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OF SWEATSHOPS AND SUBSISTENCE: HABERMAS ON HUMAN RIGHTS

ABSTRACT: In this paper I argue that the discourse theoretic account of human rights defended by Jürgen Habermas contains a fruitful tension that is obscured by its dominant tendency to identify rights with legal claims. This weakness in Habermas's account becomes manifest when we examine how sweatshops diminish the secure enjoyment of subsistence, which Habermas himself (in recognition of the UDHR) recognizes as a human right. Discourse theories of human rights are unique in tying the legitimacy of human rights to democratic deliberation and consensus. So construed, their specific meaning and force is the outcome of historical political struggle. However, unlike other legal rights, they possess universal moral validity. In this paper I argue that this tension between the legal and moral aspects of human rights can be resolved if and only if human rights are conceived as moral aspirations and not simply as legal claims. In particular, I shall argue that there are two reasons why human rights must be understood as moral aspirations that function non-judicially: First, the basic human goods to which human rights provide secure access are determinable only in relation to basic human capabilities that are progressively revealed in the course of an indefinite (fully inclusive and universal) process of collective learning; second, the institutional impediments to enjoying human rights are cultural in nature and cannot be remedied by means of legal coercion.

Discourse theory (DT) distinguishes itself from other moral and legal theories by the priority it places on group deliberation as the source of rights and duties. Like other social contract theories, it insists that no norm (law) be imposed on persons without their rational consent. However, unlike Hobbesian theory, it also insists that the rationality of the consent given be impartial (oriented toward advancing the interests of each and everyone who is affected by the norm equally, free from the effects of power); unlike Kantian (Rawlsian) theory, it further insists that impartial consent be the outcome of real dialogue and not a hypothetical thought experiment.

Taken together, the impartiality and democracy conditions generate a fruitful tension. As a moral ideal (aspiration), impartiality is at best approximated in collective deliberation. The legitimacy of any agreed-upon norm is therefore at best provisional, subject to revocation in light of retrospective knowledge of constraints, inequalities, and

exclusions. When the norm in question purports to regulate the lives of every person qua human being – as human rights ostensibly do – then the process of collective deliberation is stretched to the limit. It becomes an indefinite learning process in which the meaning of basic human capabilities (and the goods that realize them) are progressively and comprehensively (viz., reflectively) brought to consciousness.

So construed, human rights designate goals or standards against which we judge *shortfalls* that any fully civilized society ought to provide its citizens. This *exclusively moral* understanding of human rights thus designates an *aspiration*, as the Preamble to the UDHR puts it, that is urged upon all of us to realize at some unspecified time in the future, without regard to our citizenship or official status. In turn, the duties and responsibilities that flow from this aspiration emerge in the course of a global dialog concerning our own human capabilities and society's failure to develop them equally and inclusively. In the words of Habermas, human rights "function . . . as sensors for exclusionary practices exercised in their name."¹

By contrast, when considered as a *decision-procedure* for resolving normative conflicts here and now – and not as a process of enlightenment – DT inclines toward a different understanding of human rights. This is evident in Habermas's assertion that human rights designate *legal claims*: "Liberal (in the narrower sense) basic rights make up the core of human rights declarations," and so "acquire the additional meaning of liberal rights against the state held by private legal subjects."² The fact that human rights are claims against juridical institutions is further underscored by Habermas when he asserts that "the discourse of human rights is also set up to provide *every* voice with a

hearing,” presumably in a court of law under the supervision of either a constitutional state or a constitutional international body (or both).

I shall argue that Habermas fails to fully appreciate the implication his two-track model of democracy (as moral learning process and juridical decision procedure) has for a theory of human rights. By focusing almost exclusively on the juridical notion of human rights as legal claims – and virtually ignoring the moral notion of human rights as aspirations – he cannot fully capture what is most distinctive about a DT theory of human rights, namely the progressive genesis of human rights in a collective process of enlightenment.

My argument is divided into six parts. The first part explains why Habermas is exclusively drawn to a juridical understanding of human rights. I maintain that none of the practical and logico-functional considerations that compel him in this direction, which invariably concern the need for a decision procedure in resolving conflicts, individually or collectively, speak against a complementary DT understanding of human rights as moral aspirations. The second part presents a challenge to a juridical conception of human rights. Sweatshops that operate within the laws of global capitalist economy invariably threaten the subsistence of workers. However, as I argue in part three, Habermas’s juridical conception of human rights can only grasp subsistence as instrumental toward exercising those human rights that are logically and functionally embedded in modern law. In so doing, it denies a human right to subsistence, understood as a relatively unconditional moral good on par with and complementary to other goods secured by human rights. Furthermore, a juridical conception of rights is relatively

impotent in remedying the cultural causes that contribute to the insecure enjoyment of subsistence within a patriarchal sweatshop culture. The fourth part of my argument reconstructs a more adequate defense of a human right to subsistence drawing from Habermas's own account of the complementarity of moral rights and duties. The fifth part extends this defense further by grounding human rights claims in a theory of human capabilities, which serves to clarify the aspirational sense of human rights. I here defend the philosophical cogency of a theory of human capabilities against familiar Habermasian objections against substantive (non-procedural) moral philosophies. I conclude my argument by showing how DT clarifies the range of negative and positive duties that bear on securing subsistence rights for sweatshop workers, including the duty of workers to emancipate themselves from patriarchal and caste institutions through discursive enlightenment.

Habermas on Human Rights: A General Overview

Most philosophers have held that rights are claims of one kind or another. Habermas is no exception. This preference is understandable given the gravity we customarily accord to rights as singling out our most important duties to act (or forbear from acting) in certain ways. Although there is much debate about whether all rights entail duties or whether rights are best understood as interests or aspirations, one thing is clear. An aspiration toward a good does not specify an agent responsible (duty-bound) to bring about that good. Thus, although many rights listed among the articles of the UDHR are best described as only aspirations (such as the right to leisure), the rights that have

been enforced through international peacekeeping intervention have been treated as legal claims which subjects have against governments and powerful leaders.

Habermas's deep appreciation for the necessity of a global human rights regime reflects this understanding as well. In the quotation cited earlier he designates "liberal rights" – or rights to freedom (of movement, of property ownership, of speech and association, etc.) - as the core human rights. These "negative rights" – or permissions to act without interference – are claims that are directed against governments. The most important institutions Habermas singles out in enforcing these rights - international courts of law (such as the ICC) and international peacekeeping bodies (the UN Security Council) – are instituted precisely to uphold these rights against severe and widespread "violations."

Here, then, is Habermas's main reason for holding that human rights are legal rights. The liberal rights that constitute the core of human rights as Habermas understands it are conceptually and functionally embedded in modern law and their enforcement is so crucial to the very existence of society that it cannot remain contingent on the caprice of private "moral" conscience. As a related matter, human rights that are only moral rights suffer from the defects of a "state of nature": their precise meaning, individual application (adjudication) and coercive enforcement are uncertain and subject to the kinds of political opportunism (witness the 2003 US-led invasion of Iraq) that critics of human rights, such as Carl Schmitt, are quick to seize upon. Without a legal decision procedure to resolve conflicting interpretations, judgments, and actions, the discourse of human rights quickly degenerates into an abyss of endless disputation.

Finally, given the need to *legitimate* specific human rights interpretations, judgments, and enforcements, legal certainty is not enough. DT insists that these “decisions” must have the support of a universal consensus. Ideally, a global public sphere would persuade the leaders of nations and international law-enforcement bodies to interpret and implement human rights in accord with evolving public opinion.

We can argue the details of Habermas’s vision but probably most of us would agree that a global human rights regime that would interpret, apply, and enforce juridically conceived “liberal” human rights is highly desirable for the reasons he mentions. At the same time, it is important to note that, for Habermas, a juridical understanding of human rights is not free-standing of moral argumentation in the way that Rawls and some other prominent theorists have argued. Human rights, he notes, are Janus-faced: they are legal rights that are grounded not in the political values, ends, and policies of a particular people but in universal morality.

That said, it remains unclear whether, according to Habermas, human rights are moral rights that embody aspirations. Habermas’s endorsement of Dworkin’s understanding of law as “interpretation” suggests an affirmative response to this query (BFN: 197ff). According to Dworkin, the meaning of any concrete legal right (rule) is always circumscribed by a coherent body of abstract moral principles. Incorporating this interpretative account of law into his own DT, Habermas underscores the “revolutionary” nature of constitutional law as an indefinite project of dialogical reflection. Democratic public opinion “interprets” the moral content of its own legal presuppositions. This content in turn circulates through parliamentary and judicial bodies, where further discussion sharpens its statutory meaning and force. The progressive inclusion and

emancipation of legal subjects through the extension of rights increasingly expands and enriches the scope of democratic public opinion, thereby leading to a new cycle of moral enlightenment and political reform.

Habermas's understanding of human rights as "sensors" for exclusion, which I cited above, recalls this dialectic. Therefore, arguing on the basis of Habermas's discourse theoretical account of constitutional law (which he extends to cosmopolitan human rights law), it is not implausible to hold that human rights also designate moral aspirations. In any case, an understanding of human rights as aspirations does not obviously conflict with an understanding of human rights as claims.

A Weakness in the Juridical Understanding of Human Rights: Structural Human Rights Abuses

The question now before us is whether a juridical understanding of human rights can undergird human rights – specifically second- and third-generation rights - that fall outside of the classical liberal model. Take the human right to subsistence. Assuming that such a human right exists and can be philosophically defended, it is far from obvious that it can also be explained juridically. As we shall see, this right is not as integral to modern law as liberal rights are. Nor can shortfalls in its secure enjoyment be as easily described as "violations" of laws (domestic or international) that have been perpetrated by governments and their proxies who are subject to punitive sanction.

The example of sweatshops illustrates how the right to subsistence can be diminished - without being violated - by impersonal economic and cultural structures for whom no discretely identifiable agent can be held responsible. In the case of sweatshops, we can distinguish between several layers of legal rights violations. First, there are violations of workers' domestic rights directly caused by employer disregard for minimum wage, workplace safety, and collective bargaining laws. Second, there are violations of workers' human rights caused by government officials and their proxies in deliberately allowing – or in extreme cases, mandating – these violations, at least insofar as these contravene international human rights conventions.

However, in addition to these legal violations we detect other causes contributing to a shortfall in sweatshop workers' secure enjoyment of subsistence. Some of these emanate from the lawful, normal operations of a market economy in which sweatshops are forced to operate on a precariously thin margin of profitability in order to meet the demands of multinational retailers and their affluent clients. The chain of sweatshop production often ends in a household where a family sub-contractor (the family patriarch) is legally defined as *self-employed – outside the framework of legal protections*. Here the distinction between employer and employed is totally effaced; the patriarch functions as the boss who oversees his wife and children. Working at the margin – or at solvency (minimum subsistence) – the patriarch dominates and exploits his family, even as he is dominated and exploited by those who subcontract his “labor.” In a context where collective bargaining does not apply, traditional gender roles function to maintain labor discipline. So here we encounter yet another institutional impediment to securing women's right to subsistence.

This example perfectly illustrates two weaknesses of a juridical understanding of human rights: its tendency to emphasize what Thomas Pogge calls an “interactional” conception of human rights which cannot easily accommodate impersonal institutional impediments to the secure enjoyment of rights; and its corresponding embrace of a “liability” model of responsibility that focuses on punishment and compensation (distributive justice) rather than on political reform aimed at eliminating class and gender domination.

The interactional conception of human rights undoubtedly captures a significant class of human rights violations. The most visible human rights violations, involving genocide, ethnic cleansing, political repression of parties and collective bargaining agents, and so on, are perpetrated by governments and their unofficial proxies (such as civilian militias). These violations arise from person-to-person *interactions* that have been commanded (or permitted) from on high. The victims here have uncontested claims against individual leaders whom they hold liable for depriving them of a basic liberty. So blatant and extreme is their suffering and servitude that we ourselves feel a deep solidarity with them. This “negative” solidarity, Habermas points out, is not similarly extended to the world’s poor, for whom we feel a “positive” but weaker solidarity.³ For this reason, he endorses aggressive international “policing” intervention in grievous cases of violent repression but not in cases of poverty, whose remedies, he feels, fall within the province of a “global domestic policy” based on voluntary multilateral treaties.

Notice, too, that the interactional understanding of human rights assigns responsibility for human rights violations according to *personal liability*. This model

defines harms as *deviations* from a *normal* background of *conventionally sanctioned hazards* that are causally traceable to the discrete actions of *individual* wrongdoers. The proper juridical reaction to holding someone personally liable for an overt crime is police intervention aimed at stopping the crime and apprehension, processing, and punishment of the perpetrator. Along with compensating the victim for her suffering, these remedies aim at restoring the status quo ante.

When we turn to the sweatshop example, we notice that the interactional/liability model only captures one aspect of a complex human rights shortfall. Following Henry Shue, let us provisionally describe a human right as a reasonable demand (claim or expectation) that others provide (reasonable) socially guaranteed protection against standard threats on one's self-esteem as a human being. In the patriarchal sweatshop, we see that government toleration of what at times amounts to forced confinement and labor (slavery) certainly fails to protect against a standard threat to one's self-esteem as a human being. Here the interactional/liability model of human rights seems appropriate. It is not appropriate, however, when addressing the threats posed to the subsistence, freedom, and self-esteem of women workers caused by the structural workings of a capitalist economy, whose law of competition forces a constant depression of wages to which only the most desperate submit. Add to this a patriarchal structure of domination that keeps women in slave-like servitude – partly with their own complicity – and we see that the standard threat to one's self-esteem as a human being is also cultural and ideological.

The structural impediment to the reasonably secure enjoyment of a human right to subsistence implicates a complex web of global causes that are only partly explicable in

terms of personal interaction and liability. True, one might hold liable the citizens who elect the leaders who appoint the bureaucrats who underwrite the multilateral treaties that maintain unjust trade, lending, and resource extraction agreements. But who does one hold responsible for capitalism and patriarchal culture? These latter institutions arise from the unintended, aggregate effects of many actions extended over many centuries. Although their source is impersonal, their effect is not, for these structures create unequal opportunities for developing and exercising human capabilities between differently positioned groups of persons.⁴

I will later argue that the presence of unequal opportunities for developing and exercising human capabilities between differently positioned groups of persons can rise to the level of a severe human rights abuse. It suffices to note that what Iris Young calls the “social connectedness” of many differently positioned persons in contributing (however unwittingly) to the maintenance of otherwise legal, human-rights abusing economic and cultural structures calls for a non-judicial response. To begin with, the abuse in question often seldom rises to the level of a clear violation. Nevertheless, even when women are allowed a modicum of freedom and subsistence within the patriarchal sweatshop, so that there is no clear violation of their right to liberty and subsistence, we can hardly conclude that others have reasonably protected them against the standard likelihood that their liberty and subsistence will be threatened in the future. The degree of abuse is always relative and protection against it never perfectly secured. Furthermore, the source of the abuse is not always susceptible to a legal remedy. It may be that massive legal reform is both necessary and sufficient to remedy the abusive injustices of a capitalist economy. However, it is unlikely that the same could be said of the abusive

injustices of patriarchal culture. Changing culturally ingrained gender roles and misogynist ideologies in a way that might empower women to fight for improved working conditions has been at best only partly affected in places where it was legally mandated. The real source for change must emerge from within a grass-roots struggle over the meaning of culture itself, specifically regarding the basic capabilities whose equal development everyone is entitled to. [disabilities?]

The Juridical Roots of a Human Right to Subsistence in Habermas's DT

Is there a resource within Habermas's DT that can be drawn from to justify a human right to subsistence? One would think so. Habermas himself recognizes that the right to subsistence is a human right, and there are important places where he develops what Thomas Pogge refers to as an "institutional" alternative to the interactional understanding of human rights that implicates legal institutions (specifically multilateral trade agreements) in maintaining economic structures that contribute to poverty. For instance, despite his insistence that liberal rights that protect negative liberty form the core of human rights, Habermas condemns neo-liberal human rights regimes that restrict human rights to "negative liberties of citizens who acquire an 'immediate' status *vis-a-vis* the global economy."⁵ Combined with his scathing indictment of global poverty and inequality, this condemnation compels him to acknowledge a right to subsistence. Indeed, in addition to endorsing the UDHR, he expressly mentions as basic "rights to the

provision of living conditions that are socially, technologically, and ecologically safeguarded".⁶

But a problem now arises with regard to justifying this human right. Unlike Rawls, Habermas does not think that the mere presumption of an overlapping consensus among the world's peoples regarding a thin list of human rights suffices to secure them the proper respect they merit. A philosophical justification is necessary. Classical liberal and political rights, he believes, have such a justification without having to stray outside the a priori procedural categories specified by DT. Social rights, by contrast, do not, and are at best contingent and derivative of classical liberal and political rights:

From a normative standpoint, according "priority" to social and cultural rights basic rights does not make sense for the simple reason that such rights only serve to secure the "fair value" [as Rawls puts it] of liberal and political basic rights, that is, the factual presuppositions for the equal opportunity to exercise individual rights.⁷

Social and cultural rights, then, do not have the same status as liberal and political rights. At best, the right to demand protection against standard threats to material well-being is a right that persons living within liberal and democratic orders can demand of their society to the extent that it is regarded as a necessary condition for achieving civic equality. Another way of putting the matter is to say that social and cultural rights more conditional than civil and political rights. Whereas the latter are necessary for possessing a minimal degree of legal status, the latter are not. Furthermore, given that Habermas

understands cosmopolitan human rights law in terms of an extension of constitutional law in which liberal and political rights are unconditional, we can understand these rights as unconditional human rights. By contrast, the right to subsistence as it is presented here is not justified intrinsically, as an unconditionally *universal* human right, but instrumentally, as a subsidiary right that might be dispensed with without jeopardizing basic self-esteem.

The justification of the equally unconditional and universal status of liberal and political rights is worked out by Habermas at several levels: The first level involves a philosophical deduction of basic categories of rights derived from the functional concept of modern law and the normative idea of rational justification. The second level involves the political process of realizing (or interpreting) these abstract principles of right in terms of constitutional rights – the site where liberal and political rights first make their appearance. The third level involves the process of statutory legislation, adjudication, and executive enforcement – the site where liberal and political rights are statutorily defined and their opportunity for equal exercise made possible through the provision of social rights.

Habermas begins by deducing three categories of basic rights that are essential to any modern legal code. The distinctive thing about this deduction is its procedural nature. Instead of appealing to substantive arguments about basic needs and capabilities that ought to be protected by right, Habermas appeals only to the formal concept of modern law and the formal concept of discursive justification. First, in modern legal systems rights must take the form of individual liberties – insofar as this form is a functional prerequisite for market societies. Neither the bare concept of an individual liberty (or

permission to act free from interference) nor the historical record of its actual implementation shows that individual liberties must be held equally by all citizens. The normative principle that all citizens must be treated as “equals under the law” - which is crucial to the modern concept of human rights - enters law from outside. According to Habermas, natural law attempts to trace this equality back to universal morality are mistaken, since the content of morality cannot be revealed through personal introspection but only through discursive justification. Hence the concept of equal treatment must be located outside of morality as well, in a more general set of norms that inform the principle of rational discourse (D) that underlies everyday communicative action coordinated by rationally-redeemable validity claims. (D) asserts that “just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse” (BFN: 107). This principle holds that valid norms must be universally acceptable as being in the equal interest of each and everyone, following fair, free, and inclusive discussion. Applied to legal rights, (D) functions as a premise from which the following rights categories can be derived (in descending order of necessity):

- I. Subjective rights (permissions) to act freely, without constraint
- II. Citizenship rights to political membership
- III. Rights to have one's rights adjudicated according to due process
- IV. Political rights to participate in legislating rights
- V. Social rights to the background conditions requisite for effectively exercising

I-IV.

Categories I-IV possess and unconditional conceptual necessity that Habermas characterizes as “equiprimordial.” Applied to the modern concept of a legal right, (D) immediately yields the first and most basic category of *subjective* rights: equal (negative) rights to individual liberty, or non-interference in the pursuit of self-chosen ends.

The second category of *citizenship* rights follows conceptually from the fact that liberty rights are claims recognized by a legal community. When combined with liberty rights, citizenship rights entail a human right to change one's citizenship status through emigration. The third category of *due process* rights follows conceptually from the fact that legal rights are claims that can be adjudicated and enforced through recognizable legal processes.

Taken together, rights to liberty, citizenship, and due process constitute what we mean by a valid *legal code*. Generated monologically (i.e., by conceptual analysis) the legal code comprises only a set of abstract principles or “unsaturated placeholders” for rights. In order to get a substantively prescriptive bill of rights, members of a constitutional convention need to apply this code to their own political deliberation. Here the principle of discourse (D) is applied a second time. Whereas it had been used to derive the bare category of an *equal*, actionable legal right, it is now used to derive *legitimate (binding)* rights; viz., both the scope and binding force of rights must be conceived as being the outcome of democratic legislation. Although the categorical scheme of rights that limits democracy from the outside is deduced authoritatively from

the bare concept of law and equal citizenship, its concrete interpretation and elaboration in the form of a system of prescriptive permissive rights must be adduced democratically. This entails a fourth category of political rights. Herein lies the basis for human rights to speak out, associate, and publish, all of which can be interpreted as negative rights, as well as positive rights to run for public office, elect leaders of one's choice, and vote in elections. Thus there exists, as Habermas puts it, an “internal relation between human rights and popular sovereignty” (BFN: 123).

Finally, because rights I-IV cannot be effectively and equally exercised by persons who suffer from extreme need or insecurity, Habermas adduces as a fifth category of rights equal rights to the opportunities and resources necessary for exercising rights I-IV, including “basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded” (BFN: 123). Importantly, whereas Habermas insists that the first four categories of right are “justified absolutely” in relation to the concept of modern law and as such must be entrenched in constitutional law, he observes that the last category of welfare rights – under which we might include subsistence – is justified only “relatively” and contingently. As we shall see below, this claim will turn out to be problematic to the extent that Habermas regards *human rights* as extensions of *constitutional rights*.

Some constitutional rights – namely those that correspond to *equal* civil and political rights (equal freedom of speech and equal freedom to participate in political deliberation and decision) are *conceptually* (logically and necessarily) implied in the constitutive rules of democratic practice, understood as a procedure of rational discussion. Other constitutional rights - to private property, personal security, freedom of

movement, and indeed all the *classical* liberal rights that originally occupied the attention of Locke and other liberal social contract theorists during the age of monarchy, are more directly related to the “grammar of the legal code” (PC, 117-18). These classical human rights, Habermas tells us, do not “have [their] origins in morality, but rather bear the imprint of individual liberties, hence of a specifically juridical concept”⁸ More precisely, although such rights appear to be moral rights because of their universal validity, this is only apparently so. This is not to deny that classical human rights are justified by moral arguments. But these arguments are unique in having an *institutional* referent. Whereas moral arguments typically appeal to the respect owed to persons in light of their humanity, or human capabilities and needs, arguments in support of classical liberal rights arise in direct response to violations of a juridical nature that emanate from the state (BFN: 191). Hence, unlike moral rights, which entail corresponding duties, liberal human rights function as *permissions* (negative freedoms) to act without fear of government constraint. The positive freedoms (*entitlements*) that can be derived from them take the form of citizenship and due process rights. Likewise, the duty to secure these freedoms falls exclusively on governments (BFN: 174).

Here we see how the procedural deduction of basic constitutional rights (the paradigm instances of what will later be known as human rights) biases Habermas’s understanding of the human right to subsistence. The right to subsistence, if it exists at all, need not (and normally does not) find constitutional support. What finds constitutional support is a liberal right (permission) to acquire and exchange property, free from arbitrary governmental interference. Constitutionally speaking, the government has a duty to protect the political, civil, and property (and contractual) rights that

comprise the first principle of justice in Rawls's and Habermas's scheme. The priority accorded liberty stands in marked contrast to the secondary status accorded social welfare. The just distribution of material resources and opportunities requisite for the full and equal exercise of liberal rights is not constitutionally guaranteed, and its satisfaction cannot be permitted if it diminishes civil and political liberty overall (viz., while tradeoffs between liberties are permitted, tradeoffs between liberty and welfare are not). Only after the most extensive liberty compatible with equal rights for all has been legally guaranteed can government then begin to satisfy the "fair value" of civil and political liberty by adopting redistributive policies that improve the worst-off without harming the better off (Rawls's Difference Principle). So satisfying the subsistence needs of citizens "fairly" is at best a duty that the government acquires contingently, as a result of legislators and citizens voluntarily deciding to incorporate this right into statutory legislation.

What is disturbing here is not the fact that social rights, unlike civil and political rights, might not be legally guaranteed in a liberal democracy (although both Rawls and Habermas insist that a liberal democracy without a government-backed social "safety net" is morally unreasonable). My example of the sweatshop shows that some of the cultural factors influencing the secure enjoyment of subsistence probably cannot be legislated. Rather, what is disturbing is that the right to subsistence as it is here presented, within a juridical derivation of rights, cannot be treated as a basic (viz., unconditional) human right on par with other human rights to civil, political, and economic freedom. Poverty deaths caused by the *lawful* (constitutionally legitimate) workings of an unjust global economic order will not count as human rights violations, but as regrettable (if avoidable) tragedies that can at best be reduced through acts of

charitable assistance and developmental aid that are by no means obligatory as a matter of human right. While utilitarians might have good reason to argue that our duties to assist others are as strong as our duties to not harm them (even requiring the self-imposition of burdens comparable to those who are the least well off) others, preferring a more libertarian approach, will demur so that the radical political reform necessary for changing abusive structures will be replaced by superficial palliative efforts at redistribution.

To summarize: Following Habermas's derivation of rights, the right to subsistence is justified instrumentally. Its function is to provide opportunities for the equal exercise of constitutionally guaranteed civil, political, and economic liberties, not the secure protection of intrinsic goods. Second, the right to subsistence, as a statutory right, exists only as a legal right that is claimed against legal institutions. It is not a claim against oppressive economic structures or traditional systems of patriarchy and racial caste that have been imposed on the poor by the cumulative aggregation of unintended consequences extending backwards in time over many generations. Not only may such structures and systems thrive within modern legal institutions, but efforts to legally reform them may be ineffectual. Third, the right to subsistence, qua legal right, is contingent. In an affluent society in which wealth is already evenly distributed, such a legal right would be unnecessary. Fourth and finally, the right to subsistence is understood as implying a positive governmental duty to redistribute opportunities and resources, contingent on citizens' sympathetic identification with their worst-off compatriots. As such, its enforcement cannot be subsumed under the central control of a

global human rights agency, whose contributing members are not linked in democratic solidarity.

The Complementarity of Human Rights in Habermas's DT

There are resources within Habermas's theory of rights that justify a human right to subsistence, two of which we have already noted: (1) an institutional account of human rights that sees human rights as claims against freedom-denying structures that have been imposed on persons without their free, rational consent and (2) an account of basic rights, including a classical liberal right to property but not excluding "rights to life and bodily integrity" (PC: 125, that have "intrinsic value" apart from "their instrumental value for democratic will formation." A third resource is his DT account of the complementarity of moral rights and duties, which would seem to imply that the right to subsistence is equiprimordial with respect to other human rights.

In his treatment of moral rights in *Justification and Application*, Habermas argues that rights that protect negative freedom (absence of restraint) do not possess priority over rights that protect positive freedom (capability and empowerment). To act freely involves the mental capacity to think and the physical capacity to move as well as the unrestricted space in which to do both. Hence a negative right not to be mentally or physically harmed (to be free from harmful interference) is meaningless unless accompanied by a positive right to mental and physical life: the free agency of a child is diminished as much by the denial of love and affection, discipline and education, as it is by the unwanted intrusion of verbal and physical assaults.

Despite this complementarity, deontological *moral* theory since Kant has traditionally privileged negative rights and duties over positive rights and duties.⁹ Some of the reasons for doing so -- that *only* the former are *unconditionally valid, determinate* in content, and *unambiguous* in address -- prove unconvincing.¹⁰ This impression is reinforced once we follow Habermas in defining freedom in terms of capabilities of self-understanding, reasoning, and moral reflection that are not innate but only emerge within a communicative (and dialogical) process of socialization. The *integrity* of the autonomous, self-empowering individual is *dependent* upon the integrity of a caring, solidaristic community wherein her freedom and personality are socially affirmed and recognized. Freedom and dependency, integrity and vulnerability, individuality and sociality are thus dialectically linked.

If we bear in mind that legal institutions function, in part, to efficiently discharge our most important moral duties, then the link between negative and positive rights can be used to generate a moral account of human rights in which the right to subsistence complements rights to security, liberty, and political empowerment. Although neither category of right can claim priority over the others, particular kinds of rights within any give category can claim priority over other kinds within that category. Within the broad category of subsistence rights the right to resources necessary for life is more basic than (and hence prior to) the right to own private property and productive assets. When property rights conflict with survival rights, the conflict must be resolved in favor of the latter. Indeed, the right to privately own and exchange “productive assets” might also conflict with rights listed under a different category, such as political empowerment. The right of private investors (owners of stock) to run enterprises through managers they elect

is arguably less prior than the right of laborers (and of the broader community who also has a stake in the enterprise) to democratically regulate their own labor and therewith the development of their productive capacities and powers. In general, the most important rights revolve around securing conditions of agency structured by communicative reciprocity and solidarity. For this reason, classical liberal property rights are not *morally prior* to basic subsistence rights, even if they are more basic from the standpoint of constitutional law (JA: 66).¹¹

Human Rights, Human Capabilities, and Human Aspirations

Unlike a classical right to property, which is clearly a legal construction, the right to life is essentially a moral idea. Its ground precedes the legal system and is nothing other than the most basic capability, need, *and interest* that humans possess as a part of their universal nature. Invoking universal human nature as a set of universal need, interests, and capabilities, however, immediately calls to mind the kind of moral realism (and moral intuitionism) that Habermas has labeled “metaphysical” (and pre-rational) and therefore in opposition to the Kantian democratic procedural idea of self-determination.¹²

Of course, there is no reason why we can’t think of human nature non-metaphysically, as capabilities and functions that evolve contingently, in response to our evolving self-understanding as a species, and that are known empirically (revealed and constituted conversationally). But there may be another reason why Habermas resists linking human rights discourse to the moral discourse of needs and capabilities. Viewing human rights in this manner also forces us to think of them in expressly non-judicial

terms. The fact that capabilities, interests, and needs imply indeterminate conditions for their actualization suggests that the concrete meaning of human rights is not exhausted by their *minimalist* claim structure. Human rights qua moral rights remain essentially and interminably disputable – a project of discursive learning that is ill-equipped to function as a consensual decision procedure for resolving disputes generated by its own moral indeterminacy. Because the moral consensus that grounds human rights is ideal and counterfactual (forever deferred), they function as *ideal aspirations*, or evolving standards of civilization, progress, and critique, quite apart from (and even in tension with) their status as legal claims to a minimally decent threshold of decent treatment.¹³

As I noted earlier, Habermas himself regards the tension between morality and legality as a productive; a bi-level model of democratic discourse in which the fruitful interplay between formal decision-making (conflict resolution) and informal deliberation (learning) ostensibly explains how constitutional projects acquire greater legitimacy in the course of comprehensively realizing moral aspirations. However, in the absence of a global constitutional basis for cosmopolitan human rights law, it may be that acknowledging the philosophical moral rationale underlying human rights jeopardizes the legal consolidation of human rights under the auspices of the ICC and the UN (a consolidation Habermas strongly endorses). For in that case, philosophical arguments – showing what human rights are about and explaining why they are important - could no longer in principle justify the exclusion of a human right to subsistence from the pantheon of legally enforceable human rights.

Here again, as a matter of related concern to proceduralists like Habermas and Rawls, any conception of human rights based on a comprehensive moral conception of

basic human flourishing might appear to violate the pluralistic tenets of political liberalism. In their opinion, such a teleological conception of human functioning would not be universally convincing to all human beings. Hence, appealing to this standard of human flourishing as a basis for legal action, critique and reform would amount to imposing a particular, non-shareable ideal on the rest of the world.

At the risk of repeating myself once more, I find this to be a strange argument from a philosopher who is convinced that cultures are conversationally open to one another, disposed to rational cooperation by the very *telos* of language itself, and therefore capable of converging toward – if not finally agreeing upon – universal interests. As Martha Nussbaum notes in her critique of Habermas, if human rights can be justified apart from their instrumental value for subjective legal freedom and democratic autonomy, this is because they intuitively capture what we – in conversation with one another – have taken to be needs and capabilities that are so integral to our understanding of human flourishing that we insist upon securing their protection and development through legal means. Put simply, Habermas has it exactly backwards. There is no reason to expect that human beings would ever reach universal consensus on human rights unless we assumed, as a regulative idea, that they already shared general interests reflective of their human mode of existence; and there is no reason to expect that they would ever reach this consensus *impartially* unless the discursive procedure on which it was based was itself a rational reconstruction of *substantive intuitions* concerning essential human functioning.¹⁴ In that case, the UN's increasing reliance on a revisable and cross-culturally negotiated list of capabilities in assessing progress in the achievement of human rights demonstrates a healthy respect for moral realism that first-

generation critical theorists also shared, albeit not uncritically, and that Habermas would be good to acknowledge as well.

Rights, Responsibilities, and Duties: Eliminating Poverty

I have argued that Habermas privileges a juridical conception of human rights that over-emphasizes the decision-procedure requirements of a regime oriented toward resolving disputes and processing claims. The result is that first-generation (liberal, civil, and political) rights are privileged over second- and third-generation (social and cultural) rights in such a way that only the former appear to be core human rights that come under legal protection. This contradicts Habermas's endorsement of the UDHR (and its specification of a right to subsistence) as well as his own account of the complementarity of moral rights, which human rights must also be, according to his own account of the dialectic of morality and legality. Besides these theoretical inconsistencies in Habermas's thinking about human rights, there are practical deficiencies in regarding human rights as exclusively juridical in nature. These deficiencies become apparent when we examine the multiple institutional causes underlying poverty, some of which, as I noted in the sweatshop example, are cultural.

I now want to address these practical deficiencies in greater detail. How does my critique of Habermas's juridical account of human rights affect our understanding of the responsibilities and duties that accompany human rights? Suppose we accept the standard assumption (contested by certain varieties of utilitarianism and other outcome-oriented approaches) that negative duties to refrain from causing harm have priority (all

things being equal) to positive duties to assist others in avoiding harm.¹⁵ What then is our highest duty in fighting poverty?

I will argue that our highest duties are political, and involve the radical transformation of social institutions that directly harm the desperately poor. In saying that they are political – and involve positive action - by no means lessens their force, which is negative and strong. Nor does it entail a specific priority in the kinds of political duties we have. Who has what duty will depend on many factors. If I am correct in thinking that cultural institutions contribute to harming the poor, then they too have a negative duty to desist from harming themselves and others by continuing to perpetuate them.

Let me begin with the weakest – but most obvious – positive duty to provide aid to the desperately poor, no matter the cause of their poverty. Thomas Pogge mentions five facts that speak in favor of this duty: (1) the existence of widespread life-threatening poverty; (2) the relatively large gap in quality of life expectations between those who suffer this poverty and those who live in the developed world; (3) the impotence of the desperately poor to change their condition on their own; (4) the pervasiveness of their poverty in effecting all aspects of their lives, and (5) the relative ease with which those in the developed world could substantially eliminate severe poverty without depriving themselves of anything important (Pogge, p. 198).

Even if the desperately poor have unwittingly caused their suffering through bad resource management, high birth rate due to their patriarchal culture, etc., we would still have a weak duty to aid them, although if we had to choose between them and members of our own community who are suffering the same it would not be unreasonable to favor the latter. Morally speaking, an interactional account of human rights would say that the

desperately poor have a claim on each of us personally. Utilitarian theorists would add that this claim is as strong as any other claim and that it requires transferring our own resources to them up to the point at which their quality of life is roughly equivalent to our own.

Utilitarian theory represents a *maximalist* - and for most people, counterintuitive - view of our moral duties vis-à-vis protecting others' right to subsistence.¹⁶

However that may be, facts (1)-(5) certainly provide the basis for a weaker positive duty to mitigate, if not eliminate, severe poverty through individual acts of charitable giving (this assumes, of course, that neo-Malthusian predictions regarding population growth do not obtain once modest standards of secure subsistence are achieved). A stronger negative duty can be generated if we accept three other conditions mentioned by Pogge: (6) the existence of an institutional order that is shaped by the better-off and imposed on the worst-off; (7) the causal contribution of this order to the radical inequality stipulated in facts (1) – (5)¹⁷ and the existence of a feasible alternative institutional order that significantly lessens this inequality;¹⁸ and (8) the absence of extra-social factors such as natural disasters and genetic incapacities, in causing this inequality.

The addition of (6)-(8) takes us to the threshold of an institutional theory of human rights; viz., the claims raised by the poor are directed against a harmful institutional order that has been imposed on them by powerful governments. Although this fact might be interpreted in interactional terms – as inculpating those of us who live in the “imposer” countries – the fact of the matter is that these structures have an origin that precedes what anyone alive today has done, deliberately or otherwise. This becomes apparent when we consider two additional facts mentioned by Pogge: (9) “the better-off

enjoy significant advantages in the use of a single natural resource (oil) from whose benefits the poor are largely, and without compensation, excluded”; and (10) the starting positions of the worse-off and better-off have emerged from a history of social injustices.

Points (6) – (10) take us to the threshold of an institutional theory of human rights of the sort that Pogge himself endorses but the language he uses to describe the workings of these institutions is still interactional and juridical. For example, point (10) refers to a past history of colonialism, slavery, and gun-boat imperialism – all actions that are *today* condemned as violations of international law. Wealthy governments committed these “crimes” with collusion of privileged accomplices within poor countries. This fact leads Pogge to frame the negative duty to desist from causing harm into a positive duty on the part of those who today continue to benefit from the crime - the descendents of those who initially committed the crime - to *compensate* those who today continue to be harmed by it – the descendents of those who initially suffered the crime. In other words, the duty to establish a GRD is framed in terms of a juridical, liability model, which mandates compensation in order to restore the plaintiff to a status quo ante.

Points (7) and (8) generate negative duties that appear to be targeted exclusively to individual leaders and their appointed bureaucrats who assume direct responsibility for negotiating and imposing unfair trade agreements, harmful borrowing conditions (that require structural adjustments such as privatizing and downsizing services, devaluing domestic currencies, etc.), forms of foreign assistance and developmental aid (that are both woefully inadequate in meeting subsistence needs and go to pockets and projects that do not benefit the desperately poor), and the like (see note 14). It is not difficult to

see how an interactive account of human rights might best explain their “liability” in perpetrating a “monumental crime against these [poor] people.”¹⁹

But the question arises: How does the juridical model apply to us - average people who are largely ill-informed about the arcane workings of international law and economics? Are we liable for harming the very poor?

Perhaps we are complicit in harming the poor (by electing our government leaders) and perhaps we have benefitted from current unjust institutions and the cumulative advantages of past crimes and perhaps, too, we are complicit and have benefitted without our knowledge. Even “innocent” accomplices and beneficiaries of injustice are duty-bound to cease in their harmful collusion (through education) and compensate or restore what they have wrongfully taken.

However, as the sweatshop example illustrates, the causal sources of poverty may reach farther than the legal and economic institutions cited by Pogge. They may implicate the very structure of capitalism itself. In that case, it is far from certain whether a juridical model of human rights involving policing (sanctioning) governments, apprehending and punishing dictators who steal from and starve their own people, and compensating victims for past harms will be adequate to eliminating radical inequality.²⁰

Pogge’s reference to the cumulative (and by current attitudes, unintended) harms descending from past acts of colonialism, slavery, and gun-boat imperialism may well indict today’s capitalist system, which might not have come into being without the primitive accumulation of capital generated by these acts. If we assume that capitalism itself is a significant contributor to global poverty, then it makes no sense to blame

anyone for making it so. And yet there is a sense in which we – and perhaps even the poor themselves – share responsibility for maintaining it.

Assuming the facts about global capitalism and sweatshop as I have presented them, and replacing the legal model of liability with the moral model of social connectedness, what responsibilities (duties) fall upon whom in upholding the right to subsistence? We can begin by accepting Pogge's assertion that we have a strong negative duty to desist from imposing on the poor the sorts of institutional arrangements that harm them. Furthermore, we now see that we may have an equally strong duty to *change* our current economic system, whose ecologically destructive growth imperative endangers everyone's right to subsistence and not just the very poor's. The emphasis is now forward-looking and political.

Let's begin small by focusing on eradicating sweatshops. Who bears what responsibility in maintaining this system and what should they do to change it? Iris Young mentions four parameters that can guide our thought in this area: power, privilege, interest, and collective ability.²¹

Who exercises most power in maintaining this system? Certainly the large retail stores who compete with one another and who insist that those wholesale and production units with whom they contract receive no more than what the market demands. Because they are unlikely to change their policies without public pressure, citizens have an obligation to publicize their responsibility for upholding the system and to publicly boycott and demonstrate against them should they refuse to pressure their production units into raising wages and improving working conditions.

Of course, local leaders may contribute to maintaining exploitative working conditions (thereby contributing to insecure subsistence) by outlawing unions or simply refusing to enforce collective bargaining and worker-safety provisions. However, they are often pressured to do so by multinationals and international lending institutions which impose regulation-free zones and the like. Ultimately, all of these – from the most powerful multinationals to the smallest sub-contractual unit of production – work under pressure from global market forces to lower costs of production (including and especially wages). Hence citizens (perhaps through their membership in NGOs) must lobby their governments to enforce collective bargaining laws both inside and outside their own borders.²²

Who is privileged within the system? Certainly the stockholders who own shares in these retail stores, for they profit the most. However, relatively affluent consumers in the developing world who purchase goods that are made cheap at the expense of those who make them also benefit from the system. Since they can afford to pay more for these goods without experiencing any hardship at all, they should be among the leaders of those demonstrating for change.

Who is most capable of collectively organizing against the system? Not all persons are equally positioned to engage in organized political action. College students are an exception because they are well educated and well informed, generally don't have to work full time or raise families, and provide a steady source of revenue to universities and colleges, who are among the biggest purchasers of sweatshop-made apparel. On the other end of the spectrum, those who work in sweatshops are often among the least

capable of organizing themselves, especially when doing so is likely to be met with violent resistance on the part of company and police enforcement agencies.

Finally, who has the most to gain from changing the system? Those who should be most interested in changing the system are, of course, sweatshop workers themselves. On the social connectedness model, they too bear some responsibility in maintaining the system to the extent that they are able to organize themselves into unions. But suppose we are dealing with domestic sweatshops under the supervision of a patriarchal sub-contractor? Here unionization seems out of the question.

In order for the women and children who work in these sweatshops to organize themselves they must not only liberate themselves from oppressive legal and economic institutions; they must liberate *themselves* from oppressive cultural institutions, among the most oppressive being gender roles and caste distinctions. The case of India is especially instructive in this regard. India has passed the equivalent of an Equal Rights Amendment for women and has officially outlawed caste discrimination (while providing affirmative action preferences for scheduled castes that have accumulated centuries of disadvantages). However, the civil code is not uniform. Alongside a secular code there exist separate religious codes for persons who are classified as Hindu, Muslim, Parsi, or Christian. Persons are enrolled in these religious classifications at birth and can exit them only with difficulty. Importantly, these codes, which govern marriage, divorce, inheritance, and support, have placed barriers women's economic equality and have contributed to the impoverishment of women as a group.²³

Over the years these religious civil codes have been amended by the Indian Parliament and the higher court to allow women more rights in some instances and not in

others. Clearly, there is a limit to what the law can accomplish in this area, but it is important not to exaggerate this limit. It is not conceptual. The family is itself an artificial construct of the law. Government regulation of the family is necessary to prevent the worst abuses suffered by women and children: rape, exploitation, forced domestic confinement, slavery, and prostitution, to mention some of the worst violations. This regulation is all the more imperative in light of the family's critical role in nurturing the basic capabilities that are the proper content of human rights protection.

However, legal regulation has its limits. As a product of custom, the family is not exclusively a legal institution. This explains why the state encounters so much resistance when it intervenes within family life. As an institution that stands partly outside legal and economic systems, it conforms to a different logic: that of a more or less voluntary association based on mutual recognition, or what Habermas calls communicative reciprocity. Arguments in support of the family as an institution that properly belongs within the "private" sphere partly play upon the ideal of family solidarity based upon open and undistorted communication between its constituent members. These arguments provide a prima facie warrant for subjecting any legal interference into the family to the highest scrutiny. However, the state's burden of proof in regulating the family is not hard to meet, for traditional patriarchal family is anything but a consensual relationship based on open and undistorted communication.²⁴

Here we have what is perhaps the most direct application of DT in the area of human rights enforcement. The most visible forms of familial domination are personal and interactional, often involving physical and psychological coercion. The less visible cultural background that legitimates this domination, however, is institutional, rooted in

shared expectations about child-bearing, child-rearing, and the distribution of spousal roles (care-giver, bread earner, household laborer, household manager, money-manager, etc.). Often it is religion or conventional custom that determines these roles, which can be very detrimental to the well-being of women and children, who are denied economic control over their lives and are accordingly condemned to a life of dependency, vulnerability, and passivity.

In cases where fulfilling these roles effectively diminishes secure access to basic goods necessary for subsistence – or, for that matter, the satisfaction of basic needs no matter their source – we may speak of a human rights abuse. Here the claimant in question is seldom in a position to press her claim (and may not even recognize it, due to her adaptive preference for maintaining the status quo). Even if she could, it would be unclear to whom she would press it. But an institutional account of human rights can remedy this problem: it is the religious or conventional institution in which these roles are imposed (through the sheer weight of traditional authority) that stands indicted.

In cases where law is not the most effective way to change custom, another – pedagogical – form of political practice is required. Women must come to see themselves and their relationship to their religion and community differently. Because the needs for community and religion (or an equivalent source for meaning, purpose, and identity) are basic needs as well as capabilities that can be more or less developed, simple emancipation from tradition is unrealistic. Instead, political pedagogy must be aimed at showing – in a manner that is respectful of women’s cultural identities – that women can become economically self-reliant, or acquire roles that provide them with more secure access to subsistence and therewith provide them with greater equality from within their

inherited (or otherwise preferred) cultural identities. This is one measure that must be undertaken at the micro-level, in the domestic sweatshop industry where all too often traditional gender roles conspire to victimize women, who are under rule and thumb of their husbands (who, of course, are also victimized in turn by those who sub-contract their labor).

To conclude, DT has application in reasoning about human rights and our corresponding duties regardless of what parameter of responsibility we choose, but this only becomes apparent once we understand that the problem of human rights abuse – and not just the problem of human rights definition - is political (forward-looking) and not merely juridical (backward-looking). Privileging liberal and political rights (as Habermas's juridical derivation of rights does) obscures this fact because it cedes responsibility for defining (legislating), adjudicating, and enforcing human rights to formal legal institutions. No matter how political these institutions may be, their formal discourse is always oriented toward decision grounded in a pre-existing legal authoritative: the constitution (or a court-centered proxy). Only when we examine social and cultural human rights do we see that the definition and enforcement of human rights is fundamentally political and forward-looking, a philosophical matter of dialogically clarifying who we as persons and as individuals are.

¹ Jürgen Habermas, *The Post-National Constellation: Political Essays* (Cambridge, MA: MIT, 2001), 120. Hereafter PC.

² Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), 174. Hereafter, BFN.

³ Habermas, *The Divided West* (Cambridge: Polity Press, 2006), 79-80;177-78;139-43.

⁴ See Iris Young, "Responsibility, Connection, and Global Labor Justice," in *Global Challenges: War, Self-Determination, and Responsibility for Justice* (Cambridge: Polity, 2007), 159-86.

⁵ Jürgen Habermas, *The Divided West*, 186. Hereafter, DW.

⁶ BFN, 123.

⁷ PC, 125. Habermas's makes this assertion in response to a complaint made by the signatories to the 1993 Bangkok Declaration, represented by Taiwan, China, Malaysia, and Singapore. This complaint questions the priority of rights over duties and, more importantly, the priority of civil and political rights over social and cultural rights. Reversing the Western privileging of classical, civil, and political human rights, the signatories to the Declaration argued that postponing classical, civil and political human rights for the sake of satisfying material needs is justifiable for two reasons: First, civil and political freedom is not as important to starving persons as subsistence and therefore the former must be consequent upon the latter. Second, civil and political freedom may obstruct economic progress by generating social conflict. Habermas does not deny that classical *individual* freedoms associated with modern capitalist conceptions of property and market exchange, as well as civil and political liberties, can cause the disintegration of traditional *collectivist* societies; nor does he deny the fact that severely impoverished persons lack material resources and capabilities that enable them to enjoy classical, civil, and political rights. Rather than refute these objections to the Western conception and ranking of human rights, he notes that no country undergoing capitalist modernization can fail to institutionalize this legal conception of human rights. The unavoidable legal institutionalization of classical property rights and market freedoms that signatory nations to the Bangkok Declaration have already undertaken sets in motion an irrepressible demand for civil and political freedom. Free people demand not only efficient government but legitimate government. Furthermore, the prerequisites for democratic legitimation counterbalance the *egoistic individualism* unleashed by these rights; for they presuppose a high degree of *solidarity* among citizens who recognize themselves as masters of their own *collective* fate. It is this democratic equality that obligates citizens to guarantee everyone an equal right to subsistence in matters of education, health, security, and welfare.

⁸ J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity, 1999), 109.

⁹ In Habermas's opinion, this error follows from conceiving moral reasoning monologically. If, following Kant, we imagine that moral reasoning requires abstracting from contingent material interests (such as interests in health, education, and welfare) and identifying with a pure "rational will" that is given within each of us as a matter of pre-established harmony, then we must also imagine that the main rational interest each of us possesses in common with others is our interest in protecting our *negative freedom* as individuals against interference from others.

¹⁰ Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (Cambridge, MA: MIT Press, 1993 – hereafter JA), 64. Traditionally it has been supposed that our negative duty to refrain from harming or constraining others is unconditional in comparison to our positive duty to (say) provide needy persons with the material resources necessary for leading a minimally decent life. For Kant, the latter duties are "imperfect" in that individuals are permitted to exercise a wide degree of discretion as to when and to whom (and how much) they lend assistance, depending on their capacity to give aid. Furthermore, it has been argued that, while negative duties are determinate in what they command and unambiguous with regard to whom – the command against killing other persons is unquestioningly addressed to each of us – positive duties are not. For example, who is responsible for fulfilling our positive duty to aid starving people? And by what positive measures should it be fulfilled – famine relief, developmental assistance, elimination of incentives that produce corrupt regimes that rob from their own people, redistribution of social product, transformation of global capitalism, or some combination of the above?

Habermas argues that differences between negative and positive duties diminish once we realize that, from a discourse theoretic perspective, the most basic duty inscribed in the moral point of view is not the duty to leave others alone but the duty to *respect their integrity* as fellow participants in a communicative community structured in accordance with justice and solidarity. This duty entails not only a negative duty to refrain from harming and constraining others but a positive duty to treat others with equal respect. Even Kant's list of negative duties, such as the duty not to lie, retains a positive valence insofar as we are commanded to keep our promises and to tell the truth (JA: 66-7).

Second, Habermas notes that the unconditional nature of negative duties is largely heuristic and not conceptual, since even norms that command negative duties at best possess *prima facie* (conditional) validity until they are applied to concrete circumstances. The command forbidding killing, for example, admits of exceptions in cases involving justified self-defense. Indeed, when the question of their positive enforcement arises, negative duties can be just as indeterminate in what they prescribe as positive duties. Persons not only have a right not to be interfered with, but they have this right as a claim against the rest of us, a claim we are obligated to positively guarantee. Questions about how to best guarantee this negative right raise pragmatic questions about who should be responsible for doing so and by what means. The need to safeguard populations from terrorist attacks shows that the law enforcement measures and agencies best equipped for implementing security rights are costly and controversial to the point of being quite indeterminate (JA: 64).

¹¹ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2d ed. (Princeton: Princeton University Press, 1996). Shue criticized Rawls's earlier neglect of a human right to subsistence (which Rawls later rectified in *The Law of Peoples*) by arguing that subsistence and security rights were essential to realizing any right whatsoever. According to Shue, rights are reasonable demands made on others to provide socially guaranteed protection against standard threats on one's self-esteem as a human being (*Basic Rights*, 31). Just as subsistence-deprived persons are more vulnerable to coercive threats on their freedom and person, so too persons who are threatened with coercion are less free to access subsistence. (During the Central American Wars from the seventies through the mid-nineties, it was not failure to provide foreign aid that contributed to worsening poverty in the region but rather the kind of aid that was given – in the form of U.S. military hardware – which increased the insecurity of workers and peasants exponentially in the face of government-sponsored oppression and genocide.) Although Shue maintained that political rights were almost as basic as security and subsistence rights, he allowed that it was theoretically conceivable that a benevolent dictator might guarantee the latter. Furthermore, Shue denied that cultural rights – the right to culture in general or the right to a particular culture – were as basic as rights to subsistence and security. However, in the second edition of *Basic Rights*, Shue allowed that access to education might be necessary for defending and securing basic rights. Following Habermas and Pogge (against Rawls) I would insist that liberal democratic rights are equally basic; following Kymlicka I would argue that cultural rights – and not just the right to education – are also basic, since an essential part of one's self-esteem, identity, and capacity for strong value judgment and choice (in the sense articulated by Charles Taylor and other communitarians) is freedom to practice the cultural folkways that one has inherited or chosen. For a defense of these claims see David Ingram, *Group Rights: Recognizing Equality and Difference* (Lawrence, KS: University Press of Kansas, 2002), ch. 12; and *Rights, Democracy, and Fulfillment in the Era of Identity Politics: Principled Compromises in a Compromised World* (Lanham, Md: Rowman & Littlefield, 2004), chs. 6 and 7. See Shue, *Basic Rights*, 74-75; 117-118; 163; and W. Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989).

¹² Jürgen Habermas, *Truth and Justification* (Cambridge, MA: MIT Press, 2003), ch. 6.

¹³ Martha Nussbaum captures the distinction between rights as claims for minimally decent treatment and rights as aspirations in her distinction between basic capabilities, which are innate potentials, and combined capabilities, which are fully mature capabilities that possess the additional environmental supports and “social bases” in which to develop further. See M. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000), 16ff.

¹⁴ Nussbaum, *Women and Human Development*, 150n.83. Nussbaum doesn't deny the value of a clarifying procedure – such as inclusive, fair, and uninhibited rational discourse – for adducing (basic) substantive rights and capabilities; she just thinks that the design of such a procedure must itself depend upon a tacit appeal to our intuitive understanding of (basic) substantive rights and capabilities. The circular relationship between intuitive substantive “fixed judgements” and our qualifying procedures of rational deliberation is

precisely what Rawls had in mind in introducing the notion of “reflective equilibrium.”

¹⁵ Pogge, Shue, and Waldron note that human rights duties generally fall into three broad categories (in decreasing order of strength): duties to avoid harming a person in the enjoyment of a human right; duties to protect against other persons and institutions from harming a person in the enjoyment of a human right; and duties to aid a person who is deprived of the secure enjoyment of human rights, whether through human failure or through purely natural causes. As Pogge notes, our first-wave duty to avoid harming strangers is at least as strong as our duty to avoid harming consociates (indeed, our duty to repair harm done to strangers may even be greater than our duty to do the same with respect to consociates). Conversely, our second- and third-wave duty to protect and aid may be great with respect to consociates than with strangers. That said, the relative strength of our duties is largely conditioned by situational features, including the resources, capabilities, and opportunities we have for realistically effecting relief and, last but not least, our psychological capacities and accumulated debt to others (assuming that it is unjust that between two persons who are equally placed one has aided more than another). See, Shue, *Basic Rights*, 165; T. Pogge, *World Poverty and Human Rights* (London: Polity, 2002), 132; and Waldron, *Liberal Rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993), 25.

¹⁶ Peter Singer, “Famine, Affluence, and Morality,” *Philosophy and Public Affairs* 1 (1972): 229-43.

¹⁷ Pogge cites a number of harmful legal institutions that are imposed on the poor without their consent. Some of them are unfair trade agreements that permit wealthy nations to protect their domestic industries with tariffs and subsidies while denying these same privileges to the poor (thereby enabling wealthy countries to weaken the domestic economies of poorer countries by “dumping” their discounted exports on their markets) (idem, 16). Others include conventions of international law that bestow legitimacy on dictators in resource-rich impoverished nations so that these criminals can sell their nation’s resources at discounted rates to developed countries or use them as collateral for borrowing and purchasing, among other things, the military hardware that keeps them in power (in other words, contrary to an “explanatory nationalism” that would pin the blame for corruption-induced poverty on poor people, it is really the governments of wealthy countries who benefit the most from discounted resources who conspire with military dictators in overthrowing democratic regimes) (22-3). Although Pogge also implicates the policies imposed by economic institutions such as the WTO, IMF, WB, OECD in causing poverty, he expressly distances himself from a Left critique of capitalism and its structures, arguing that eliminating poverty needn’t require a drastic overthrow of the current system (24). Whether this view is adopted on grounds of expediency or principle remains unclear (in a personal exchange with the author, Pogge allowed that capitalism may indeed be an unjust and intolerably (ecologically) catastrophic system).

¹⁸ Pogge’s alternative institutional set contains a complex mix of legal, political, and economic institutions. Pogge believes that ending the system of protective tariffs and subsidies alone would generate a transfer of \$700 billion in exchange to developing countries - \$400 billion more than the \$300 billion required to eliminate severe poverty (18). He also proposes the democratization of the world – the delegitimation of corrupt dictatorships - through international military intervention and/or a system of disincentives (ending the international resource and loan privileges, for instance). Implementing this system would require setting up an international Democracy Panel as well as an International Democratic Loan Guarantee Fund (155-67). Finally, Pogge proposes a Global Resources Dividend (GRD) generated from taxes imposed on resources whose extraction is easily monitored and whose consumption is ecologically destructive. A \$2 per barrel tax imposed on the extractors of crude oil alone (which would be passed down to the consumers in the form of a 5-cent increase in the cost of a gallon of petrol) would presumably generate 18 per cent of the initial high-end cost required to eliminate poverty. This initial fund Pogge contends, would raise 67 times as much money as is now spent by all developing countries together in satisfying basic subsistence needs (\$4.65 billion) without requiring any alteration of the current economic system. The GRD would also have to be backed up by trade and loan sanctions and disbursements of the dividend would have to be closely monitored (and perhaps implemented) by NGOs, the UN, or other international agencies to insure that it goes to the neediest (205-08).

¹⁹ Pogge, 16.

²⁰ David Schweickart, “Global Poverty: Alternative Perspectives on What We Should Do – and Why,” *Journal of Social Philosophy* 39/4: 471-91.

²¹ Young, 183-86.

²² It is sometimes maintained that sweatshops are not unjust, because those who work in them do so freely,

and in any case do not suffer deprivations of subsistence, and in fact are often able to earn higher wages than they would in production units geared solely toward domestic consumption. Furthermore, it is argued that popular campaigns against workshops are misplaced since raising a subsistence wage will discourage further hiring (perhaps compelling relocation of the industry) and increase inequality. The last “utilitarian” argument is easy to refute. Since labor costs are a marginal part of total costs (typically less than 6% of the retail price), and increases in labor costs are passed down to consumers in affluent countries, where demand for designer products is relatively inelastic, raising wages significantly will not result in decreasing employment (as studies on minimum wage increases in industrialized societies has amply demonstrated). It is unlikely that industries would relocate to lower-wage zones unless they were guaranteed substantial savings since the difference in wage scales between any two low-wage zones is small (and if they did, so much the better for those “worst off” who gain the new jobs). Even if raising wages resulted in laying off workers, adding to the mass of those already unemployed will not lower their wages, since they are already rock-bottom. Indeed, Keynesians will argue that the increased wages of the employed will spur demand and lead to the creation of new jobs. The justice and human-rights arguments are also defeasible. Structural injustice is simply that: the imposition of structures that provide unequal opportunities for securing access to subsistence and therewith the satisfaction of basic needs and human capabilities. It matters not that those who work in sweatshops do so freely since the injustice (and coercion) in this case stems from a structural diminution of opportunities. While those who work in sweatshops may indeed receive subsistence (and even above subsistence) wages, their access to subsistence is dependent on those who have absolute power over them – their bosses – and is therefore insecure. Moreover, because subsistence itself is relative to increased needs and opportunities for developing capabilities, minimum subsistence wages – especially in industrial sectors – are invariably experienced as sub-subsistence. Hence enjoyment of a human right to subsistence has been impeded. See Young, *Global Challenges*, 164-67; “Garment Industry Subcontracting and Workers’ Rights,” *Women Working World Wide*, at www.cleanclothes.org; Saba Gul Khattak, “Subcontracted Work and Gender Relations: The Case of Pakistan,” in Radhika Balakrishnan, ed., *The Hidden Assembly Line: Gender Dynamics of Subcontracted Work in a Global Economy* (Bloomfield, CT: Kumarian Press, 2002), 35-62; Robert Pollin and Stephanie Luce, *The Living Wage: Building a Fair Economy* (New York: New Press, 1998); and David Schweickart, “The Wages of Nike/The Wages of Sin: Commentary on Ian Maitland, ‘The Wages of Nike’” (unpublished ms).

²³ See Nussbaum, *Women and Human Development*, 21-30, 212 ff.

²⁴ Nussbaum argues that Rawls’s ambiguous treatment of the family – as at once a part of the “basic structure” of society that requires legal regulation and as a quasi-private association that is at best “indirectly” effected by the law presumes that the family is entirely a legal construct. In India, where family law is partly defined by religious custom, this makes some sense. However, even here – not to mention in more secular contexts – there remains a “consensual” aspect of the family that properly falls within the private sphere and which, therefore, is not (and perhaps ought not to be) directly regulated. Private religious institutions, for instance, may well practice forms of gender, racial, and sexual orientation discrimination that are rightly outlawed in the public sphere but which cannot (and ought not) be legally outlawed within these institutional settings, so long as membership within them is consensual and exit options are available (a condition that may not always be met in some practices, such as those of fundamentalist Mormons, who recruit wives into polygamous marriages at a very early age and closely monitor their behavior). That said, these forms of discriminatory relationships may still impede the full enjoyment of human rights by some who have consented to them. While legal intervention may be appropriate remedies for counteracting the coercive pressuring of under-age women into exploitative relationships of dependency and abuse, it may not be in others. Nussbaum herself recognizes that some consensual arrangements that adversely impact the full enjoyment of human rights, such as *pardah* (the seclusion of women from public view practiced by some Muslims), may at best be regulated to prevent the worst abuses while less severe abuses will have to be counteracted through education and consciousness-raising (*Women and Human Development*, 237 ff).