-rights violations.”
2. They may do so “‘under the color of law,’ i.e. by perversely construing existing legislation as licensing human-rights-violating policies.”
3. A government may refrain from human rights violations but “reserve for itself the legal power to order or authorize” them.
4. It may pass human rights legislation but not enforce it.¹³
5. It may organize or encourage private groups to violate human rights.
6. Even if it does not organize or encourage them, a government may “stand idly by” when private groups violate human rights. (Similarly, Pogge says that “Unofficial violations of a right that is on the list of human rights do not constitute human-rights violations; but official indifference toward such private violations does constitute official disrespect.”¹⁴)
7. Citizens may sufficiently fear “violent interference or punitive measures” that they refrain from conduct protected by human rights standards or legislation. In such

¹³ Although Pogge mentions passing human rights legislation but not enforcing it as one way to violate people’s human rights, it seems clear that such legislation being “on the books” is not necessary, according to Pogge, to violate human rights. Human rights are pre-existing, whether or not they are legally in force.

¹⁴ “How Should Human Rights Be Conceived?,” p. 197.

cases lack of government interference in protected conduct does not signify respect for human rights.¹⁵

Pogge divides government misconduct regarding human rights into two categories: official government violations, and manifestations of “official disrespect.”¹⁶ The line between these is not always clear; Pogge includes the first two categories on the above list as violations, whereas the others are manifestations of official disrespect, which is presumably less serious. Others might draw the line in a different place. By including manifestations of official disrespect as impermissible, Pogge elides the distinction some would make between violating a person’s rights and allowing them to be violated.

Cases like *Deshaney* fit under the sixth category: the government “standing idly by” while a private person violates a person’s human right not to be subjected to cruel and inhuman treatment.¹⁷ “Standing idly by” suggests that the government is aware of the mistreatment. In the *Deshaney* case this was so: the Winnebago County Department of Social Services had taken various steps to protect the child, so it was clearly aware of the abuse; the problem was that it did not remove the child from his father’s custody. But perhaps a stronger condition is appropriate: the government shows official disrespect in those cases when it *ought* to be aware of (private) mistreatment, whether it is in fact aware or not. Pogge suggests as much further on when he says that “Avoidable

¹⁵ Ibid., pp. 193-7. Pogge argues also that the more closely the moral wrongs of a government official are related to his job, and the more tolerated they are “throughout officialdom,” the closer they fit under the term “human rights violation.”

¹⁶ Ibid., p. 192.

¹⁷ If human rights are in the first instance rights against a person’s government, how can we talk about “a right not to be subjected to cruel and inhuman treatment” full stop? Is it part of the very meaning of the right that the correlative duty is a duty of government? I take it the answer is no, otherwise a violation by a private party would not be a violation of a human right. But it appears that even those who believe human rights are rights against governments talk as if private violations are violations.

insecurity of access (beyond certain reasonably attainable thresholds) [to the object of human rights] constitutes official disrespect...”¹⁸

We are left with several questions. If we distinguish between direct violations of human rights by governments and manifestations of official disrespect (“standing idly by” and the like), do governments have strict duties to avoid both? When we consider civil, political, and security rights, duties to refrain from direct violations look much easier to meet than duties to refrain from all possible manifestations of official disrespect; and committing direct violations may seem to demonstrate greater *mens rea* and be particularly reprehensible. Are the duties to be distinguished in terms of strength, and, if so, how? Shall we say that all these duties are strict, but some are stricter than others?

In the case of subsistence or economic rights, the distinction between direct violations and manifestations of official disrespect becomes hard to draw. Although Pogge obviously endorses economic rights, his list and the accompanying descriptions conjure up violations of civil, political, or security rights. Suppose we accept Article 25 of the *Universal Declaration*, according to which “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family...,” and suppose this is a right in the first instance against one’s government. When people lack an adequate standard of living, it will rarely be easy to tell whether governments have engaged in direct violations or are manifesting official disrespect—or what the difference amounts to.

Even if we accept the view that human rights impose duties in the first instance against one’s government, then, there is enormous variation in how we interpret these

¹⁸ Ibid., p. 200. In a note to this passage, Pogge argues that “What is new about my understanding is that it links rights fulfillment with insecurity rather than violation” (note 19, 209). This claim does not adequately credit Shue, whose concept of social guarantees does the same work.

duties and in deciding when and to what extent governments violate human rights. On the broad interpretation that appears to follow from both Shue's and Pogge's accounts, governments will themselves have onerous duties, and others will have burdensome obligations when governments fail, as they so often do.

IV

Shue shows that the standard view of basic rights biases the case against subsistence or economic rights, which appear disproportionately demanding. When we recognize that security rights necessarily require positive action and subsistence rights can sometimes be satisfied by refraining from certain kinds of actions, he argues, the two kinds of rights are not dissimilar. If we accept the existence of security rights—which, it is implicit in the argument, everyone does—then we should also accept the existence of subsistence rights.

Pogge too aims to “narrow the gap” between civil and political rights on the one hand and social and economic rights on the other. But whereas Shue insists that both security and subsistence rights contain negative as well as positive elements, Pogge argues that “The most remarkable feature of... [his institutional understanding of human rights] is that it goes beyond minimalist libertarianism without denying its central tenet: that human rights entail only negative duties.”¹⁹ Pogge accuses Shue of a “maximalist” approach that leans heavily on positive duties.

One may be sympathetic to Pogge's strategy. Positive rights, usually identified with duties to render aid, are controversial, largely because they seem to demand so

¹⁹ Ibid., p. 202. For the “narrowing the gap” idea, see *World Poverty and Human Rights*, p. 70.

much, while everyone accepts negative rights, associated with duties not to kill or harm.²⁰ A central reason negative rights are uncontroversial is that they seem not to demand very much. They are rights to be left alone, not to be interfered with. So as long as you keep your hands to yourself—literally and perhaps figuratively—you can succeed in fulfilling the negative duties thought to correlate with negative rights.

Shue shows this picture to be inaccurate, for reasons we have seen: even so-called negative rights to be left alone require a complex and costly infrastructure, including positive duties, in order to be meaningful; and when this infrastructure is in place, the rights typically thought to be positive may not be. But Pogge's claim that his view involves only negative duties and the implication that it is therefore correspondingly less demanding is questionable for another reason as well. It's a reason that many of us have become painfully aware of as we negotiate daily life, asking ourselves whether our most humdrum social and economic practices are morally permissible.

Pogge argues that "you must not participate in, and thereby help to uphold and to impose upon [a person], social institutions under which she does not have secure access to the object of her human right." Can I wear these running shoes? That sweater? Half the clothes in my closet? Which fruits and vegetables can I buy? Which gadgets and electronics? Where may I travel or take a vacation? Fulfilling our negative duties may require that we refrain from many practices integral to our daily lives. Not the least of our duties will be to learn which actions are unacceptable—where my clothes and household

²⁰ There is another difference between negative and positive rights and duties that underlies some resistance to the latter. It involves a kind of existential claim: you may be held responsible for making the world worse than it would have been had you never been born, but you may not be held responsible for not making it better. See Judith Lichtenberg, "The Realm of Charity and the Realm of Justice," unpublished manuscript. I take up this issue in the next section.

goods come from, under what conditions they are made, and so on. And this by itself will be costly and time-consuming.

Although philosophers are in the habit of asking how much people ought to sacrifice in order to *aid* people—thereby fulfilling positive duties—Poggean negative duties may be equally stringent, forbidding us from many aspects of our ordinary existence. Moreover, although Pogge argues that on his institutional view (as opposed to the “maximalist interactional view” he attributes to Shue), a human right to “the necessities of subsistence...involves no duty on everyone to help supply such necessities to those who would otherwise be without them,” this claim is not consistent with what Pogge says elsewhere (even in the same paragraph). Our positive duties may not be to bring food to the hungry or to build shelter for the homeless with our own hands. But citizens have a duty “to ensure that the social order they collectively and coercively impose upon each of themselves is one under which each has secure access to these necessities, insofar as this is feasible.”²¹ Exactly how such duties are to be discharged is an open question—perhaps by lobbying, organizing, or education rather than spending money or engaging in manual labor. But if we have duties to ensure that the social order we live under provides secure access to everyone’s human rights we will be busy indeed—especially because “all human beings are now participants in a single, global institutional order” so that “all unfulfilled human rights have come to be, at least potentially, everyone’s responsibility.”²² If these are merely negative duties, then much of the attraction of the merely negative has disappeared.

²¹ “How Should Human Rights Be Conceived?,” p. 203.

²² Pogge, “Cosmopolitanism and Sovereignty,” *Ethics* 103 (1992), reprinted in *World Poverty and Human Rights*, p. 171.

Pogge would probably reply that he focuses on negative duties not because they are easy to satisfy but because in fact the rich have harmed the world's poor. And he believes that the duty not to harm takes priority over the duty to aid: Pogge agrees with the libertarians that "the distinction between causing poverty and merely failing to reduce it is morally significant."²³ But this response faces two problems. First, even if the distinction is significant, it is doubtful that, for example, an individual's decision to buy a pair of sneakers made under sweatshop conditions causes harm. By itself, my choice to purchase or not purchase this or that item will make no difference to the workers' well-being; only if many people change their behavior will oppressive conditions abate. The conclusion we should draw is not that individuals should continue in their old habits, only that the reason for abandoning them cannot appeal directly to the harm one's action causes but to some other principle: for example, the demand for integrity or lack of complicity or the expressive or symbolic significance of refusing to participate in an unjust order even if one's participation has no appreciable bearing on the outcome.

The other problem with the reliance on harm and negative duties is that the distinction between causing poverty and merely failing to reduce it is not as easy to draw as Pogge and others, including Shue, suggest. The reason has to do with what may be called the baseline problem. When A strikes B with his fist, we can say with confidence that A has harmed B, because we know what B's situation would have been had A not done struck him. If A had not struck B, B would not have required twenty-six stitches in his forehead. Similarly, we can know that driver C has harmed pedestrian D because if C's car had not run D down, D would not have suffered a broken leg and internal injuries.

²³ *World Poverty and Human Rights*, p. 13.

But when harm involves complex causal chains involving many intervening people and events, often over a long period, it is impossible to establish the counterfactual: to know how things would have been had the allegedly harmful events not occurred.

Consider Shue's hypothetical example, which also invokes the harm principle. A peasant landowner, who grows a quarter of the black beans sold in a village and employs six men who hold the only paying jobs there, is offered and accepts a contract by "a man from the capital" to grow flowers for export instead. As a result, black beans prices soar, creating hardship for many; in particular the laborers, whose own land was too poor or too little to allow them to support themselves by farming it, lose their jobs. The motives of the landowner or of those offering him the contract need not have been morally questionable. And the bad consequences for the workers do not result from a single act or from the acts of a single agent. Nevertheless, the malnutrition resulting from the economic change was not simply bad luck, the result of a natural disaster. It was, Shue argues, "a social disaster. The malnutrition was the product of specific human decisions permitted by the presence of specific social institutions and the absence of others": by "the requirement in the contract for a switch away from food, by the legality of the contract, and by the performance of the required switch in crops" (44). Shue continues by drawing out the underlying principle:

In general, when persons take an action that is sufficient in some given natural and social circumstances to bring about an undesirable effect, especially one that there is no particular reason to think would otherwise have occurred, it is perfectly normal to consider their action to be one active cause of the harm (44).

We may be inclined to think the laborers have a legitimate grievance because the actions of the landowner and his colleagues made the workers significantly worse off than they had been. But why is the state of affairs immediately prior to the flower contract the baseline against which to judge the decline in their well-being? Suppose the landowner had employed the workers for five or seven years, but before that time they had had no jobs and had lived below subsistence. Would they still have had cause for complaint? How many years of employment does it take for that state of affairs to become the norm? Why privilege the immediate past?

Pogge contrasts his harm-based view with the idea, which he rejects, that “What matters for the moral assessment of an economic order under which many are starving is whether there is a feasible institutional alternative under which such starvation would not occur.”²⁴ But no standard other than “feasible institutional alternatives” is available. To what shall we compare the current global institutional order? What would have happened in its absence?²⁵ Although intuitively we may feel confident that certain large-scale economic institutions and events have harmed people, the baseline problem makes it impossible to establish such claims except by comparison with other possible ways of organizing economic and social life.

²⁴ Ibid. He associates this approach with consequentialist as well as “veil-of-ignorance reasoning a la Rawls.”

²⁵ I leave aside here Derek Parfit’s famous non-identity problem: if certain seemingly harmful large-scale events had not occurred, different people would have lived; since those now living would not have been born, they cannot have been harmed by the events in question. Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1986). Even if we assumed that the same persons existed as would have in the absence of these events, knowing what would have happened to them if... is difficult at best. My parents met as a result of Hitler’s rise to power and their emigration from Germany during the 1930s. Suppose Hitler had not come to power and they had still somehow met and begat me. What would my life have been like? Not like it is; but more than that it is impossible to say.

This claim is confirmed by the natural understanding of why exploitation is objectionable. In exploiting Worker, Boss does not necessarily harm him in the sense of making him worse off than Worker would have been had Boss not been in the picture; on the contrary, Worker might have been even worse off, having no means of employment whatever. We object to exploitation not because Boss necessarily makes Worker worse off but because we believe that people are owed certain minimum conditions of treatment—conditions that can be met under “feasible institutional alternatives.”

In many contexts—discrete harms to individuals of the sort treated in tort law—it seems obvious that the appropriate baseline is the situation immediately prior to the change. Such accidents are like acts of God that disrupt causal chains whose paths seem otherwise clear, and in these cases we can speak of negative duties not to cause harm. But in the realm of social and economic life it is impossible to establish the default or baseline. The economic acts, policies, and conditions now in place do not disrupt causal chains whose paths are otherwise predictable.

In the absence of a baseline, the distinction between negative and positive duties blurs. In contracting to grow flowers rather than black beans, did the landowner and his colleagues, or the system within which they operated, violate a negative duty not to harm the workers? A duty not to deprive them of a livelihood? How does this differ from a duty to ensure the workers a livelihood? The terms we use, and whether they contain grammatical negatives (like “not” and “deprive”) may suggest the presence of negative duties. But grammar can mislead. Much depends on where we take up the story: for example, with the landowner employing the workers to harvest the black beans, or earlier. Where we begin will affect our view of the appropriate baseline—of how to

answer the question “How would things have been had a given chunk of behavior not occurred?”

These issues elude simple analyses. Here again tort law is instructive. In the famous case of *Newton v. Ellis*, the defendant had dug a hole in the highway; a passerby fell in the hole and was injured.²⁶ *Ellis* was held liable for failing to put up a light showing the hole. Although the failure to light the hole appears to be an omission, when properly viewed it is part of the act of digging the hole—thus, in legal terms, a case of “misfeasance” rather than “nonfeasance.”²⁷ The test of what “would have happened had the agent not been on the scene in the first place” explains the result. *Ellis* violated a negative duty not to harm, not a positive duty to render aid.

Newton v. Ellis might appear to support the view that today’s rich and powerful violate negative duties by *causing* harm to the world’s poor rather than simply failing to prevent harm to them. On this view, the failure to pay workers decent wages (for example) is part of the larger act that begins when corporations or landowners hire those workers—thus misfeasance rather than nonfeasance, a negative rather than a positive duty. There is something right about this way of looking at the matter but also something mistaken. What is mistaken is that, as I have argued, we do not know what condition the workers would be in if the corporations were not on the scene at all—the baseline problem. What is plausible, on the other hand, is the idea that a certain kind of *engagement* with others triggers duties that might not otherwise exist. Perhaps the world’s rich and powerful would have no duties to the poor if they had nothing

²⁶ 119 *Eng. Rep.* 424 (K.B. 1855).

²⁷ *Ibid.*, p. 428: “Here the cause of action is the making of the hole, compounded with a not putting up a light. When these are blended, the result is no more than if two positive acts were committed, such as digging the hole and throwing out the dirt: the two would make up one act.” Quoted in Ernest Weinrib, “The Case for a Duty of Rescue,” note 30. (Get complete citation.)

whatsoever to do with them. In a world of Robinson Crusoes, to use Robert Nozick's metaphor, duties between those Crusoes blessed with abundance and those in need might not exist.²⁸ But engagement creates new duties. On Pogge's view, that people everywhere in the world now inhabit a single institutional order constitutes engagement in the relevant sense and creates duties. But it does not follow that the duties are negative or arise simply from the harm principle. In such cases, I have argued, the very distinction between negative and positive duties starts to fade.

The conclusion, clearly, is not that workers and others in such cases have no rights to better treatment than they get. It is rather that these are not most plausibly construed as negative rights not to be harmed. Shue's fundamental intuition that people have basic rights to minimal economic security—to "unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care"—expresses the moral truth at issue more clearly. Such rights will sometimes require that others act, and sometimes that they refrain from acting. But it is the right to be in a certain condition (to "subsist," or better), rather than the right not to be harmed, that is the primary notion.²⁹

²⁸ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 185. Such situations may be characterized by ignorance, isolation, and inability. Presumably these affect the existence or degree of duties to aid. Our reason for thinking today's rich ought not to allow poor people to suffer is at least partly that the rich are economically and socially engaged with them in the Poggean sense. But the mere fact that the rich are aware of distant deprivation and in a position to act effectively to remedy it in ways that previous privileged people were not is also relevant.

²⁹ This idea stands in stark contrast to the libertarian view. "The particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition" (Nozick, *Anarchy, State, and Utopia*, p. 238).

VI

Shue's basic rights impose strenuous duties on both governments and individuals; Pogge's human rights demand no less. In the abstract, the existence of these rights and duties is compelling. Billions of people in the world suffer severe deprivations of basic human needs while hundreds of millions live well; the deprivations could be radically reduced, if not altogether eliminated, without excessively discomforting the comfortable. From the point of view of the universe (and perhaps not only from the point of view of the universe) the juxtaposition is obscene.³⁰ Yet beginning from the world as we now find it, beneficiaries of the current order will doubtless find the duties falling on them burdensome, and so reform of current arrangements is likely to encounter enormous resistance. Individuals, as well as collective bodies such as corporations and nations, have powerful interests in preventing such changes from occurring.

So the question is how to rearrange the world we now inhabit to reflect the moral imperatives entailed by Shue's and Pogge's views without making demands so burdensome as to ensure their failure. Or, to put it another way, how to make basic or human rights seem, especially to those who would bear the corresponding duties, like real rights, rather than something merely aspirational. The answer, I believe, depends ultimately on the psychology of individual versus collective action. By definition, most human beings are not saintly or heroic. There is a great deal of plasticity in human behavior across cultures, but within a society most people will do as others around them do. People can happily and without great sacrifice do without all sorts of things that

³⁰ It is easy to see why one would want to make the further claim that the juxtaposition is non-accidental in the sense that the rich have caused the plight of the poor. Such a claim, when true, gives another and stronger reason for action. Sometimes it will be possible to establish the claim, sometimes—partly for reasons I explored in the last section—not.

would be considered necessities in a different society, as long as they do not have to go it alone but live similarly to those around them—having what others have and foregoing what others forego, acting as others act and refraining from behavior that others also refrain from.

Several factors explain why well-being is largely relative to what others around one has.³¹ One has to do with the infrastructure of one's society and with what economists call networking effects. For example, in a city without good public transportation, you need a car to get around; in places where subways and buses are common one can do without. A second way in which well-being is relative concerns salience or availability, in the sense that psychologists use these terms. We want things partly because we see them, and we see them because others around us have them. The third and probably the most complex aspect of the relativity of well-being has to do with the status functions of goods. In every society certain things function as markers of respect and self-respect, or the lack of them; they denote a person's status relations with others. These functions are closely connected with what the economist Fred Hirsch calls "positional goods."³² The value of a positional good depends on its place in a system—on how it compares to what other people in the system have. To the extent that the value of a good is positional, the absolute amount of it is irrelevant; what matters is what one possesses compared to others. Positional goods need not be material—in many societies educational attainment is as important an example as any. Even non-remunerative

³¹ I have made these arguments at length in "Famine, Affluence, and Psychology," forthcoming in Jeffrey Schaler, ed., *Singer Under Fire* (Open Court, 2008), and "Consuming Because Others Consume," *Social Theory and Practice* 22 (1996), reprinted in David Crocker and Toby Linden, eds., *Ethics of Consumption and Global Stewardship* (Lanham, Md.: Rowman and Littlefield, 1997).

³² Fred Hirsch, *Social Limits to Growth* (Cambridge: Cambridge University Press, 1976), chapter 3; see also Robert Frank, *Choosing the Right Pond: Human Behavior and the Quest for Status* (New York: Oxford University Press, 1985).

activity such as political or philanthropic work has positional aspects. Not only can such work confer status in itself (especially if there are means of making such work widely known), but the opportunity costs of engaging in it rather than financially remunerative or otherwise self-oriented labor decline if “competitors” do likewise. Positionality also applies to institutions. Somewhat smaller profits for corporations—as a result of paying higher wages to workers, for example—would not be threatening as long as other corporations bore similar burdens, since competitive pressures would not be affected. Smaller defense budgets (the excess to be used to improve the well-being of the worst-off members of societies) would not endanger nations as long as other nations’ budgets shrank simultaneously.

But few people or institutions are sufficiently motivated to change their behavior significantly without assurance that others will as well. Coordination is required, and this is partly a matter of institutional design. Coordination matters not only at the supply side but also at the demand side. Discussing the lack of incentives to slow climate change, Jonathan Rauch notes that “There is no market for fuel-cell vehicles because they are expensive; they are expensive because there is no market for them.”³³ Solving the chicken-and-egg problem requires coordinating potential buyers—rounding up and guaranteeing orders—and presenting them to suppliers who can then cut costs in view of increased demand. The same logic of organizing markets to achieve economies of scale can be applied to drugs for malaria and other diseases, fertilizer, desalinization

³³ Jonathan Rauch, “‘This Is Not Charity’,” *The Atlantic*, October 2007, p. 75. The article describes Bill Clinton’s recent ventures that are supposed to “reinvent philanthropy.”

equipment, textbooks downloaded on the Internet, and other goods that could make life better for impoverished people in developing countries.³⁴

Recall again Shue’s assertion that “Institutional design must combine judgments about what it is fair to expect people to do, what it is efficient to ask people to do, and what it is possible to motivate people to do” (170). The three are not unrelated, for perceptions of what is fair and effective affect motivation. To make the fulfillment of basic or human rights more likely we cannot rely on virtue (certainly not on virtue alone) but must work to bind people together in collective action. Governments acting as agents for their citizens are an indispensable tool, of course, and could be much more effective in protecting the human rights not only of their own people but of others as well. There is also much to learn from experimental psychology and behavioral economics—for example, about the role of default options in influencing what people do.³⁵ Just how painless—thus “guaranteeable” and realizable—can the myriad duties Shue describes become? We need to find out.

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³⁴ Ibid., p. 76.

³⁵ For a general account, see Robert Cialdini, *Influence: Science and Practice*, 4th ed. (Boston: Allyn and Bacon, 2001); also see Eric Johnson, “Defaults Can Make a Difference in Public Policy,” forthcoming in a book edited by Eldar Shafir on Behavioral Foundations of Policy.