

UC Berkeley

ISUS-X, Tenth Conference of the International Society for Utilitarian Studies

Title

“Two Utilitarian Approaches to Human Rights”

Permalink

<https://escholarship.org/uc/item/7pp5z07p>

Author

Habibi, Don A.

Publication Date

2008-08-08

Two Utilitarian Approaches to Human Rights*

Don Habibi

Department of Philosophy & Religion
University of North Carolina Wilmington

What can utilitarianism bring to our understanding of the international human rights regime? Both utilitarianism and human rights theory claim to be grounded in ethics and seek to guide political leaders. Both are influential enough to merit analysis and a measure of scrutiny.

For the purposes of this paper, I define 'rights' as protections or entitlements that individuals and groups hold against others, usually the state, community, or the majority, who in turn have a corresponding obligation to noninterference or to enable the rights holders to exercise their rights.¹ *Human* rights are rights that we hold by virtue of the fact that we are human beings.² Rights are likened to shields, or to borrow a metaphor from Ronald Dworkin, rights are like political trump cards held by individuals, that override other factors or aggregative interests.³ Rights protect us from the “tyranny of the majority.”

In this paper, I will use a utilitarian analysis to show the key weaknesses and strengths of human rights in theory and practice. I will explore this question from two utilitarian approaches, following the classic formulation of utilitarianism's founder, Jeremy Bentham.⁴ My paper is divided into four sections. The first section proceeds from a theoretical point of view, where Bentham notes the basic weakness in claims that all people hold a range of 'rights' based on nature, God, or simply because they are human beings. There is no philosophical foundation to support universal rights, which he denounces as “moral and intellectual poisons.”⁵ Section two briefly tracks the historical transition from

natural rights to human rights, efforts for justification, and persistent problems.⁶ Section three revisits the lack of a philosophical foundation for human rights and concludes by noting that many of the best thinkers concede this, yet nonetheless strongly support human rights. The final section approaches the question from a practical point of view. I argue that utilitarianism can support the notion of human rights. The strength of the international human rights movement⁷ (IHRM) is its manifest success in building up its role in the international arena. While there are many problems in how the IHRM functions in the world of power politics, the noble efforts to minimize pain and suffering, and maximize human welfare and pleasure, must be recognized as sources of happiness.

I. Bentham's Discord with Natural Rights

The idea of 'human rights' has a long history. During the Enlightenment, Thomas Hobbes, John Locke, and Immanuel Kant incorporated a belief in natural law and natural rights into their seminal political philosophies.⁸ Locke's claims about what was divinely ordained for humanity were to have profound influence on two of the enlightenment's most important documents—the American “Declaration of Independence” and the “French Declaration of the Rights of Man and Citizen.” An early encounter between utilitarianism and an assertion of natural rights came in Bentham's skeptical and dismissive analysis of Jefferson's "Declaration of Independence." In a letter to John Lind, written shortly after the American "Declaration," Bentham gave Lind several arguments for rejecting the unsupported claims of the rebellious colonists.⁹ The famous encounter occurred when the French National Assembly adopted the "Declaration of the Rights of Man and Citizen" in August, 1789. This triggered the most famous confrontation between classical

utilitarianism and the assertion of natural rights, which came some years later, when Bentham wrote *Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution*. The French “Declaration” proclaimed 17 rights as “the natural, inalienable and sacred rights of man”. In his point-by-point critique, Bentham argued forcefully that there are no ‘natural’ rights, since rights are only created by a society’s law:

Right, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come *imaginary* rights, a bastard brood of monsters, ‘gorgons and chimeras dire’.¹⁰

For Bentham, the concept of natural rights was “simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.”¹¹ He recognized that proclaiming rights based on nature was too incoherent and unsubstantiated to be defended philosophically. Like his protégés, John Stuart Mill and John Austin, Bentham was a legal positivist. Bold declarations or abstract claims might express utter simplicity, rosy ideals, or dramatic sloganeering, but they are no substitute for specific legislation.

Bentham’s attack on natural rights did not end there. He took it further by arguing that even the *idea* of a ‘natural’ right undermines rights in general and the authority of law.

[A] natural right is a round square or an incorporeal body. What a legal right is I know. I know how it was made...To me a right and a legal right are the same thing, for I know no other. Right and law are correlative terms: as much so as son and father. Right is with me the child of law;

from different operations of the law result different sorts of rights. A natural right is a son that never had a father. By natural right is meant a sort of a thing which...is to have an effect paramount to that of law, but which subsists not only without law, but against law: and its characteristic property...is...being the everlasting and irreconcilable enemy of law. As scissors were invented to cut up cloth, so were natural rights invented to cut up law, and legal rights. A natural right is a species of cold heat, a sort of dry moisture, a kind of resplendent darkness.¹²

For Bentham, 'rights' must come from laws enacted by established governments. Only then we can speak coherently about 'legal rights.' Claiming any other source for rights subverts the force of law. Thus, he warned that even a belief in natural rights is worse than nonsensical. It is a threat that must be opposed.

II. The Rise of Human Rights

For all his fine prose, Bentham was unable to drown the baby at birth. His attack did little to stop the loose use of natural rights claims. Over the long term, the advocates of rights have made steady and impressive gains. The United States and the French Republic (for all their ups and downs) are thriving liberal democracies. Appeals to natural rights were prominent in attempts to ban the slave trade, the first wave of feminism, the founding of the International Labor Organization, and the founding of the League of Nations. The major historic turning point came at the conclusion of World War II, when the victorious Western allies worked to make the notion of human rights increasingly important as an ethical standard and common in popular discourse. The Nuremberg War Crimes Tribunal, and the

founding of the United Nations and its Universal Declaration of Human Rights marked a new era committed to promoting and expanding the ideals of human rights internationally. Indeed, human rights are now enshrined in international law and the laws of nations. Several nongovernmental organizations (NGOs) were established, and human rights became a set of criteria for judging nations as well as for defining and interpreting international law. What has taken place is “nothing less than a revolution in global human rights consciousness.”¹³

On the rhetorical and theoretical levels, a noteworthy development was the shift from the religiously based conception of ‘natural’ rights, to the more secular notion of ‘human’ rights. This shift led to an increased reliance on law as the appropriate framework for grounding human rights, thus addressing Bentham’s main objection.¹⁴ However, the major weakness that he objected to has only been partially remedied. As I argue below, he would have objected to claims asserting that all persons possess universal human rights if this was intended to establish that such rights are anything more than creations of legal authorities. He would also object when legislators behave like activists by overreaching with assertions of universal, inalienable, indefeasible, and indefatigable rights. Core theoretical questions are notoriously unresolved. For lawyers, diplomats, and the staunchest advocates of human rights, vagueness is a virtue. It generates room to maneuver and allows for constructive ambiguity. In contradistinction, from a philosophical point of view, this underscores many persistent problems. People routinely use the term ‘rights’ carelessly, without understanding what rights are, where they come from, what it means to be in possession of a right, or how we might resolve competing rights claims.

Advocates claim that human rights are universal, held by everyone, everywhere, transcending culture and place. Not only does this clash with Bentham's view that rights are the invention of some cultural or political tradition, it leads to a direct clash with cultural and ethical relativism.¹⁵ This has also led many to suspect or denounce human rights as absolutist, a liberal conceit, or an ideological tool in the service of Western imperialism.¹⁶ Nonetheless, for many of its passionate defenders, human rights are inalienable, indefeasible, and indefatigable. Everyone has them and no one can take them away. We cannot stop being human, and therefore cannot lose or forfeit our human rights because we act monstrously or are downtrodden.¹⁷ Even a bad sovereign or a non-state actor cannot make human rights go away (i.e., a legal authority cannot outlaw human rights or make them nonexistent, and a non-signatory to human rights conventions must still abide by human rights standards).¹⁸ And if these assertions are not enough to make Bentham's head and body spin in their respective containers at the University of London, some bolster their arguments for human rights by relying on Bentham's philosophical contemporary and arch-rival, Immanuel Kant. Human rights are interpreted to be political specifications of Kant's supreme principle of morality: that every human being is of infinite worth and dignity and should be treated as an end, and never as a means only; and that human rights are categorical and without exception.¹⁹

In addition to the problems stemming from sweeping universal claims, the sweeping egalitarian claims embedded in the meaning of human rights raise several important questions. The human rights regime includes the basis for an international welfare state; however, after sixty years we are far from clear on the extent of these rights. Furthermore, we are far less clear on how to bring these rights about. The Universal Declaration does

not indicate who carries the responsibilities that correspond to the different rights.²⁰

Another problem is that there are numerous rights listed in the UDHR (there are 30 articles, many of them multipronged) and several conflict with others.²¹ Important work remains to define key terms, weigh the articles' relative importance (both in general and in specific contexts) and find a way to prioritize and balance them. Unfortunately, rational discussion is hampered by those who regard all 30 articles as equally absolute, and those who evade the vexing theoretical problems for fear of their implications.

The conceptual haze also facilitates widespread corruption of human rights principles. As I have argued elsewhere, the leading organizations of the IHRM are politicized, manipulated, inconsistent, and disproportionate to the point that bias has clouded their effectiveness and commitment to human rights values.²² The leadership follows the agenda of the most unscrupulous human rights offenders, and diverts its attention and resources away from where they are most needed. The problems of politicization and proportionality enable the most egregious violators to avoid scrutiny and pressure. This has catastrophic consequences for millions of victims and further undermines the legitimacy of the entire human rights enterprise.

III. Stilts Management

Although many have tried to construct a philosophically sound defense for the commonly asserted and highly important concepts of natural rights and human rights, Bentham's objection remains valid. His successor, John Stuart Mill, noted the importance of rights as a check on the potential excesses of utilitarian calculations, but did not attend to the foundations of rights theory.²³ Other utilitarian scholars attempt to provide a moral

foundation for rights.²⁴ The able philosopher Alan Gewirth makes worthwhile efforts to justify human rights as well.²⁵ Jack Donnelly opts for a comprehensive smorgasbord approach in the hopes that some claim or combination of weak arguments will be satisfactory. In a survey on "The Source or Justification of Human Rights" he concludes:

We thus have a considerable variety of possible moral justifications, as well as an array of theories that deny or radically devalue human rights.

In what follows I will assume that there are human rights, that is, that we have accepted some sort of philosophical defense. This theoretical evasion is justified by the fact that almost all states acknowledge the existence of human rights. In other words, this assumption is relatively unproblematic for our purposes here.²⁶

This conclusion is honest in so far as he openly begs the question. Donnelly relies on assumptions because he understands that the weight of the arguments do not provide the elusive foundation.

The problem of universal and egalitarian claims has led some scholars to take a less ambitious approach in support of human rights. John Rawls recognizes that many traditional assertions of human rights "would require a quite deep philosophical theory that many if not most hierarchical societies might reject as liberal or democratic."²⁷ He prefers to follow Thomas Scanlon's politically neutral approach that human rights express a minimum standard of well-ordered political institutions for all peoples.²⁸ Law professor and defense lawyer Alan Dershowitz argues cogently that it is wiser to defend a theory of rights using a "bottom-up approach," beginning where there is a consensus for eliminating

absolute injustice, instead of trying to achieve perfect justice, for which there is no agreement and common understanding.²⁹ The universalism question is hence sidestepped.

Even less ambitious (but perhaps most honest) is pragmatic philosopher Richard Rorty, who defends a perspective of "anti-foundationalism." He deals with the problem by abandoning the effort to ground human rights philosophically.³⁰ Michael Walzer makes open evasion his strategy of choice: "Whether [human rights] exist at all is the philosophical question that I am determined not to answer."³¹ He asserts that even if the foundation is shaky, the human rights enterprise is not nonsense. Thus, he prefers to avoid

all the hard philosophical questions about the meaning and grounding of human rights. The questions will recur, and I will push them away each time. Of course, I could escape from the hard questions by avoiding the "rights-talk" with which I began. And there are philosophical reasons for doing that—namely, the argument that rights have neither meaning nor grounding. Remember Jeremy Bentham's quip that talk about rights is "nonsense on stilts." He may be right, but I am going to manage my stilts as best I can and let my readers decide about the nonsense question.³²

Walzer recognizes that there are other factors besides philosophical standards. In the 'real world,' at stake are matters of life and death. He is confident that his readers are realistic enough to overlook the ambiguities, inconsistencies, and shortcomings, in order to obtain the benefits of a human rights regime.

IV. The Utility of Human Rights

I have argued that Bentham was correct to regard natural rights (and its 20th century extension human rights) as mere fictions. I conclude by arguing that they are *indispensable* fictions. However problematic the concept of human rights might be in theory, it would be preposterous to stop the good works of thousands of dedicated human rights defenders until the philosophical case can be made satisfactorily. From a practical utilitarian perspective, the many organizations and people who work to minimize pain and suffering are to be commended for their noble efforts. The Universal Declaration is harmonious with the value of promoting happiness. Efforts made to agitate against governmental abuses of power, to render prison systems more humane and grant amnesty to nonviolent political prisoners and prisoners of conscience, to eliminate torture, slavery, rape, oppression, assaults on human dignity, and other sources of intense pain must be recognized as good works on any utilitarian calculus. Conversely, efforts that promote the liberal values of personal freedom, justice and fairness in the judicial, educational, and legislative systems, the importance of providing for social welfare, and promoting the dignity of humankind must be recognized as sources of pleasure. On balance, a utilitarian analysis must acknowledge that the world is a better place for having human rights as a standard and for having people and organizations dedicated to the promotion of human rights.

The noble effort to enshrine human rights principles in the laws of nations and international law should be supported by those who wish to promote the greatest happiness for the greatest number of people. It is thus reasonable to speculate that Jeremy Bentham would recognize the utility of human rights for practical purposes.³³ After all, the reformist agenda of Bentham and his followers, the Philosophic Radicals, closely mirrors human rights values.

We must not overlook the serious shortcomings of human rights in theory and practice. The leaders of the IHRM need to climb down from their stilts and do the necessary collective ‘soul searching’ to assess and evaluate. This may not be sufficient for the IHRM to cut out the nonsense, but it is necessary for at least recognizing the problems. They must not conflate legal rights with grandiose universal claims. They must also recognize and correct the politicization problem by applying human rights standards and international law fairly and consistently. They need to allocate resources in a way that corresponds to where the most urgent needs are and where they can do the most good.

Indeed, human rights can do a great deal of good. The human rights NGOs can play a unique role as credible sources of documentation, educating the public, and naming and shaming human rights offenders. Human rights have become a powerful instrument for extending the reach of international humanitarian law and even for military intervention.³⁴ The instrument is flawed, but there is no alternative waiting in the wings. For the sake of our world, we must strive to improve this instrument so as to maximize happiness.

The people who comprise the international human rights movement would do well to appreciate Bentham. His work as an activist philosopher make him a role model for those who are dedicated to educational opportunity, fair legal systems, humane prisons, and a host of other causes. He may have set out to achieve his agenda for different reasons, but his tireless efforts for civil liberties, social equality, and all manner of progressive reforms, support a commitment to human rights ideals. His contributions as a seminal theorist are particularly worth careful study; for he understood well the importance of clarity and detail. As Walzer alludes, Bentham’s legacy reminds human rights activists to be humble and circumspect, for he may well be right about nonsense on stilts.

*Portions of this essay appear in a different context as the introductory section of my “The Politicization of the International Human Rights Movement: A Utilitarian Critique,” *Journal of Human Rights*, 6:1 (March, 2007).

¹ Here, I simplify by following Alan Gewirth's observation that "claim-rights are the most important kind of rights because they entail correlative necessary duties to forbear from interfering with persons' having the objects of their rights or, in some situations, to help persons to have these objects." See entry for "Rights" in, *The Oxford Companion to Philosophy* (Oxford University Press, 1995), p. 776. Gewirth relies on Wesley N. Hohfeld's fourfold distinction between claim-rights, liberty rights, power-rights, and immunity rights. See *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1964).

² Jack Donnelly, “Human Rights,” in, John S. Dryzek, Bonnie Honig, and Anne Phillips, eds., *The Oxford Handbook of Political Theory* (Oxford University Press, 2006), pp. 601ff.

³ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), p. xi; and, “Rights as Trumps,” in Jeremy Waldron, ed., *Theories of Rights* (Oxford University Press, 1984). See also George W. Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006), pp. 189-94.

⁴ According to Bentham's principle of utility, "it is the greatest happiness of the greatest number that is the measure of right and wrong." (*A Fragment on Government* [London: T. Payne, 1776], Preface, paragraph two, p. ii.) Utilitarianism is based on hedonism (pleasure

is intrinsically good, pain is bad), consequentialism (we judge actions by their results) and universalism (everyone's pleasures and pains are taken into account).

⁵ Jeremy Bentham, *Anarchical Fallacies*, art. ii, in John Bowring, ed., *The Works of Jeremy Bentham*, p. 513. The longer quote is cited in the text below, corresponding to note 10.

⁶ For the purposes of this paper, I do not delineate the differences between the terms 'natural' rights and the more contemporary term 'human' rights. With respect to this point, I refer the interested reader to James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, 2nd edn. (Oxford: Blackwell, 2006). See also, Anthony Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," *Political Theory*, 31:2 (April 2003), pp. 171-99; Gary Herbert, "Postscript to A *Philosophical History of Rights*," *Human Rights Review*, 4:1 (October-December 2002), pp. 10f; and, Alan S. Rosenbaum, *The Philosophy of Human Rights: International Perspectives* (Westport, CT: Greenwood Press, 1980).

⁷ This is a widely used term for the many organizations (both governmental and nongovernmental) and individuals (politicians, attorneys, judges, academics, activists, etc.) who are dedicated to the promotion of human rights worldwide.

⁸ For the interested reader, see Timothy Stanton, "Hobbes and Locke on Natural Law and Jesus Christ," *History of Political Thought*, 29:1 (2008), pp. 65-88.

⁹ See Bentham's letter to John Lind, dated September 2[?] 1776, in Timothy L.S. Sprigge, ed., *The Correspondence of Jeremy Bentham, Volume I: 1752-76* (University of London: Athlone Press, 1968) pp. 341-44. Many of Bentham's criticisms are incorporated in Lind's

pamphlet, *An Answer to the Declaration of the American Congress* (London: T. Cadell, J. Walter, T. Sewell, 1776).

¹⁰ *Anarchical Fallacies*, op. cit., p. 513. Originally written in French in 1796, it was published posthumously in 1834. See also, "Anarchical Fallacies; being an examination of the Declaration of Rights issues during the French Revolution", in Jeremy Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (New York: Methuen, 1987, p.69). In *Reflections on the Revolution in France*, Edmund Burke also launched a harsh attack on the French Declaration's affirmation of natural rights, by arguing that rights were those benefits won within each society. Thus, the rights held by the French and the British were different, since they were the outcome of different political struggles through their respective histories. In response to the attacks on the French Declaration, Thomas Paine wrote a defense of natural rights and their connection to the rights of a particular society. In *The Rights of Man* (published in 1791 and 1792), Paine drew a distinction between *natural* rights and *civil* rights, the latter stemming from the former.

¹¹ Ibid., p. 501.

¹² *Supply Without Burthen or Escheat Vice Taxation* (written in 1793 and published in 1795), in W. Stark, ed., *Jeremy Bentham's Economic Writings* (London: George Allen & Unwin, 1952), vol. I, pp. 334-35. See also Jeremy Waldron, "Supply Without Burthen Revisited," *Iowa Law Review*, 82 (1997), pp. 1467-85.

¹³ Douglass Cassel, "The Globalization of Human Rights: Consciousness, Law and Reality," *Northwestern University Journal of International Human Rights*, vol. 2 (April, 2004), paragraph 7, see also paragraph 17.

¹⁴ See Robert Paul Churchill, *Human Rights and Global Diversity* (Upper Saddle River, NJ: Prentice Hall, 2006), pp. 20-22.

¹⁵ More scholarly work has focused on the universalism/relativism debate, than any topic pertaining to human rights. Many non Western countries wish to disregard the universalist claim in favor of incorporating cultural relativism into the theoretical and legal meaning of human rights. For good, recent discussion of the issues see Jack Donnelly, "The Relative Universality of Human rights," *Human Rights Quarterly* 29:2 (May 2007); Michael E. Goodhart, "Neither Relative nor Universal: A Response to Donnelly," and Jack Donnelly, "Human Rights: Both Universal and Relative (A Reply to Michael Goodhart)" *Human Rights Quarterly* 30:1 (February 2008). See also, Arvind Sharma, *Are Human Rights Western? A contribution to the Dialogue of Civilizations* (New Delhi: Oxford University Press, 2006); Allison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (Newbury Park: Sage Publications, 1990); Adamantia Pollis and Peter Schwab, eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1979); Michael E. Goodhart, "Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization," *Human Rights Quarterly* 25:4 (November 2003); Michael Ignatieff and Amy Gutmann, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001); Fernando Tesón, "International Human Rights and Cultural Relativism," *Virginia Journal of International Law* (1985), pp. 869-98; Amitai Etzioni, "Cross-Cultural Judgments: The Next Steps," *Journal of Social Philosophy*, 28:3 (Winter 1997); Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* (1989), pp. 400-419; Henry J. Steiner and Philip Alston, eds., *International Human Rights in Context: Law, Politics, Morals* (Oxford

University Press, 2000), chs. 5 and 6; and, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 1989), esp. chs. 3 and 6.

¹⁶ Peter Ness, ed., *Debating Human Rights: Critical Essays from the United States and Asia* (London: Routledge, 1999); Robert Paul Churchill, op. cit., note 14, chapter two; Jack Donnelly, “Human Rights,” op. cit., note 2, pp. 609ff; and, Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000), pp. 36f.

¹⁷ For example, when Saddam Hussein was captured, the leading human rights organizations protested against calls for the death penalty. As it turned out, they also protested the legal standards of the trial procedures and the manner in which Hussein was executed. Among other things, the hanging was botched and a witness made a cell phone video recording which was posted on the internet. The US was also criticized for the actions of the Iraqi court.

¹⁸ However, human rights organizations (e.g., Amnesty International and Human Rights Watch) spend considerably less attention on the human rights violations of non-state actors than they do on democratic nation states. For example, note the disparity in the number and frequency of critical reports and public statements of Israel and Hezbollah during Summer, 2006; or the US and Al Qaeda in Afghanistan and Iraq.

¹⁹ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998). As Michael J. Perry explains: because human life is sacred and inviolable, then some things should be done for everyone, and other things should not be done to anyone.

²⁰ For example, if a government is too poor to provide its citizens with the social, economic, and cultural rights listed in the UDHR, do the UN or wealthy have a responsibility to ensure these human rights? To offer another example: Article 24 of the UN Declaration states, "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." As much as I would like to exercise this set of claim-rights for myself and my family, it is far from clear from who I can claim them. The University of North Carolina (my employer)? The U.S. Government? The UN? The Disney Corporation?

See David Lyons, "The Correlativity of Rights and Duties," *Nous* 4 (1970), pp. 45-57.

²¹ These grandiose claims are not merely a reflection of the exuberance of 1948. Similar sweeping claims are made in the declaration of the U.N. Teheran Conference (1968), the Vienna Declaration and Programme of Action (1993), etc. For an example taken from the UDHR, we all have a right to a nationality, self determination, and democratic governance, as well as a right to emigrate and seek asylum. If Haitians show up in Florida seeking asylum, is the U.S. responsible for giving them asylum or citizenship? Is there a relevant moral difference if it is Cubans who show up? (US immigration policy grants asylum to Cubans, but not to Haitian refugees.) If a boatload of Afghanis or Vietnamese arrive in Australia, must the Australian government accept them? What if the democratically elected governments of the U.S. and Australia deny refuge to these refugees/asylum seekers, based on the will of the overwhelming majority of their citizens? Article 21, part 3 of the Universal Declaration states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections

which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Do Kurds, Basques, Catalonians, Hmong, Hawaiians, Mohawks, Dinka, or Berbers have a right to self determination? If so, who has the corresponding obligation to enable them to exercise their right? Are sovereign nations required to give up territory to provide for this right?

We are all entitled to freedom of religion as well as equality that disallows for discrimination based on sex. How then, do we resolve the equal rights of women with the right of men to religious practices that discriminate against women and relegate them to second class status?

Article 26 states that everyone has a right to free education and parents have a prior right to choose the kind of education to be given to their children. Does this mean that a government must provide children with a religious education, if the parents so desire? I raise these questions to show there are many questions of interpretation and adjudication for the basic principles of human rights.

²² On these points, see my "The Politicization of the International Human Rights Movement: A Utilitarian Critique," *Journal of Human Rights*, 6:1 (2007), pp. 3-35, and "The Proportionality Problem in NGO Coverage of Human Rights Abuse," in Thomas Cushman, ed., *Routledge International Handbook of Human Rights*, forthcoming.

²³ See John Stuart Mill, *Utilitarianism*, chapter 5, *Collected Works of John Stuart Mill* vol. X, and, *Principles of Political Economy*, Book II, Chapter XII,

section 2, in *Collected Works of John Stuart Mill*, Vol. II (University of Toronto Press, 1965), p. 360.

²⁴ Richard B. Brandt, *Morality, Utilitarianism, and Rights* (Cambridge University Press, 1993), pp. 179-95; Allan Gibbard, "Utilitarianism and Human Rights," *Social Philosophy and Policy* I:2 (Spring, 1984), pp. 92-102; Russell Hardin, *Morality within the Limits of Reason* (University of Chicago Press, 1988) chapters 3 and 4; and, L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987).

²⁵ Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press, 1982), pp. 208-33, and *The Community of Rights* (University of Chicago Press, 1996). See also, Michael Ignatieff and Amy Gutmann, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001). For criticisms, see, Attracta Ingram, *A Political Theory of Rights* (Oxford: Clarendon Press, 1994), pp. 198ff; and, Alasdair MacIntyre, *After Virtue: a study in moral theory* (University of Notre Dame Press, 1981), pp. 64ff. MacIntyre argues against an earlier work by Gewirth and dismisses a belief in human rights as on par with "belief in witches and in unicorns" (p. 67).

²⁶ *International Human Rights*, Second Edition (Boulder, CO: Westview, 1998), p. 22; and, "Human Rights, op. cit., n. 2, pp. 604f. See also, Jerome J. Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly*, 20:2 (1998), pp. 201-234; and, David Kennedy, "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal*, 15 (Spring, 2002), pp. 106f.

²⁷ John Rawls, "The Law of Peoples," part V, in *Collected Papers* (Harvard University Press, 1999), pp. 551-52.

²⁸ Ibid. Here Rawls cites Thomas M. Scanlon's "Human Rights as a Neutral Concern," in Peter G. Brown and Douglas MacLean, eds., *Human Rights and U.S. Foreign Policy*, (Lexington, MA: Lexington Books, 1979), pp. 83-92.

²⁹ Alan Dershowitz, *Shouting Fire*, Chapters 1-3, esp. pp. 33-34. See also, Dershowitz' *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York: Basic Books, 2004).

³⁰ See Richard Rorty, "Human Rights, Rationality, and Sentimentality," in Susan Hurley and Stephen Shute, eds., *On Human Rights: The 1993 Oxford Amnesty Lectures* (New York: Basic Books, 1993), pp. 112-134. An interesting connection to note is that William James dedicated his seminal work *Pragmatism* to John Stuart Mill.

³¹ Michael Walzer, "Beyond Humanitarian Intervention," in *Thinking Politically: Essays in Political Theory* (New Haven & London: Yale University Press, 2007), p. 261.

³² Ibid., p. 252.

³³ This presupposes that Bentham would retreat from his rhetorical hyperbole that characterizes natural rights claims as "moral and intellectual poisons." Hugo Adam Bedau, a harsh critic of Bentham's position, wants to believe that the founder of utilitarianism would see the light and become a supporter of human rights, were he alive today. See Bedau's "'Anarchical Fallacies': Bentham's Attack on Human Rights," *Human Rights Quarterly*, 22:1 (2000), p. 279. See also Sheldon Wein, "Human Rights," in Christopher Berry Gray, ed., *The Philosophy of Law: An Encyclopedia* (New York and London: Garland Publishing, 1999), p. 383.

³⁴ On the topic of justifying military intervention in Iraq to topple the regime of a serial human rights violator, see Thomas Cushman, ed., *A Matter of Principle:*

Humanitarian Arguments for War in Iraq (Berkeley: University of California Press, 2005).