

Appendix B:

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The main thesis of Pogge's splendid and timely paper² is that "we" (i.e., most of us in relatively affluent democratic societies) are guilty of violating the human rights of the poor. He argues for the thesis partly on the basis of a (somewhat prescriptive) account of what it means to "violate" a human right and partly on the basis of empirical evidence that purports to show that the human rights of the poor are being "violated" (in the stipulated sense).³ In my comments, I'll focus on the account he offers of what it means for the human rights of the poor to be "violated."

The principal distinction that is crucial to Pogge's recommended account is between the "non-fulfillment" and the "violation" of a human right. A human right goes "unfulfilled" whenever – for whatever reason – the human beings who have the right do not enjoy the "object" of that right. If, e.g., the right is the right of secure access to an adequate standard of living, then -- since secure access to an adequate standard of living is the "object" of the right -- all human beings who lack secure access to an adequate standard of living can be described as not having that right "fulfilled." What marks off situations in which human rights are "violated" from situations in which they are (merely) "unfulfilled" is the nature of the explanation for the right going "unfulfilled."

There are, however, three strands in Pogge's account of the distinguishing features of human rights "violations." While two of these strands can be readily enough combined, I shall argue that the third cannot be successfully integrated with the other two.

The first of these strands is (what might be called) the "causal responsi-

1. Emeritus Professor, Queen's University. Thanks to Colin Macleod for valuable suggestions about a draft of this paper.

2. Thomas Pogge, *Are We Violating the Human Rights of the World's Poor?*, 14:2 YALE HUM. RTS. & DEV. L.J. 1 (2011).

3. Pogge recognizes that citizens in affluent democratic societies can "violate" the human rights of the poor both in their interactions with the poor and (more extensively) through the institutions, domestic and international, for the establishment and maintenance of which they bear responsibility:

(H)uman rights violations come in two varieties, one of which has (unsurprisingly) been overlooked. There is the interactional variety, where individual or collective human agents do things that, as they intend, foresee, or should foresee, will avoidably deprive human beings of secure access to the objects of their human rights. And there is the institutional variety, where human agents design and impose institutional arrangements that, as they intend, foresee, or should foresee, will avoidably deprive human beings of secure access to their human rights.

Id. at 18.

bility" strand, and it represents the causal relationship between the acts and omissions of human agents and agencies and the non-fulfillment of human rights as the crucial feature of human rights "violations." A human right is "violated" when it is the case both (a) that the right is "unfulfilled" and (b) that individual agents or agencies are causally responsible for (i.e., make a causal contribution to) the "non-fulfillment" of the right.

The "causal responsibility" strand plays an important role in Pogge's discussion throughout the paper, as is clearly signaled in the summary he provides in the opening paragraph of what he means by a human rights "violation." There he claims that "a human rights violation involves non-fulfillment of human rights *as well as a specific causal relation of human agents to such non-fulfillment.*"⁴ [Italics supplied.] This strand in his account provides the rationale for much of Part III, in which he sets out the "empirical evidence" for the thesis that human agents and agencies in the more affluent democratic societies "violate" the human right of the poor to an adequate standard of living.⁵

The second strand in Pogge's account (which might be dubbed the "moral responsibility" strand) calls for the fulfillment of an additional condition – viz. (c) the agents or agencies causally responsible for the "non-fulfillment" of a human right must be morally responsible (and thus morally to blame) for the non-fulfillment of the right because they "foreseeably and avoidably" contributed to the non-fulfillment of the right.⁶

The third strand in Pogge's general account of human rights "violations" reflects his insistence that they only occur when "negative" duties aren't discharged. Here the focus isn't on the causal relations that obtain between what human agents or agencies do or fail to do and non-fulfillment of a human right nor on whether they are morally responsible (and thus morally to blame) for their causal contribution to its non-fulfillment. Rather what's centrally important is whether their acts or omissions breach positive or negative duties. According to (what might be called) the "negative duty" strand in Pogge's account, it's only when a negative duty is breached that a human rights "violation" can be said to occur.

The clearest statement of the "negative duty" component in Pogge's ac-

4. *Id.* at 1

5. *Id.* at 20-32. Whether in the event the "empirical evidence" Pogge cites in Part III suffices for the establishment of a causal connection between the acts and omissions of most ordinary citizens in the democratic societies of developed countries and violation of the human right of the poor to an adequate standard of living is at least questionable, not because of doubts about the causal contribution to this human rights deficit both of the governments of these countries and of the international agencies they have helped to create, but because serious imperfections in the ostensibly democratic institutions in these societies make it difficult to show that the acts and omissions of ordinary citizens are causally responsible for what has been done in their name.

6. Pogge's insistence on the "foreseeability" and "avoidability" of the causal contribution agents and agencies make to the non-fulfillment of human rights is a constantly recurring feature of his account of human rights "violations."

count is to be found in the passage in Part II in which he takes up the question: "What is the relationship between the non-fulfillment of a human right and its violation?" Drawing on Article 15 of the General Comment 12 that was adopted in 1999 by the United Nations Committee on Economic, Social, and Cultural Rights, he recognizes that "human rights may give rise to four distinct kinds of duties" – viz. "duties to *respect* human rights, duties to *protect* (secure access to the objects of) human rights, duties to *provide* (secure access to) the objects of human rights, and duties to *facilitate* human rights fulfillment."⁷ He is quick to insist, however, that some breaches of these duties are not human rights violations. He consequently draws a sharp distinction between those breaches that do violate human rights and those that don't. Only duties to "respect" human rights (duties, that is, of the first of the four kinds) fall on the "negative duty" side of the line he draws, because what they require of human agents or agencies, according to Pogge, is merely that they refrain from preventing someone "from enjoying secure access to the object of a human right."⁸

Duties of the other three kinds -- duties to "protect" human rights, duties to "provide" the "objects" of human rights, and duties to "facilitate" the fulfillment of human rights -- all fall on the "positive" duty side, because (on Pogge's account) they all require – albeit in different ways – that human agents or agencies act in certain ways to help to bring about the "fulfillment" of human rights. The crucial cut is thus between breaches of "negative" duties and breaches of "positive" duties.⁹ It's only when negative human-rights-correlative duties are breached that the breach constitutes a human rights "violation." When positive human-rights-correlative duties are breached, the breach contributes of course to the non-fulfillment of human rights but human rights are not being "violated."

Can these three strands in Pogge's account of human rights "violations" be interwoven to form a single, integrated account?

7. His endorsement of the four kinds of human-rights-correlative duties provided in Article 15 is subject to an important qualification. He dissociates himself from the Article 15 restriction of duty-bearers to states, maintaining (surely very plausibly) that the class of those who can have human-rights-correlative duties is a much larger and more diverse class and that it includes individual human agents. He also contests the assumption—again, surely quite plausibly—that "the human rights of any person normally impose counterpart duties only upon the state or states under whose jurisdiction she falls either through physical presence or through a legal bond of citizenship or residency." *Id.* at 5-17. (Pogge traces the classification provided in General Comment 12 back to Henry Shue's book, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980). Shue's typology was elaborated in the 1980s by Philip Alston and Asbjorn Eide before being taken up and adapted by the framers of General Comment 12.)

8. Pogge, *supra* note 2, at 9.

9. "The most straightforward human rights violations involve breaches of *duties to respect*, that is, duties not to take any measures that result in preventing a human being from having secure access to the object of a human right. As this negative formulation indicates, these are conceived as negative duties: *duties that can be honored by remaining passive and can be breached only by taking action.*" *Id.* at 9 (Italics supplied. Since duties of the other three kinds require that action of some sort be taken, they are all "positive" duties for Pogge, and they can be breached without human rights being "violated.")

It's not difficult to see how the first two strands might be combined if – as is very plausible – an agent's causal responsibility for some undesirable state of affairs (say, the state of affairs constituted by the non-fulfillment of a human right) is a necessary condition of that agent's being regarded, justifiably, as morally responsible (and morally to blame) for that state of affairs. Moreover, given Pogge's interest in identifying those situations in which human rights have been "violated," and given, in particular, the negative evaluative force of the term "violated," it seems clear that the causal responsibility strand couldn't provide a free-standing criterion for the identification of human rights "violations": there are familiar circumstances in which the acts or omissions of human agents or agencies can be causally responsible for some undesirable state of affairs without triggering any adverse judgment of these agents or agencies. Thus, it's not only that the causal responsibility and moral responsibility strands can be combined (because moral responsibility can't be justifiably assigned for an untoward state of affairs in the absence of causal responsibility for that state of affairs). It's also the case, given Pogge's interest in what counts as a human rights violation, that the causal responsibility strand in his account must be combined with the moral responsibility strand if the account is to get off the ground.

Since the first two strands in Pogge's account of human rights "violations" can be readily combined, it's natural to wonder whether the third strand too could be integrated into (what would then be) an even more complex, but now unified, account.

According to such a unified account, situations in which human rights are going "unfulfilled" would be situations in which human rights are also being "violated" only if all of three conditions were satisfied. (1) First, they would have to be situations in which acts or omissions of human agents or agencies make a causal contribution to the non-fulfillment of a human right. (2) Second, in acting or failing to act in these ways, these agents or agencies would have to be (regarded as) morally responsible (and thus subject to moral blame) for contributing causally to non-fulfillment of the right (e.g., because what they do or fail to do "foreseeably and avoidably" contributes to non-fulfillment of the right). (3) Third, the agents or agencies in question would have to be found to be in breach of a negative human-rights-correlative duty.

Although this three-condition account involves no internal inconsistency, two of Pogge's claims about human rights point to a tension between the "negative" duty condition and the two "responsibility"-related conditions.

The first of these claims is that human rights can (and do) generate both positive and negative duties. This is a claim to which Pogge commits himself quite explicitly when he sets out the four-fold classification of duties that can be correlated with human rights.¹⁰ However, since it's only the

10. See *supra* note 7 for the way in which, given his adaptation of the four-fold classification of

first of the four kinds of duties – viz. duties to “respect” human rights¹¹ – that are classified as “negative” duties, it’s clear that the “negative” duties highlighted in the third (“negative duty”) condition of the composite account form only a (perhaps rather small) sub-class of human-rights-correlative duties.

While the restrictiveness of condition (3) might well itself give rise to doubts about the “negative” duty strand,¹² these doubts are intensified when notice is taken of the second (human-rights-related) claim to which Pogge seems to be committed. This is the claim that failure to discharge positive human-rights-correlative duties -- no less than failure to carry out negative human-rights-correlative duties -- can be culpable or blameworthy.¹³ Pogge’s endorsement of this second claim isn’t as explicit as his endorsement of the first, but it seems clear that, even so, it’s a claim to which he is committed.¹⁴ For example, when he refers to situations in which human rights go unfulfilled because of failure to carry out a positive human-rights-correlative duty, he characterizes the failures as “culpable” failures.¹⁵ The use of the term “culpable” is significant because it calls into question the claim that the language of “violation” has no application to breaches of positive duties. After all, once it’s conceded that judgments about the blameworthiness or culpability of such breaches can be perfectly appropriate – and given the near-equivalence of pejorative judgments of these kinds and judgments to the effect that agents or agencies have “violated” human

human-rights-correlative duties in Article 15 of General Comment 12, Pogge draws the line between “negative” and “positive” duties.

11. It is Pogge’s somewhat restrictive characterization of the duty to “respect” human rights that enables him to represent all such duties as “negative” duties. Pogge, *supra* note 2, at 9.

12. Since the ground of positive human-rights-correlative duties is the same as the ground of negative human-rights-correlative duties—both are grounded in the contribution they make to the “fulfillment” of human rights—restricting rights-“violations” to situations in which “negative” duties are breached seems arbitrary. If what is crucial to their status as “duties” is the role they play in facilitating the “fulfillment” of human rights, it seems irrelevant that they play this role in two different ways—by performing certain actions in the case of “positive” duties, and by refraining from performing certain actions in the case of “negative” duties.

13. Needless to say, as the moral responsibility strand in Pogge’s account of human rights “violations” brings out, the breach of human-rights-correlative duties (positive or negative) can be “culpable” or “blameworthy” only if moral responsibility for the breach is properly ascribable.

14. Given the implausibility of trying to combine recognition of positive human-rights-correlative duties with refusal to concede that the breach of such duties can be culpable or blameworthy, it would be entirely reasonable to assume that Pogge would endorse this second claim even if there were no evidence in the paper that he does. After all, to reject it would be to be at odds both with our understanding of the linkages there are between important items in our ordinary moral vocabulary and with the evaluative judgments they are ordinarily used to express.

15. “Human rights violations are not tragic events, like the destruction of a town by a meteorite, nor even *culpable failures to give enough aid or protection.*” Pogge, *supra* note 1, at 18 (emphasis added). Because for Pogge both the human-rights-correlative duty to “provide” the “object” of a human right in order to secure its “fulfillment” and the duty to “protect” a human right are classified as “positive” duties, when he talks in this context of “culpable failures,” the reference must be taken to be to failures to discharge “positive” duties.

rights – it isn't clear on what footing a principled distinction can be drawn between judgments that represent agents or agencies as "culpable" or "blameworthy" for contributing to the non-fulfillment of human rights and judgments that characterize these agents or agencies as "violating" human rights.

Pogge recognizes, then, both (i) that human rights can (and do) generate positive and negative duties, and (ii) that failure to discharge a positive duty of this sort (no less than failure to carry out a negative duty) can be morally blameworthy. Since characterization of breach of a human-rights-correlative duty in given circumstances as a "violation" of the right that is the source of the duty is simply one of a number of more or less equivalent ways of representing the agent or agency responsible for the breach as having done something reprehensible or blameworthy, it is mysterious why Pogge should suppose that talk of the "violation" of human rights is appropriate only when negative human-rights-correlative duties are breached.

Is there, then, a rationale for the inclusion of this third condition that would dispel the mystery? The only clue to a possible answer that I can locate in Pogge's paper is that the "negative duty" strand marks off a class of human-rights-correlative duties that are "more stringent" than positive human-rights-correlative duties. Thus, when Pogge is discussing the view that all citizens in a just society have a general duty to create and maintain just institutional arrangements (arrangements that, among other things, facilitate the fulfillment of human rights), he represents this positive duty – stringent though he acknowledges it to be – as less stringent than "the negative duty not to collaborate in designing or imposing unjust social institutions upon other human beings."¹⁶ As he himself puts it, the "general positive duty" citizens have "to promote the justice of social institutions for the sake of safeguarding the rights and needs of human beings anywhere" and the "*negative duty not to collaborate in designing or imposing unjust social institutions upon other human beings*" are duties that "*differ in stringency.*"¹⁷ [Italics supplied.]

This defense of the "negative duty" strand is unpersuasive for several reasons.

First, it's not at all clear that what purports to be a clear-cut distinction

16. The passage in which this description of the relevant negative duty occurs is as follows: [T]he citizens of a society generally have two obligations to work toward making its social institutions more just. One of these derives from their quite general positive duty to promote the justice of social institutions for the sake of safeguarding the rights and needs of human beings anywhere. The other obligation derives from their *negative duty not to collaborate in designing or imposing unjust social institutions upon other human beings*. In regard to a citizen's home society, the content of these two obligations is essentially the same. But *they differ in stringency*. Other things equal, it is worse to let an injustice persist if one is complicit in it than if one is merely an uninvolved bystander. If the injustice manifests itself in human rights deficits, then one is a human rights violator in the first case but not in the second."

Pogge, *supra* note 1, at 16 (emphasis added).

17. *Id.* at 16.

between two kinds of duties – the “positive” and the “negative” -- can readily be mapped onto a distinction that merely highlights differences in the degree of stringency of “positive” and “negative” duties.

Second, it’s not at all clear that “negative” duties as a class are in fact more stringent than “positive” duties as a class. For example, when Pogge elsewhere illustrates the distinction between positive and negative duties by contrasting the positive duty of “bystanders” to aid persons in need of assistance with their negative duty not to harm them, the claim that the negative duty is always more stringent than the positive duty is at odds with many of our ordinary judgments. Breaching what would be classifiable as a negative duty by casually destroying the sandcastle a child has laboriously constructed on a beach, while no doubt reprehensible, is much less blameworthy than failing to discharge the positive duty of rescuing the child if she is at risk of drowning in a shallow salt-water pool. Again -- to take an example that relates directly to the human rights of the poor -- the (positive) duty to create new international institutions (like Pogge’s own Health Impact Fund¹⁸) to help “fulfill” the right of access of the poor to health care is arguably a more urgent duty than the negative duty to try to effect changes in TRIPS,¹⁹ given the virtual impossibility, for the foreseeable future, of success in the effecting of the needed changes.

Third, even in those situations in which a negative human-rights-correlative duty is more stringent than a positive duty of this sort, it isn’t clear why reserving the language of “violation” to express the greater culpability or blameworthiness of breach of the negative duty is thought to be either necessary or illuminating. Human rights violations can themselves be more and less blameworthy, and there is no plausible basis for distinguishing between the degrees of blameworthiness of breaches of negative human-rights-correlative duties (which, in the restrictive sense favored by Pogge, are the only breaches that count as human rights “violations”) and the degrees of blameworthiness of breaches of positive human-rights-correlative duties (breaches that don’t count at all, for Pogge, as human rights “violations”).

Moreover, there are at least two reasons why simply eliminating the

18. “The Health Impact Fund (HIF) is a proposed mechanism that “proposes a new way of paying for pharmaceutical innovation by incentivizing the development and delivery of new medicines through pay-for-performance mechanisms.” HEALTHIMPACTFUND.ORG (last visited September 11, 2014). Pogge has played a leading role in creating and promoting the HIF proposal.

19. TRIPS is the acronym for the international agreement on “Trade Related Aspects of Intellectual Property Rights,” an agreement negotiated in 1994 and administered by the World Trade Organization (WTO). The greater stringency of the (positive) duty to devise (new) institutional measures that can promote the human right to health care of the poor by bypassing TRIPS might be supported by noting the extreme difficulty, for the foreseeable future, of successfully carrying out the (negative) duty to effect the changes in TRIPS that would appreciably improve the health prospects of the poor. After all, the obstacles are currently enormous to securing international agreement for the elimination of the features of TRIPS that contribute to deteriorating health prospects for the poor.

“negative duty” condition in the three-condition account of human rights violations should be accepted with equanimity. First, the remaining two (responsibility-related) conditions can readily accommodate both the view that there are positive and negative human-rights-correlative duties, and the view that the failure to discharge duties of either sort can be culpable or blameworthy (variable though the degree of culpability no doubt is in different situations). Second, elimination of the “negative duty” condition is consistent with the general thrust of Pogge’s argument for the thesis that most citizens in affluent democratic societies are guilty of violating the human rights of the poor. Indeed, what its elimination would facilitate is considerable extension of the “reach” of this thesis. Instead of human rights violations being restricted to situations in which negative human-rights-correlative duties are being breached, violations could now be recognized also in situations in which there is failure to discharge positive human-rights-correlative duties. It’s true that there is resistance on Pogge’s part to seeing this as an advantage. Indeed he inveighs against what he claims is a tendency “to deflate the term ‘human rights violation’ by using it in a broad sense so that it covers all cases, or all avoidable cases, of unfulfilled human rights.” He consequently sees the “negative duty” strand in his account as a means of rescuing talk about “human rights violation” from (as he puts it, in uncharacteristically colorful language) “the political preachers and media windbags ever in search of stronger expressions to show that they care more than the rest.”²⁰ However, once it’s clear that judgments accusing agents and agencies of “violating” human rights aren’t in fact “stronger” than judgments representing these agents and agencies as “culpable” or “blameworthy” for contributing to the “non-fulfillment” of human rights, it also becomes clear that “the political preachers and media windbags” will have to look elsewhere for more powerful expressions of the depth of their concern for the non-fulfillment of human rights.

20. Pogge, *supra* note 2, at 17-18.