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INTRODUCTION¹

If subsistence includes unpolluted air and water, adequate food, clothing, and shelter, and minimal preventive health care, then approximately one billion people worldwide (most of them children) live at or near the level of minimal subsistence. In view of the magnitude of the problem, it is striking, and to many shocking and/or hypocritical, that the United States has failed to recognize a human right to a minimal subsistence. On the contrary, U.S. policy is based on a distinction between two kinds of rights found in the United Nations International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The former are often called "negative" rights, because they have as correlative duties on the part of other person's only duties against interference. The latter are often called "positive" rights because they have as correlative duties those to aid or assist bearers of positive rights. Furthermore, U.S. policy formally recognizes only negative rights. Thus, since the right to a minimal subsistence is a positive right to receive the means of subsistence, it is not formally recognized as a human right in U.S. policy.

In *Basic Rights*, Henry Shue argues that there are basic rights, including the right to minimal subsistence.² Shue contends that the failure to recognize a right to subsistence rests upon the acceptance of a false dichotomy between negative and positive rights. In place of that dichotomy, Shue develops a set of triple duties correlative to all basic rights. In the first edition of the book, he concluded that there should be serious substantive changes in United States foreign policy, beginning with ratification of the Covenant on Economic, Social and Cultural Rights.³

This paper examines Shue's defense of basic rights and his rejection of the negative-positive rights dichotomy. The first section examines his argument for a basic right to a minimal subsistence. The second section examines his critique of the negative-positive rights dichotomy. The conclusion maintains that both fail because although Shue claims that his argument for basic rights is solely a conceptual or analytical argument, it nevertheless rests on moral reasons that do not support a purely conceptual, rather than moral, argument.

THE BASIC RIGHT TO SUBSISTENCE

Shue's argument for the basic right to subsistence employs two central concepts, that of a moral right and that of a basic right. Three features characterize Shue's concept of a moral right:

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)

While it is not necessary that every moral right have all three features, every basic right must. Social guarantees against standard threats imply that some effective arrangements must be established to provide a reasonable level of protection, and the notion of a standard threat functions to specify this level.

According to Shue, what is distinctive about *basic* rights is that "enjoyment of them is essential to the enjoyment of all other rights." (19) The enjoyment of basic rights is a necessary condition for the enjoyment of other moral rights. While non-basic rights may be sacrificed for basic rights, the latter may not be sacrificed for non-basic rights, for that would be self-defeating. If basic rights are denied, then no other rights can be enjoyed. Thus, Shue claims that basic rights "are everyone's minimum reasonable demands upon the rest of humanity." (19)

Shue's strategy in defending a basic right to subsistence is to argue that if there is a (negative) right to physical security, then by that same argument form there is a (positive) right to subsistence. The argument for a basic right to physical security is:

No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right. Such threats to physical security are among the most serious and--in much of the world--the most widespread hindrances to the enjoyment of any right. If any right is to be exercised except at great risk, physical security must be protected. (21)

A basic right to security is necessary, for "its absence would leave available extremely effective means for others, including the government, to interfere with or prevent the actual exercise of any other rights that were supposedly protected." (21)

The argument for a basic right to subsistence parallels the argument for the basic right to physical security:

No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life. Deficiencies in the means of subsistence can be just as fatal, incapacitating, or painful as violations of physical security. The resulting damage or death can at least as decisively prevent the enjoyment of any right as can the effects of security violations. (24)

As in the physical security argument, a basic right is asserted on the grounds that it is necessary for the enjoyment of other rights.

Arguments for basic rights, Shue explains, have the following structure:

1. Everyone has a right to something.
2. Some other things are necessary for enjoying the first thing as a right, whatever the first thing is.
3. Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right. (31)

Two important points about this argument structure are clarified by Shue. First, the argument "is based upon what it normally means for anything to be a right or, in other words, upon the concept of a right." (31) The concept of a moral right, it will be recalled, was characterized in terms of a justified demand that the enjoyment of a substance be socially guaranteed. Hence, the second premise and the conclusion include the notion of "*enjoying* the first thing as a right." The inclusion of this notion in the argument structure will play a central role in my critique of Shue's argument.

The second point is that the argument structure employs the notion of "conceptual necessity": ...it is essential to interpret "necessary" in the restricted sense of "made essential by the very concept of a right." The "other things" include not whatever would be convenient or useful, but only what is indispensable to anything else's being enjoyed as a right. Nothing will turn out to be necessary...for the enjoyment of any right unless it is also necessary for the enjoyment of every right and is, for precisely this reason, qualified to be the substance of a basic right. (31)

The notion of "necessity" here is, Shue says, "analytic": "It is analytically necessary that if people are to be provided with a right, their enjoyment of the substance of the right must be protected against the typical major threats." (32-33)

My first objection concerns Shue's characterization of a moral right as including the feature of the enjoyment or exercise of a right. ⁴ This feature is central to Shue's argument for a basic right, because basic rights are defined in terms of what is necessary for exercising other moral rights: "the enjoyment of them is essential to the enjoyment of all other rights." (31) In fact, if enjoyment of a right is a feature of the concept of a moral right, then basic rights follow analytically from that concept. But if enjoyment is not a feature of the concept of a moral right, then by definition there are no basic rights. It would seem that enjoyment is not a feature of the concept of a moral right. There is a well-accepted distinction between having a right and exercising a right, which, as we will shortly see, Shue himself makes. It seems patent that a person might have a right that he or she cannot exercise or enjoy. So exercise or enjoyment do not follow analytically from the concept of a moral right. The objection is that Shue's argument for basic rights fails because he has built the feature of enjoyment into the concept of a moral right, thus begging the question.

Apparently, however, Shue anticipates this objection. Thus, while recognizing the distinction between having and exercising a right, he maintains that merely having a right means very little:

It is not merely that people should "have" their other rights in some merely legalistic or otherwise abstract sense compatible with being unable to make any use of the substance of the right. For example, if people have rights to free association, they ought not merely to "have" the rights to free association but also to enjoy their free association itself. Their freedom of association ought to be provided for by the relevant social institutions. (20)

Furthermore, in discussing the objection that he blurs the distinction between a right to physical security and a right to be protected against assaults on physical security, Shue argues that this distinction might make sense in a wilderness situation where people rarely meet, but "in an organized society...no one would have much interest in the bare rights to physical security. What people want and need...is the protection of their rights...it is the rights-to-be-protected-against-

assaults that any reasonable person would demand from society." (38)

This response maintains that people *morally* ought to be able to enjoy, not merely have, moral rights, and that such enjoyment ought to be provided by social institutions. Thus the response appeals to moral reasons ("What people want and need") as grounds for why people ought to be able to enjoy rights. However, Shue's argument for basic rights contends that enjoyment is a feature of the concept of a moral right, a concept derived from a *description* of the usage of the term "moral right." This response therefore confuses the difference between the concept of a term and how the concept morally ought to be viewed. To build enjoyment into the concept of a moral right, for moral reasons, would defeat Shue's project of establishing basic rights on conceptual grounds. Ordinary or normal usage of the term "moral right" supports a distinction between having and enjoying a right, a distinction that Shue himself recognizes.⁵

To respond to the objection Shue must take the position that enjoyment is in fact a feature of the concept of a moral right. Indeed, Shue takes this position:

...the list of features is, not the premises for, but the conclusion from, the detailed description of individual rights considered in the body of the book. Thus, the order of presentation is not the order of derivation. These general features were distilled from the cases of security rights, subsistence rights, and liberty rights discussed in the first three chapters. (183)

In formulating the concept of a moral right, then, Shue attempts to remain faithful to an acceptable description of rights.⁶

The problem with this response is that Shue's characterization of a moral right is derived from descriptions of the rights to security, subsistence, and liberty that are replete with the terms "enjoyment" and "exercise." The question then becomes: Is Shue justified in describing rights in these terms? His book provides no response to this question. Nor can it, because any acceptable description of moral rights will distinguish between having and exercising a right, even if it is true that merely having a right means very little or nothing. But if enjoyment is not a feature of the concept of a right, then Shue's concept of a moral right must be rejected because it is not a concept that reflects the meaning of the term "moral right" in ordinary usage among English speakers and writers.

Without the requirement of enjoyment, however, Shue's argument for basic rights fails. This may be seen by re-formulating the structure of the argument for basic rights in the following way:

1. Everyone has a non-basic right to something.
2. Having a right means enjoying a right.
3. Some things are necessary for enjoying a non-basic right.
4. The things necessary for enjoying non-basic rights are basic rights.
5. Therefore there are basic rights.

Steps 3, 4, and 5 presuppose the truth of the second premise. I have argued that Shue provides no relevant argument for this premise, other than a moral argument that would defeat his attempt to give a conceptual argument.

I turn now to the third feature of a moral right, the social guarantee enforcing the enjoyment of moral rights. Shue offers several rationales for the social guarantee requirement. First, Shue maintains that the social guarantee is "probably the most important aspect of a standard right, because it is the aspect that necessitates correlative duties." (16) He continues:

An alleged right that did not include a demand for social guarantees, in the sense of arrangements made by, or with, some of or all the rest of humanity, would be a right with no correlative duties, with nothing required of others, and this would not be a normal right at all but something more like a wish, a dream, or a plea. (75)

Shue's argument is that since a moral right with no correlative duties is not "a normal right," and since correlative duties imply social guarantees, therefore moral rights imply social guarantees.

But it seems false that social guarantees are necessary conditions for the existence of correlative duties. Without social guarantees, the correlative duties would still hold, though they might not be enforced. This is not to deny the importance of social guarantees, but only that duties correlative to rights exist independently of their enforcement. Of course where social guarantees are lacking, duties may be ignored, but this means that rights are violated. Were this not the case, Shue would have to hold the absurd position that, where there are no social guarantees, no rights can be violated because no duties exist.

Where there are no social guarantees-- in the wilderness or the desert, for example--the moral duty not to violate rights still exists. And in such situations we say that people have rights, and that their rights may, or may not, be violated. Suppose that in the wilderness a helpless person is robbed and murdered: by hypothesis, there are no social guarantees, but the person's rights have been violated. Or suppose that helpless person is not robbed and murdered: her rights have not been violated. In either case, the helpless person has rights, even if there are no social guarantees. In the first case, the helpless person was denied the opportunity to enjoy her rights, but she had rights that were violated. In the second case, she had rights that she could enjoy because her rights were not violated. Thus, Shue is mistaken to collapse the distinction between having and enjoying rights.

As a second rationale, Shue links social guarantees to the purposes of morality, moral rights, and basic rights:

...one of the chief purposes of morality in general, and certainly of conceptions of rights, and of basic rights above all, is indeed to provide some minimal protection against utter helplessness to those too weak to protect themselves. Basic rights are a shield for the defenseless against at least some of the more devastating and more common of life's threats...Basic rights are an attempt to give to the powerless a veto over some of the forces that would otherwise harm them the most. (18)

In response to the question, "Why are security and subsistence basic rights?"

Shue replies:

Each is essential to a normal healthy life. Because actual deprivation of either can be so very serious--potentially incapacitating, crippling, or fatal--even the threatened

deprivation of either can be a powerful weapon against anyone whose security or subsistence is not in fact socially guaranteed. (29)

Similarly, Shue writes:

Without security or subsistence one is helpless, and consequently one may also be helpless to protect whatever can be protected only at the risk of security or subsistence. Therefore, security and subsistence must be socially guaranteed, if any rights are to be enjoyed. (30)

Social guarantees are required, then, for the protection of the helpless, whose enjoyment of security and subsistence is vulnerable without social guarantees.

This rationale for the social guarantees feature of the concept of a moral right is subject to one of the same objections to the enjoyment feature: it is a moral argument to the effect that social guarantees morally ought to be provided, not an argument about the concept of a moral right, and therefore provides no support for Shue's attempt to provide a conceptual argument. Legions of helpless human beings are not only vulnerable, but too often tragically vulnerable. For them, something should be done, or millions of them will suffer and/or die. This is a strong reason for having social guarantees, but it is not a reason for building social guarantees into the concept of a moral right. Millions of humans suffer and die where social guarantees do not exist, but one reason why there should be social guarantees is to protect the rights that those humans *have* as human beings. With social guarantees, those humans would be able to exercise and enjoy the human rights that they *have*.

I conclude that two of Shue's three features of a moral right are not adequately defended by Shue. Indeed, as the concept is ordinarily used, neither enjoyment nor a social guarantee seems to be included in the ordinary meaning of "a moral right." On the contrary, Shue seems to have built both features into *his* concept of a moral right precisely for *moral* reasons.⁷ While there may be moral support for doing so, Shue claims that his is a conceptual or analytical argument for basic rights. The moral reasons, however convincing they may be, are irrelevant to the argument Shue purports to be making for basic rights.

NEGATIVE AND POSITIVE RIGHTS

Shue argues that all moral rights have negative and positive aspects, and that therefore there are no purely negative or positive rights, but only "mixed" rights. Thus, the basic right to physical security implies a correlative duty on the part of all others not to violate a person's physical security, but, Shue adds, "it is impossible *to protect* anyone's rights to physical security without taking, or making payments toward the taking of, a wide range of positive actions," such as police forces and criminal courts. (37) Positive measures are therefore necessary for the *protection* of a so-called "negative" right. "The central core of the right," Shue adds, "is a right that others not act in certain ways. But the mere core of the right indicates little about the social institutions needed to secure it, and the core of the right does not contain its whole structure." (39)

The "positive" right to subsistence implies a correlative duty on others to aid those who lack the means of subsistence. Shue notes that "All that is sometimes necessary is to protect the persons

whose subsistence is threatened from individuals and institutions that will otherwise intentionally or unintentionally harm them." (40) The right to subsistence may therefore be provided even without the provision by others of aid or commodities: "A demand for the fulfillment of rights to subsistence may involve not a demand to be provided with grants of commodities but merely a demand to be provided some opportunity for supporting oneself." (40) Thus, a subsistence right may involve nothing more than a demand "to be allowed to be self-supporting on the basis of one's own hard work." (40) Thus, a "positive" right implies a correlative duty to avoid depriving others of their only available means of subsistence, as well as a duty to aid the deprived.

Shue proposes that all basic rights (and perhaps all moral rights) have a set of three correlative duties: to avoid depriving; to protect from deprivation; and to aid the deprived. To Shue, "What is striking is the similarity between protection against the destruction of the basis for supporting oneself and protection against assaults upon one's physical security." (40) Indeed, protection by social guarantees is the basis for Shue's rejection of the negative-positive rights dichotomy: the "positive" aspect of a basic right to physical security follows from the need for protection, and protection is required to prevent deprivation of one's subsistence. Without protection, the basic right to physical security would be a bare "negative" right with correlative duties only to avoid depriving a person of physical security. Again, without protection, the basic right to subsistence would be a "mixed" right with correlative duties to avoid depriving and to aid the deprived. Consequently, without the protection requirement the basic idea of the negative-positive rights dichotomy would remain intact: only a positive right would include a correlative duty to provide aid.

Shue rejects the position that if one is entitled to enjoy a right, then that enjoyment consists only in non-interference by others. His rejection rests on his contention that persons are entitled to protection of their rights, and protection leads to a rejection of the dichotomy between negative and positive rights. But his argument against the dichotomy *assumes* that social guarantees are part of the ordinary meaning of the concept of a moral right. I argued in the previous section that Shue's arguments for including social guarantees in the concept of a moral right are unconvincing. Hence, I also find his argument against the negative-positive rights dichotomy equally unconvincing.

CONCLUSION

I conclude that Shue's defense of basic rights and rejection of the negative-positive rights distinction fails. The central argument of this paper is that Shue does not present a purely conceptual or analytical argument for basic (positive) rights, as he claims to do, because he imports moral reasons into his purported conceptual argument. Shue assumes that there are human rights, and argues that they imply basic rights.

Furthermore, his proposal to replace the negative-positive rights distinction with a set of triple duties presupposes his concept of a moral right, a concept that includes the social guarantee/protection element. The second triple duty—"to protect from deprivation"—assumes social guarantees as part of the concept of a right. I therefore find Shue's proposal to replace the negative-positive rights dichotomy with triple duties likewise unconvincing.⁸

NOTES

1. I would like to thank the Editors, David Heise and Michael Goodman, for helpful suggestions on this paper.
2. Henry Shue, *Basic Rights* (Princeton, New Jersey: Princeton University Press, 2nd ed. 1996). Parenthetical page references are to this edition.
3. The second edition of the book substitutes an extensive Afterword for chapter 7, which called for foreign policy changes that may have been relative to 1980, the date of the first edition.
4. Shue usually speaks of “enjoyment of a substance.” But exercising or enjoying a right means enjoyment of a substance. Thus, Shue uses the terms “enjoyment of a substance,” “enjoyment of a right,” and “exercise of a right” interchangeably.
5. Shue says that “This distinction between merely having and actually enjoying a right may seem a fine point, but it turns out later to be critical.” (20) His point, as already noted, is that what is important to people is enjoying their rights.
6. Shue says his characterization of a moral right is “not the usual North Atlantic account of what a right is, although it incorporates, I think, what is correct in the usual accounts.” (182)
7. I certainly do not claim that Shue did so intentionally. I believe it was unintentional.
8. Hence, I find the Afterword in the second edition unconvincing, because it assumes, and builds on, Shue’s proposal to replace the negative-positive rights dichotomy with triple duties.