

Amartya Sen's Defense of Human Rights and the Challenge of Bentham

Abstract

This essay explores the foundation problem in human rights theory by examining the criticism of Jeremy Bentham and the response of Amartya Sen. Unlike most defenders of human rights, Sen does not avoid Bentham and the foundation problem; nor does he retreat from the traditional theory that regards human rights as preexisting and universal. Furthermore, Sen also embraces other key aspects of the robust traditional theory, namely that human rights include the full range of positive welfare entitlements. Bentham, who famously denounced natural rights claims as "nonsense upon stilts," was unyielding in his insistence that rights must be legally enacted and enforceable by clearly named rights providers, such as governments. This essay analyzes the debate between these two philosophers and concludes that Bentham's criticisms remain cogent and prescient.

KEYWORDS: *Jeremy Bentham; Amartya Sen; human rights; natural rights*

Don A. Habibi

University of North Carolina Wilmington

There is never an orderly upshoot or superstructure when the root or foundation is disorderly. There is never yet a tree whose trunk is slim and slender and whose top branches are thick and heavy. This is called "to know the root or foundations of things."¹

Confucius

1. Introduction

For all of its spectacular successes, the international human rights movement is beset by problems – both on the theoretical and practical levels. The central theoretical problem is that just what we mean by 'human rights' is far from clear. The most basic questions persist in a conceptual muddle: how we define our terms; how we understand the status and functions of human rights and the origins of these rights; and, how we can support the claims and demands of the human rights regime. Charles Beitz tells us that “the framers of modern human rights *declined* to propose a philosophical view about their foundations.”² I put it more bluntly: the human rights movement is undermined by the noteworthy failure to resolve the key theoretical problems that lie at its roots. Gaining clarity requires a serious examination of the long standing debate regarding its foundations.

My aim is to present a critical analysis of Amartya Sen's theory of human rights. In my judgment, he stands out as the most passionate, articulate, sophisticated, and prominent philosopher defending the traditional theory of human rights. He defends universalist claims as well as the full range of rights – including positive rights to food, public health, employment, and welfare. He promotes an ambitious agenda for what is termed his “strong” theory of human rights.³ However, unlike other analytic philosophers engaging in this debate, Sen does not avoid the foundational question, nor does he retreat from the grand claims of human rights rhetoric. In particular, he critiques Jeremy Bentham's dismissal of natural rights as simple nonsense. Ever since the bold proclamations of natural rights in the American Declaration of Independence and the French Declaration on the Rights of Man and Citizen, Bentham cast serious doubts on unsupported assertions of rights. The ghost of Bentham lives on – in the sense that the substance of his criticisms have haunted the human rights movement from the start. Just as I regard Sen as the best and boldest philosophical defender of human rights, I regard Bentham as the most articulate, prominent, and prescient opponent of ungrounded rights claims. Sen recognizes the importance of Bentham's naysayer legacy, and he understands that refuting Bentham's ideas will go a long way toward resolving the foundational problem.

In the following section, I describe how human rights are traditionally understood as well as Sen's own version. Section three presents Bentham's understanding of the ‘foundational problem’ and why he regards preexisting, extra-legal rights as dangerous. Section four presents Sen's defense of human rights. Finally, section five critiques Sen's response to Bentham, and contends that his attempts to invalidate Bentham do not succeed. The section concludes by arguing that Bentham's contribution to the debate over human rights remains relevant and even helpful for those who take rights seriously.

2. Sen and the Traditional Theory of Human Rights

Those who believe in human rights envision them as fundamental moral rights that all possess, simply by the fact that we are human beings. The existence of human rights is derived from claims about human nature, belief in the 'inherent dignity of the human person,' and ideas about the necessary conditions for human action and decent, meaningful, or purposive lives. As Sen puts it, they are “primarily ethical demands” of “special importance.”⁴ Human rights are high priority international norms that indicate standards for how states may treat people, and they are often invoked to transcend the authority of the state. Believers in the traditional version, such as Sen, claim that they are imprescriptible. They do not need to be invented or legislated, nor are they contingent on a particular value system or relative to particular cultures. They have always existed and they always apply. Human rights are universal, in that they are moral rights that transcend borders. Sen dismisses claims that they are a Western European invention. He rallies against this assumption with his arguments against “Asian values.”⁵ He also offers examples of enlightened Indian rulers such as Ashoka and Akbar to show that Europeans do not have a monopoly on good ideas, enlightened leadership and humane governance.⁶ Although he does not rely on terms such as absolute and inalienable, and some claim that he is skeptical of universal principles,⁷ he squarely defends a full, thick, traditional theory of human rights.

There are many different conceptions of human rights, and many different defenses and justifications for them. The traditional conception of super empowering rights remains widespread in terms of historical understanding, rhetoric, and popular perception. It makes for a very durable, extensive, generous, and appealing set of protections. As John Simmons summarizes:

Human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity...They will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeatability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.⁸

Thus, universal human rights are purportedly permanent, infeasible, and indefatigable. Everyone has them and no one can take them away. Their applicability is not dependent on our good deeds, merit, moral, or social status. The dignity of the human person applies to everyone. It does not matter if a person is flawed or lacking in some ability. We cannot stop being human, and therefore cannot lose or forfeit our human rights because we act wrongly or are downtrodden. Even the worst criminals are entitled to human rights.⁹ Further, our possession of human rights does not depend on any legal authority or legislative enactment. A sovereign or a non-state actor cannot make human rights go away. A legal authority cannot outlaw human rights or make them non-existent, and a non-signatory to human rights conventions must still abide by human rights standards.¹⁰ Our special status as persons requires that everyone be treated with respect and fairness and that nobody be subject to cruelty, abuse, or unfair discrimination. Theorists and laypeople alike invoke human rights in ways that recall the moral objectivism and absolutism of classical natural law theory from the Middle Ages and the Enlightenment.

The traditional conception does have a variety of critics – ranging from supporters of human rights who embrace a more modest, less mystical version of human rights, and skeptics who reject the idea altogether. This corresponds to Sen's distinction between discriminating rejection and comprehensive rejection.¹¹ In the case of the former, critics who see human rights as a worthy project try to make adjustments that scale back the unwarranted rights claims. Sen regards this approach as a 'strategic retreat.' In the case of the comprehensive critics, the idea of human rights is ungrounded, implausible, impractical, and quite possibly irresponsible, harmful, imperialist, racist, and immoral. Both groups deny the unbridled claims of the full, thick, strong theory of rights. They are unwilling to make a "leap of faith" for set of claims that are superficially appealing, but ultimately implausible and unsupportable.

To invigorate the human rights movement in theory and practice, Sen takes on the critics from both camps. To his credit, he recognizes the serious criticisms and he confronts them. Moreover, as a philosopher, he understands the threat these criticisms pose to the traditional core claims of the human rights movement. Thus, he sets out to explain the central idea of human rights and articulate a cogent theory that responds to the concerns of intelligent skeptics. In a widely read *Philosophy & Public Affairs* article, his seminal book *The Idea of Justice*, his 2012 Society for Applied Philosophy Annual Lecture at Oxford, his recent *An Uncertain Glory*, and other works, Sen builds the case for human rights by tackling the thorniest criticisms challenging the human rights movement.¹² I refer to these criticisms as the foundational problem, the universalism problem, and the feasibility problem. They correspond, respectively, to the claims that human rights are nonsense on stilts; that they are a Western-liberal conceit that functions as neo-imperialism; and, that human rights, particularly the positive social welfare rights, are often unfeasible because we are unable to identify who carries the moral responsibility for upholding everyone's rights. In those cases where we can identify the rights provider, we run into serious difficulties in implementation, such as the lack of financial commitment, or the indifference of insensitive elitist bureaucrats. In *An Uncertain Glory*, Sen and his co-author, fellow economist Jean Drèze, provide several examples of Indian governmental failures to meet the basic needs of citizens in key areas such as medicine, nutrition, and education. When it comes to the 'second generation' welfare entitlements of the traditional theory, we can

describe human rights as ‘precious’. They are expensive. Nevertheless, as Sen and Drèze argue, providing these rights must be the priority. Moreover, they explain that India loses revenue by not committing more funding for sanitation, public health, schools, and other public needs. Thus, providing human rights should not be thought of as costly, rather, we should see it as a wise investment.

Sen connects human rights to democratic political legitimacy, civil liberties, and social justice – including the social, economic, and cultural rights of the liberal welfare state. If states are unable or unwilling to ensure human rights, they still remain “strong ethical pronouncements of what *should* be done.”¹³ He does not think international welfarism is merely a theoretical ideal or social aspiration. He supports Thomas Pogge and Brian Barry in calling for wealthy nations and individuals to be moral global citizens by helping to uphold the positive rights of the poor.¹⁴ He recognizes that the implications of this are enormous, but the plight of the poor is compelling. Sen hopes to educate us to recognize our obligation to help strangers in need if we are able to do so.

For the foreseeable future, I do not believe this can work without coercion. The wealthy will not voluntarily heed Sen’s plea to accept an obligation to give up or share their wealth. A radical redistribution of wealth is unlikely to appeal to the rich or to the large middle and working classes of the developed world. It is doubtful they will be persuaded to share their savings with impoverished strangers far away – even if the logic of rights and egalitarian moral principles demand it, and Sen tells them this is their ethical obligation. But there is another obstacle to the feasibility of generous entitlements. Expanding welfare rights will be a harder sell now that an increasing number of states are unable to pay for their entitlement programs without borrowing. But Sen does not address concerns that the welfare state is unsustainable or that European Union and United States debt are moving them closer to the Greek model of economic meltdown. He regards freedom and justice as the grounds for human rights and he emphasizes his ‘capability approach,’ which focuses on the moral importance of people’s ability to achieve the kind of lives they have reason to value. Sen is interested in the quality of life that people are actually able to achieve. Having the freedom to choose, the ability to reason, and the opportunity to accomplish our goals are essential to our well-being. This requires a serious commitment to the full range of human rights. They are necessary and vital for people to develop their potential. It is therefore incumbent upon us to do what we can to help others.

The comprehensive rejection of human rights comes from those who question the very idea and existence of super-empowering rights. Leading the charge are analytic philosophers, who object to using the word ‘rights’ too loosely. By definition, for a claim right to be whole, proper, and real, it needs to satisfy certain requirements. If we cannot identify any providers of the right or how it can be enforced, then it is incomplete and we must question whether or not it exists as a *right*. As Hillel Steiner puts it, “To have a right is to be in possession of the powers to waive or demand and enforce compliance with its correlative duty.”¹⁵ In other words: “rights are essentially about who is owed what by whom.”¹⁶ It is careless and irresponsible to assert that an abstract right exists without a basic understanding of the structure of rights. It is reckless to pull rights claims out of thin air. Once judges, politicians, activists, opportunists, and propagandists lost sight of the meaning of rights, and broke free from responsible usage, there was nothing to stop the runaway inflation that James Wilson and Francis Fukuyama dismiss as “a lot of crap.”¹⁷

Sen recognizes that the comprehensive rejection of human rights goes to the very heart of its legitimacy and validity. To defend the cause, he takes the battle to the most astute, articulate, and influential critic of natural rights theory, Jeremy Bentham. Many philosophical skeptics of human rights believe that Bentham

scored a devastating knockdown punch in an early round when he denounced the claims of the French Declaration of the Rights of Man and of the Citizen to be “nonsense upon stilts.” Bentham’s critique is clear and compelling. He argues that people should not be seduced or misled by grandiose, generous claims labeled as ‘rights.’ The power of rights must not be used to support unreasonable, impractical, unenforceable, contradictory demands.

As I explain in the section that follows, Bentham believed that natural rights are nonexistent. Even a belief in extra-legal rights is dangerous. Fabricating claims can easily become “words that speak daggers.” They are fallacies that lead to the devaluation of actual legal rights as well as anarchy. It is important to note that what Bentham opposed was the open-ended fabrication of universal, absolute, eternal entitlements. He insisted that the only responsible route is the legal one and requires making clear the duties of the rights providers.

3. The Foundation Problem Revisited: Understanding Bentham

I hold that Bentham's objections to natural rights are substantive and remain cogent. His fears and warnings were justified. He was ‘present at the birth’ of the 18th century rights revolution when it made its impact on the world stage. He was consistently skeptical, and he defended this stance with passion, precision, and perspicuity. To put matters in historical context, Bentham's anxiety over natural rights and natural law precede the American and French Revolutions. Its roots lie in his core commitment of replacing the religious based claims of ancient and Medieval English law with a system built on a secular foundation. He was critical of his jurisprudential rival Blackstone, and argued that belief in natural law and natural rights confused the origins and principles of English law with wishful thinking.¹⁸ Belief in an abstract or pleasing ideal without supporting evidence was nothing short of fallacious.¹⁹ Similarly, he criticized Hobbes and Locke for appealing to natural law to support their principal claims.

Although overlooked by Sen, a revealing encounter between Bentham and an assertion of natural rights came in his skeptical and dismissive analysis of Thomas Jefferson's “Declaration of Independence.” In a letter to John Lind, written less than two months after the “Declaration”, Bentham listed several arguments for rejecting the unsupported claims of the rebellious American colonists.²⁰ Many of Bentham's criticisms were incorporated in Lind's pamphlet, *An Answer to the Declaration of the American Congress*.²¹ The most famous encounter was triggered by the French National Assembly’s Declaration in August, 1789. It was first published in French in 1816, and finally published posthumously in English as *Anarchical Fallacies*.²² The French Declaration proclaimed 17 rights as “the natural, inalienable and sacred rights of man.” Moreover, the French National Assembly proclaimed these rights not just for Frenchmen, but as universal rights.²³ In his point-by-point critique, Bentham argued forcefully that there are no ‘natural’ rights, since rights are only created by a given 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’.”²⁴ For Bentham, the concept of natural rights was “simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.”²⁵ His opposition was ontological – natural rights are nonexistent.²⁶ He recognized that a proclamation of rights based on nature was too incoherent and unsubstantiated to be defended philosophically. With his belief in precise language and his scientific, secular approach, Bentham was a pioneer of legal positivism.²⁷ Grand declarations of rights might serve as a revolutionary rallying cry, but they were no substitute for coherent argument and legislation.

Bentham's denunciation of natural rights did not end there. He pressed his attack further by arguing that even the *idea* of a 'natural' right subverts 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.²⁸

Bentham likened the French revolutionaries' use of 'natural rights' to "words that speak daggers."²⁹ He feared that such assertions would lead to despotism and abuse, for natural rights "hold out a mask for every crime;—they are every villain's armoury — every spendthrift's treasury."³⁰ It is too tempting to invoke a rights claim or rights violation — especially by those who are irresponsible or lack rational argument. Because super-empowering sacred rights claims trump all others, invoking them stifles rational discussion.

As far as Bentham was concerned, rights must come from laws enacted by established governments. Such a pedigree allows us to speak coherently about *legal* rights. Claiming any other source for rights subverts the force of law, and will ultimately weaken the order and security that the rule of law provides. Furthermore, he warned that even a *belief* in natural rights is dangerous. The mistaken notion that everyone everywhere can invoke a litany of rights that trump the general welfare will undermine democracy. Bentham the radical was all for expanding the electorate, and he abhorred class privilege, inequality, and abuse of power. Bentham the progressive was particularly concerned about the painful consequences of punishment and sensitive to the pains of prisoners. He advanced his own theory of punishment and his own model of incarceration. However, Bentham the utilitarian thought he had a better route to achieving a rational, scientific, secular, enlightened society, with kinder, fairer, and more efficient institutions. Bentham's vision had the added advantage of neither requiring nor resting its foundations on a fiction, pipe dream, or leap of faith.

Bentham, who lived in London during the heyday of the Industrial Revolution, understood that achieving democracy required an end to the feudal legal system that favored the nobility at the expense of the peasantry. Inventing rights that could override the majority would distract from needed legal reform. The well-educated aristocrats would recognize the threats and opportunities that rights claims presented, and use the system to secure their privileges and property. He persistently derided their undemocratic pursuit of sinister interests. Eventually, other interest groups would assert their own rights and societies would stagnate in a gridlock of overlapping rights claims. He foresaw that incompatible, unyielding claims would lead to dysfunction. In his criticism of the French Declaration, Bentham explained the dangerous ambiguities with the specific rights to freedom, property, security, and resistance to oppression. The "selfish and dissocial passions" of the wealthy, the poor, the anarchist, the criminal, and the foolish, would break down the community.³¹ This would frustrate and even prevent utilitarianism — the movement guided by the value of respecting democracy and equality before the law — from achieving its legal reforms. He did

not want to undermine the greatest happiness for the greatest number by privileging private interests – be they the interests of the royal family or the peasantry. To be clear, Bentham supported civil liberties, property rights, and social equality, as well as radical social, legal, and electoral reforms. He opposed colonialism as an economic liability and an endless source of war. However, he took social reform seriously enough to have mapped out a realistic program for bringing it about. The all-important legal path required stability and security. Good intentions would come to nothing if irresponsible rhetoric led to worsening the situation. A rights regime that was ill-conceived, undefined, unregulated, subjective, and utterly wide open to interpretation would lead to chaos. Satisfying everyone's rights claims would be impossible. Further, declarations that these rights were imprescriptible, immutable, unrepealable, and nonabrogable – that they supersede positive law and could never be changed – made it obvious to Bentham that even the notion of natural rights was dangerous nonsense.

Positing such abstract rights waters down the meaning of actual legal rights and undermines the true science of legislation. Appeals to ultimate, preemptory rights would preclude rational solutions.³² It would repress debate and criticism and thus make dialogue and compromise far more difficult to achieve. Hence, loose talk about absolute, universal rights constituted a threat that he steadfastly opposed. Throughout his confrontations with assertions of natural rights, Bentham was consistent. Everything that the concept entailed led him to total rejection.

For all his consistency, clarity, fine prose and dire predictions, Bentham was unsuccessful in this contest of ideas. His harsh criticisms did little to stop the ultimate proliferation of ungrounded natural rights claims while the foundational problem has not been resolved. Despite the theoretical shortcomings, the advocates of wide ranging powerful rights have made steady and impressive gains over the past few centuries. As Sen points out, proactive human rights activists understandably ignore Bentham. The urgency of confronting intense oppression and great misery should not wait for theoretical clarity.³³

4. Understanding Sen's Defense of Human Rights

During Sen's lifetime, the growth of the human rights movement has been nothing short of dramatic. The founding of the United Nations marked a new era committed to promoting and expanding the ideals of human rights. The UN Charter (1946); the landmark Universal Declaration of Human Rights (1948); and, the Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights (1966) are official documents acceded to by the UN member states and enshrined in international law and the laws of nations. The creation of the International Criminal Court in 1998 has extended the legal reach of the international community to bring war criminals to justice. Furthermore, the UN Security Council and international law regard human rights violations as grounds for censure, sanctions, and even military intervention. As John Rawls puts it: "Human rights...restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."³⁴ As Charles Beitz explains, "human rights have served as bases for standard setting, monitoring, reporting, and advocacy by nongovernmental organizations...To whatever extent contemporary international political life can be said to have a "sense of justice," its language is the language of human rights."³⁵ What has taken place is "nothing less than a revolution in global human rights consciousness."³⁶ The human rights movement is increasingly becoming a force in world affairs.

Since 1948, the human rights movement has gone from strength to strength, and we now find ourselves under an expanding human rights regime. The foundational problem remains, but that has not

stopped the human rights movement from becoming a major player on the international stage. An academic debate has taken place and political, legal, and moral theorists have responded to criticisms of human rights in a variety of ways. Some have retreated from the full, thick claims of the traditional doctrine and defended a more humble conception of human rights. Some have taken a cue from Bentham and pursued codifying human rights into international and statist law. Indeed, much of the work has been done to incorporate human rights into both national and international positive law. However, Bentham would undoubtedly remain skeptical and dissatisfied. As long as the language of super-empowered rights is invoked without identifying the requisite rights providers and without addressing enforcement, Bentham would have denounced such legal tactics as moral fictions posing as legal fictions. He attacked legal fictions in the harshest terms. He writes: "*fiction* is a *wart* which here and there deforms the face of justice: in English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness."³⁷ Throughout his writings, Bentham condemns legal fictions as strongly as he condemns natural rights claims.³⁸

Many important philosophical defenders of human rights prefer to dismiss or sidestep Bentham's critique. For example, the pragmatic philosopher Richard Rorty, citing Eduardo Rambossi, defends a perspective of "anti-foundationalism." He deals with the problem by abandoning the effort to ground human rights philosophically. Instead of engaging in a futile debate, it is better to provide a 'sentimental education' to cultivate the emotional disposition to respect people's rights. "Producing generations of nice, tolerant, well-off, secure, other-respecting students of this sort in all places in the world is just what is needed – indeed *all* that is needed to achieve an Enlightenment utopia."³⁹ 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."⁴⁰ 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.⁴¹

Unlike his many predecessors, Sen is not intimidated by Bentham. He does not take the easy way out. He does not base his argument for the legitimacy of human rights on the primacy of now existing legal rights, for this would concede Bentham's point that real rights are legal rights. Sen emphasizes that human rights exist independent of positive law. Moreover, he declines to join the analytic philosophers who have strategically retreated from the grand vision by 'circling the wagons' around a more modest version of human rights. Instead, he attempts to repudiate Bentham and restore traditional human rights to a solid foundation.

Sen adopts multiple strategies against Bentham. He relies on a more expansive definition of rights, in contrast to Bentham's 'narrow' understanding of natural rights. As I explain below, he reinterprets the relationship between natural rights and legal rights by arguing that human rights are preexisting and therefore they are the source of legal rights (not the other way around, as Bentham claimed). Sen attacks Bentham as misguided, obsessive, and motivated by partisan interests. He suggests that Bentham rejected natural rights because he did not want competition. Rights offered an ethical approach to rival

utilitarianism.⁴² Sen is confrontational, but he does not adequately address Bentham's apt criticisms regarding the irresponsibility of claiming powerful universal rights based on feelings, scripture, imagination, or reason. Instead, he goes on the offensive, and attempts to invalidate Bentham's "classic hatchet job on natural rights in general and on the 'rights of man' in particular."⁴³ Sen accuses Bentham of asking the wrong question and making the wrong comparison to reach his simplistic dismissal of human rights.⁴⁴ According to Sen, the French legislature was merely taking an ethical approach, not addressing the legal status of any rights. Sen echoes Hugo Adam Bedau's anachronistic criticism that Bentham failed to grasp that the French National Assembly was using the term 'rights' as "a manifesto of aspirations, full of imperatives and exhortations addressed to the people of France."⁴⁵ But it is Bedau who misunderstood Bentham and failed to address his serious objection. The interpretation that 'rights' can be legitimately interpreted as aspirational or announced manifesto-like did not emerge until the twentieth century.⁴⁶ In fairness to Bentham, he understood the job of a legislature is to make law, rather than to proclaim ethical demands. Further, he cannot be faulted for taking the French revolutionaries at their word in proclaiming rights to be universal. They held that their Declaration was not just for the French. Lastly, reading *Anarchical Fallacies*, there is no doubt that Bentham understood the ramifications of proclaiming sacred rights that are aspirational, imperative, and unrealizable.

Sen's critique of Bentham's famous attacks aim at no less than changing the context of how we understand the issues. Instead of conceding Bentham's distinction between the clarity of legal rights and the vagaries of natural rights, Sen makes him out to be narrow and misguided. He disparages "Bentham, the obsessive slayer of what he took to be legal pretensions"⁴⁷ for misunderstanding the relevant questions. He challenges Bentham's "privileged use of the term of 'rights,'"⁴⁸ as limiting rights to an exclusively legal interpretation. He argues that we must do away with the 'legal straitjacket' that Bentham imposed on the concept of rights. Once taking rights seriously turns into taking off the straitjacket, Sen can claim victory for exorcising the ghost of Bentham. In my judgment, he can only claim success for redefining the terms of the debate. Sen sidesteps the serious problems that Bentham warned against. As I explain, human rights inflation and gridlock, along with a politicized corrupt United Nations and NGO network spell trouble for the future of the human rights movement.

5. Sen and Bentham in the 21st Century

In a contemporary context, Sen's argument has merit. In recent decades, the concepts of rights and human rights have indeed expanded beyond the traditional definition of claim rights. The vast majority of people engaged in 'rights talk' are not precise or serious about defining their terms. Nonetheless, Sen should at least acknowledge that his treatment of Bentham is anachronistic. In the 18th and 19th century context, Bentham was neither mistaken nor obsessive – he was correct to uphold the proper definition and warn us that changing the meaning of 'rights' comes at a price. Human rights theory remains a conceptual free-for-all. The meanings of key terms, from 'human' to 'rights,' are still in dispute. If all humans possess a set of given rights, is this based on personhood, rationality, purposive agency, autonomy, inherent dignity, freedom, the ability to choose, individualism, or something else that is fundamental to our nature? But then, what of infants, teenagers, the mentally retarded, the comatose, the insane, and the senile? Do they all possess the same rights? What of the dead, the unborn and future generations? Do they have rights claims that the living must provide or respect? What of endangered species, primates and other 'nonhuman animals,' or forests and coral reefs? Do planetary rights require that we forego the material wealth that is crucial for providing jobs and welfare entitlements for persons? Depending on how we define the basic terms, there are many ways to answer these questions. Moreover, the applications and lists of human rights

have greatly expanded since Bentham's time. Where Bentham sees problems, Sen sees progress. The rise of human rights is reason for optimism. The gains must be preserved and the problems can be worked out through discussion, education, experimentation, and learning from best practices.

While we note the impressive achievements of the human rights revolution, Bentham's warnings remind us that success brings problems. As Bentham feared, the ever increasing proliferation of rights claims has taken place without seriously addressing the sources of rights or identifying the rights providers and their responsibilities to the rights holders. This makes it easy to declare 'rights' as ethical pronouncements, without figuring out the practicalities of how to achieve them. Adding to the confusion, there is no understanding or consensus on how to resolve competing rights claims. The consensus is that we cannot rank order various rights in terms of importance or urgency.⁴⁹ (In fairness to Sen, I point out that he recognizes the value in debating these issues and open and informed discussion.⁵⁰) Even when we consider *legal* rights to such goods as freedom of speech and religion, gender equality, and nondiscrimination, how do we prioritize these rights when they inevitably clash? Should religious freedom be curtailed if it entails an inferior status for nonbelievers, women, or homosexuals? Should the right to free speech be curtailed if it leads to defaming a race, religion, or ethnic group? When the issues are framed in terms of rights claims, the competing claimants have reason to be stubborn. Bentham understood that academic, legal, and political debates will be more amenable to reason and easier to resolve when trumps (such as rights or knowledge of Divine Will) are not invoked.

The dramatic expansion of human rights has led to "human rights inflation" defined by James Nickel as "the devaluation of human rights caused by producing too much bad human rights currency."⁵¹ Of course, some rights claims will be supported by reasoned argument, but many will be the products of emotion, intuition, ignorance, self-interest and personal desire. Just as Bentham predicted, opposing sides invoke natural law, natural rights, and human rights to solidify their respective positions. An illustration of this was the slavery debate in 19th century America. Retentionists and expansionists were just as likely as abolitionists to cite God, the Bible, history, reason, and natural law to back up their natural rights claims.⁵² Likewise, advocates for women's rights as well as believers in male dominance sought to justify their competing views with appeals to natural law and natural rights. For the debates over slavery and gender equality, the gridlock was eventually overcome. Arguably, Sen was right in trusting open discussion and reasoned debate to achieve consensus and reach the correct position on these issues. However, we must never forget that the American debates over slavery and White supremacy were only resolved after a bloody civil war and a lengthy, hard fought civil rights struggle for racial equality. Nor can we forget that slavery still exists in such human rights disaster zones as Sudan, Mauritania, and Western Sahara; or that oppressive forms of servitude still exist all over the world.

Bentham was certainly prophetic that rights can be used as daggers. Stopping human rights violations can override state sovereignty and serve as just cause for a just war. As Joseph Raz sums it up: "Disabling the defence 'none of your business', is definitive of the political conception of human rights."⁵³ Certainly, there are regimes or militias so vicious that humanitarian intervention is morally justified. In the instance of genocide, the contracting parties to the UN's Genocide Convention are compelled to prevent it from happening.⁵⁴ Just as there are many voices in the human rights movement who condemn military interventions and impugn their motives, there are many voices in the movement who are pleading for the UN, NATO or anyone else to intervene in Syria. Not wishing to take sides or even enter into the debate, I will only point out that there certainly are costs for inaction; and, there is a potential for terrible abuse when 'human rights' become a marketing and propaganda cover for elective aggressive warfare that some characterize as "human rights militarism."⁵⁵ Citing vital national interests is sometimes a more honest

explanation. There is reason to suspect the policy notion of ‘responsibility to protect.’⁵⁶ No rules have been agreed to, so there are no clear guidelines as to who, when, and how to intervene. The consequences are unpredictable and a lot can go wrong.⁵⁷

How else can rights be misused and abused as daggers? Here Bentham foresaw a danger that I regard as the most serious challenge for the moral legitimacy of human rights. With the special strength of the shameless, many of the world’s worst human rights violators are able to manipulate the language and institutions of the human rights movement to define the terms and dominate the debate. Given the confusion and ambiguities in the idea of human rights this is not difficult for the clever and unscrupulous. One would think that those with the worst human rights records would fear negative exposure. Indeed, in 1948, the Soviet Union (and five of its Eastern European satellites), Saudi Arabia, and South Africa openly expressed their serious reservations over the Universal Declaration. Nonetheless, they discovered (as did other nations that voted to adopt the UDHR) that it was far better to play along and appropriate human rights to their advantage. It is more than interesting to note that Josef Stalin and Jan Smuts contributed to writing the UN’s key human rights documents.⁵⁸ It was very easy to get away with violating human rights. There was safety in numbers and there was little the UN was prepared to do to prevent abuse or enforce compliance. The bad players figured out how to do the things that Bentham feared the aristocracy would do: use their power to advance their interests. The ability to define the terms of the debate and control the agenda makes for a ‘win-win’ situation for human rights violators. It becomes easy to deflect attention from one’s own shortcomings by accusing one’s adversaries.⁵⁹ The best defense is a good offense, and daggers get this point across very effectively.

For better and for worse, there is no centralized authority, no quality control, no rights hierarchy, and no checks and balances to resolve conflicting rights claims, establish priorities, or decide on where best to allocate resources. As a result, the worst human rights disasters are ignored and the attention and resources of the international community are diverted. The horrors of the War in the Congo and the Sudanese Civil War (which together have a death toll of over six million people) were not a priority for the international human rights movement.⁶⁰ Millions of victims of rape, maiming and severe injuries, starvation, and destroyed villages have been neglected by the world’s leading human rights organizations.

The closest thing we have to a supervisory authority is the United Nations and its organs, such as the UN Human Rights Council. Unfortunately, the UN is driven by power politics, not human rights. The UNHRC (like its discredited predecessor, the UN Commission on Human Rights) is dominated by the worst offenders, who benefit from distracting world attention from their own crimes by dedicating most of the Council’s time and resources to a one-sided castigation of Israel. Superpowers, such as the Russian Federation and China, and diplomatically strong countries, such as Saudi Arabia, Algeria, Morocco, Kuwait, and Pakistan (backed by the 21-nation Arab League or the 56-nation Organization of Islamic Cooperation) got away with genocide, routine use of torture, open intimidation of dissenters and reporters, and belligerent military occupation without significant comment or reprimand from the UN or the UNHRC.⁶¹ The UN’s principal human rights organ can be used to waste precious time and money on petty, pointless, propagandistic publicity stunts, such as Cuba’s sponsorship of a UNHRC special investigation of hunger in Canada. Even more absurd, in 2011, the UNHRC commended Libya’s commitment to human rights⁶² and voted to bestow its Human Rights Award on Muammar Qaddafi. Had it not been for the Libyan people’s uprising against their repressive, delusional dictator of 42 years (which resulted in his summary execution in October, 2011), Qaddafi was scheduled to receive the award in March, 2012.

Unfortunately, the problem is not just with the United Nations. Many of the human rights NGOs also follow the lead of the UN, and thus neglect the most urgent violations and the neediest victims.⁶³ Not to be outdone by the UNHRC, Human Rights Watch went easy on the world's longest-ruling head of state, in the hope that Qaddafi and his articulate, Western educated son Seif al-Islam were modernizing human rights reformers. The director of HRW's Middle East and North Africa Division, unwittingly demonstrated the gullibility, incompetence, irresponsibility, and double standards that mar the reputation of human rights, in her egregious, gushing *Foreign Policy* article, "Tripoli Spring."⁶⁴ When the top guardians and watchdogs are politicized, partisan, corrupt, and astray, it is time to reevaluate the standing of the international human rights movement and listen to its critics, starting with Bentham.

Bentham was not mistaken in his harsh denunciation of natural rights. He was remarkably prescient. However, his views did not prevail in the open public debate, and history has moved in a different direction. From the standpoint of the contemporary debate, Sen is not mistaken to support the redefinition of 'rights' and to advocate for what is widely regarded as a benevolent and worthwhile cause. A lot more has changed since the 18th century than language. However, I contend that Sen's effort to refute Bentham falls short and it does not strengthen the cause of human rights. To support my contention, I will examine *how* Sen makes his case and show what it reveals about his theory of human rights.

Sen recognizes the cogency of Bentham's negation of imprescriptible rights claims, and this is the focus of his counter-attack. He seeks to refute Bentham decisively. But he mistakes Bentham's argument against the existence of natural rights for an outright rejection of human rights. Contrary to widespread belief, Bentham's objection to natural rights should not be taken as 'comprehensive' rejection of all rights claims. Bentham's own 'strategic retreat' jettisoned extra-legal rights, but allowed a toe-hold for what we now call human rights. He could support properly codified legal rights that would protect citizens from overbearing state power. For instance, he actively supported a right to vote by secret ballot, a defendant's right to a fair trial, and a right to freedom of religion – including freedom from religion. This is a far cry from Sen's strong theory of human rights. Bentham retreats from universal, super-empowered rights to the safe inner citadel of legal rights. But at least he concedes that there are rights, albeit modest and scaled back.

The very essence of Bentham's attack bestowed legitimacy to the existence of some form of international rights. Bentham taught us to make them real. Instead of stealing them from the heavens and bringing them down to humanity, he showed a path to human rights with foundations. Many defenders of human rights also made their own discriminating retreat, and advocates have made thorough efforts to write human rights into the positive laws of nations. Ironically, Bentham is one of the fathers of the human rights revolution.

Rather than build on the modest legal toe-hold that Bentham concedes and the Archimedean point it offers, Sen prefers to press his attack all the way to the inner citadel. He wants nothing from Bentham. Instead, Sen builds his argument on a conditional point offered in a famous essay from H.L.A. Hart⁶⁵ to argue that Bentham was wrong to regard rights only as the child of law. Sen turns Bentham's ideas on their head by arguing that it is our moral sense of justice and fairness which inspires people to recognize and claim pre-existing rights, which in turn, motivates us to legislate rights. Before there was rule of law, there was a common morality that moved us to legislate. Hence, human rights grounded in a particular community's concept of justice are the parent of legal rights, *not*, as Bentham asserts, the child of law.⁶⁶

Bentham certainly understood the role that sentiment can play in originating law. Bentham's overblown rhetoric notwithstanding, he knew that laws are not created *ex nihilo*. Nevertheless, by making his point so strongly, Bentham was guilty of overstatement. But Sen does not address Bentham's substantive point. Tribal wisdom is not universal and a tribal code of behavior that inspires law does not imply any preexisting universal rights. *This* is the fallacy that Bentham rails against and Sen should address it if he wants to discredit Bentham's argument. Without more evidence, believing that legislation is the product of universal, strong human rights requires a leap of faith no shorter than the foundational myths of religions.

We return to the flaw in natural law theory – how are we to know if there is universal reason, and if so, what it dictates? I do not agree that humans share a basic sense of justice. We do not even share a basic sense of *injustice*, which supposedly, is much easier to figure out so as to achieve broader consensus.⁶⁷ People value different things and evaluate situations in different ways. For a majority of people in the world today their sense of justice corresponds to self-interest and socialization, rather than universalism, impartiality, fairness, equality, or disinterested abstractions of promoting the general welfare. In terms of recreation, entertainment, private behavior, and public political expression, large numbers of people derive enjoyment from cruelty, violence, sectarian and ethnic hatred, racism, sexism, etc. Examples are legion, but we need only witness the taunting, insulting, mean-spirited chants of soccer fans and the popularity of full contact martial arts, or the multi-billion dollar pornography industry. For the vast sweep of human history our natural sense of compassion has been confined to a small circle of kith and kin. There have been times and places where our sense of justice was defined by religion or nationalism and the circle of compassion expanded. Even if we confine our universalism to the current, enlightened generation of 'human rights consciousness' (ignoring the claim that human rights are timeless) and restrict our examination to the liberal democracies (ignoring the claim of universal, comprehensive application), those who share Sen's sense of justice and belief in human rights likely constitute a small percentage of the population. Although local majorities may support (or oppose), for example, a total ban on the death penalty or torture, or a right to equal marital status for homosexual couples or abortion on demand, certainly no universal consensus exists for such rights either within or especially outside the liberal democracies in the 21st century.

I do not dispute Sen's claims that the idea of human rights can inspire legislation, that implementing them goes beyond legislation, and that the theory of human rights has expanded dramatically, such that it cannot be sensibly "confined within the juridical model in which it is frequently incarcerated."⁶⁸ But his defense of strong human rights exposes glaring conceptual gaps and blinding practical gaps. The rhetoric stemming from this effort to break out from the 'straightjacket' that Bentham and others imposed is best understood as visionary declarations, using the language of rights claims in a manifesto sense. Thus, by conceptualizing rights as aspirational rather than normative, and by regarding bold rights claims as rhetorical flourishes, exaggerations, or poetic license, there is less need to justify these claims in a literal, analytical, or philosophical sense.

As long as people don't take precise notions of rights seriously, the true believers can indulge themselves with half-baked ideas and get away with it. But then, we end up with a plethora of "rights" that can be violated with impunity. As Onora O'Neill puts it, "We would in effect have to accept that human rights claims are not real claims"⁶⁹ Furthermore, they are not real rights. When we cannot say who is obligated or responsible, or how we can resolve competing rights claims, there is a fundamental problem. This vindicates Bentham's stern warning that exaggerated rights claims undermine the authority and legitimacy of rights in general.

By adhering to the implausible traditional human rights vision and defending many of its boldest claims, Sen ultimately weakens the cause for strong rights. His definition of human rights does not withstand Bentham's challenge or his own standard of open public scrutiny and debate. Those who retreated were smart to move away from the visionary, declarative, manifesto-like rhetoric that has made human rights both popular and faith-based. Sen's vision of human rights utopia is splendid as an ideal, but it sorely lacks the support of realistic foundations. Human rights end up in a similar mystical realm as natural rights, and as such, they are unclear, impractical, and prone to abuse.

Endnotes

¹ Confucius, *The Wisdom of Confucius*, ed. and transl. Lin Yutang (New York: Random House, 1938), p. 140.

² Charles R. Beitz, "Human Dignity in the Theory of Human Rights: Nothing But a Phrase?" *Philosophy & Public Affairs* 41:3 (Summer, 2013), p. 259. Emphasis mine.

³ I get this term from Don A. Habibi, "Amartya Sen's Strong Theory of Human Rights," *Journal of Indian Philosophy and Religion*, 17 (December, 2012), pp. 107-141.

⁴ Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32:4 (2004), p. 319.

⁵ Amartya Sen, "Universal Truths: Human Rights and the Westernizing Illusion," *Harvard International Review*, 20:3 (Summer, 1998), pp. 40-43; and, "Human Rights and Asian Values: What Lee Kuan Yew and Le Peng don't understand about Asia," *The New Republic*, 217:2-3 (July 14, 1997); and, "Elements of a Theory of Human Rights," pp. 351ff.

⁶ See Habibi, "Amartya Sen's Strong Theory of Human Rights," section 2, pp. 108-12.

⁷ On the point of Sen avoiding claims to universalism, see Samuel Freeman, "A New Theory of Justice," *New York Review of Books*, October 14, 2010, section 3.

⁸ A. John Simmons, "Human Rights and World Citizenship," in *Justification and Legitimacy: Essays on Rights and Obligations* (New York: Cambridge University Press, 2001), p. 185.

⁹ For example, Anders Behring Breivik, who murdered 77 people (mostly children) in Norway on July 22, 2011 received the maximum 21 year sentence in a comfortable, three room suite, in a pleasant correctional facility. Norway does not have the death penalty. See, *The New York Times*, "Life in Prison Suite Doesn't Agree with a Mass Killer," Saturday, November 10, 2012, p. A4.

¹⁰ 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 on Israel and Hezbollah during Summer, 2006; Israel and Hamas in the Winter of 2008-09; or the US against the Taliban and Al Qaeda in Afghanistan and Iraq.

¹¹ "Elements," p. 316.

¹² "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32:4 (2004); *The Idea of Justice* (Harvard University Press, 2009). Sen's Oxford lecture is published as: "The Global Reach of Human Rights," *Journal of Applied Philosophy*, 29:2 (May, 2012). His recent book, co-authored by Jean Drèze, is: *An Uncertain Glory: India and Its Contradictions* (Princeton University Press, 2013).

¹³ *Justice*, p. 357.

¹⁴ See Brian Barry, *Why Social Justice Matters* (London: Polity Press, 2005; and, Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2nd edn. 2008). Sen cites more works by Pogge and others in *Justice*, p. 448, note 20. More recently, see Pogge's "Are We

Violating the Human Rights of the World's Poor?" *Yale Human Rights and Development Journal*, 14:2 (2011). See also Jeffrey D. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (New York: Penguin), 2005; and, Nicole Hassoun, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations* (Cambridge University Press, 2012).

¹⁵ Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), p. 260.

¹⁶ Hillel Steiner, "Moral Rights," in Thomas Hurka, ed., *The Oxford Handbook of Ethical Theory* (Oxford University Press, 2007), p. 459.

¹⁷ Francis Fukuyama "Natural Rights and Human History," *The National Interest* (Summer, 2001).

<http://nationalinterest.org/article/natural-rights-and-human-history-390>

¹⁸ David Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Oxford: Clarendon Press, 1973), p. 8. See also, Brian H. Bix, "Legal Positivism," in Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, Ltd., 2005), p. 38.

¹⁹ Bentham articulates this point in *Anarchical Fallacies*. "In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread." *Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution*, in John Bowring, ed., *The Works of Jeremy Bentham*, Part VIII (Edinburgh, William Tait: 1839), p. 501.

²⁰ 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. John Lind was Bentham's friend from their student days at Oxford who served as a propagandist for King George III. Even though Bentham wrote about the French Declaration some years later (1791-95) and then published it in French in 1816, Sen tells us "it did not take Bentham long" to respond. (*Justice*, p. 356.) Sen overlooked the truly quick response Bentham made to the American Declaration. The two month turnaround time is all the more remarkable when we remind ourselves that news of the Declaration of Independence had to travel across the Atlantic by ship.

²¹ See John Lind's *An Answer to the Declaration of the American Congress* (London: T. Cadell, J. Walter, T. Sewell, 1776).

²² *Tactiques de assemblée legislatives, suivi d'un traité des sophismes politiques*, 1816 The English edition was translated, re-titled and published in 1843 by the editor, Étienne Dumont under the title *Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution*.

²³ Some attribute this observation to Alexis de Tocqueville. For an elaboration on this point, see Lynn Hunt, *Inventing Human Rights* (New York: Norton, 2007). See also, Nancy L. Rosenblum, *Bentham's Theory of the Modern State* (Cambridge, MA and London: Harvard University Press, 1978), pp. 62f.

²⁴ *Anarchical Fallacies*, op. cit., p. 513. 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.

²⁵ *Ibid.*, p. 501.

²⁶ See Philip Schofield, "Jeremy Bentham and the British intellectual response to the French Revolution," *Journal of Bentham Studies* 13 (2011), p. 23.

²⁷ For an analysis that challenges Herbert Hart's interpretation of Bentham as a forerunner of legal positivism, see Philip Schofield, "Jeremy Bentham and HLA Hart's Utilitarian Tradition in Jurisprudence," *Jurisprudence* 1:2 (December 2010), pp. 147-167.

²⁸ *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.

²⁹ *Anarchical Fallacies*, op. cit., p. 500.

³⁰ *Ibid.*, p. 524.

³¹ *Ibid.* p. 497.

³² An example is the right of refugees to return to their homes. If the 12 million German refugees from central and eastern Europe in 1945 insisted on returning en masse to their homes in Strassberg, Danzig, Breslau, Stetin, Königsberg, Transylvania, Prague and the Sudetenland, etc. this could destabilize central Europe. See Henry A. Carey, "The Tension Between Peace and Justice in the Age of Anarchy Building" in Thomas Cushman (ed.), *Human Rights* (London: Routledge, 2010), pp. 421-431.

³³ *Justice*, p. 356.

³⁴ John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited*, (Harvard University Press, 2002), p. 79.

³⁵ Charles R. Beitz, "Human Rights as a Common Concern," *American Political Science Review*, 95:2 (June, 2001) p. 269. pp. 269-282.

³⁶ 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. See also Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1993).

³⁷ Bentham, *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law*, in J. Bowring, ed., *The Works of Jeremy Bentham*, V, p. 92.

³⁸ Bentham was quite outspoken in his denunciation of legal fictions. For numerous quotes from Bentham, see Lon L. Fuller, *Legal Fictions* (Stanford University Press, 1967), pp. 2-4. See also Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), chapter 8; R.M. Sainsbury, *Fiction and Fictionalism* (Oxon: Routledge, 2010), p. 158; and Rae Greiner, *Sympathetic Realism in Nineteenth-Century British Fiction* (Baltimore: The Johns Hopkins Press, 2012), pp. 58-71.

³⁹ 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), p. 127.

⁴⁰ Michael Walzer, "Beyond Humanitarian Intervention," in *Thinking Politically: Essays in Political Theory* (New Haven & London: Yale University Press, 2007), p. 261. See also, Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1999).

⁴¹ *Ibid.*, p. 252.

⁴² *Justice*, p. 361.

⁴³ "Elements," p. 324; see also *Justice*, p. 361.

⁴⁴ *Justice*, *Ibid.*

⁴⁵ Hugo Adam Bedau, "Anarchical Fallacies': Bentham's Attack on Human rights," *Human Rights Quarterly*, 22:1 (2000), pp. 264, 268.

⁴⁶ Joel Feinberg is credited for identifying this different way of understanding rights. He observed that some rights of the UDHR are expressed “in an unusual new, ‘manifesto sense’ rather than on the model of legal claim rights. See, *Social Philosophy* (Englewood Cliffs, NJ Prentice Hall, 1973), p. 95.

⁴⁷ “Elements,” p. 321; *Justice*, p. 362

⁴⁸ “Elements,” p. 325; *Justice*, p. 362; “Global,” section 3.

⁴⁹ There has been an ongoing debate on prioritizing human rights; however, the international consensus remains against this. This was the outcome of the Vienna Conference in 1993. On this, see Charles R. Beitz, “Human Rights as a Common Concern,” *The American Political Science Review*, 95:2 (June, 2001), p. 271.

⁵⁰ See for example, “Global Reach,” section 5.

⁵¹ See James Nickel’s “Human Rights” entry in the Stanford Encyclopedia of Philosophy.

<http://plato.stanford.edu/entries/rights-human/>

See also James Griffin, *On Human Rights* (Oxford University Press, 2008), p. 170; and, Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Boulder: Co: Westview Press, 1999).

⁵² Supporters of slavery frequently asserted natural law to support their beliefs in White supremacy and Negro inferiority. They even cited support from Aristotle, Aquinas, and Locke. See, for example the speeches of John C. Calhoun and the writings of James Henry Hammond and John Campbell, the author of *Negromania*. See also three recent books: Fergus M. Bordewich, *America’s Great Debate: Henry Clay, Stephen A. Douglas, and the Compromise That Preserved the Union* (Simon & Schuster, 2012); and, Allen C. Guelzo, *Fateful Lightning: A New History of the Civil War and Reconstruction* (Oxford University Press, 2012); Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press, 2012).

⁵³ Joseph Raz, “Human Rights Without Foundations” (March 2007). P. 18. Oxford Legal Studies Research Paper No. 14/2007. Available at SSRN: <http://ssrn.com/abstract=999874> or <http://dx.doi.org/10.2139/ssrn.999874g>

⁵⁴ See the United Nations’ Convention on the Prevention and Punishment of the Crime of Genocide. <http://www2.ohchr.org/english/law/genocide.htm>

⁵⁵ See for example, Slavoj Žižek, “Against Human Rights,” *New Left Review* 34 (July-August 2005); and Žižek, Eric L. Santner, Kenneth Reinhard, *The Neighbor: Three Inquiries in Political Theology* (University of Chicago Press, 2013), p. 3.

⁵⁶ On the notion of Responsibility to Protect, see: Emma Gilligan, “Redefining Humanitarian Intervention: The Historical Challenge of R2P,” *Journal of Human Rights* 12:1(2013); Kurt Mills, R2P3: Protecting, Prosecuting, or Palliating in Mass Atrocity Situations,” *Journal of Human Rights* 12:3 (2013); Gareth Evans and Mohamed Sanoun, “The Responsibility to Protect,” *Foreign Affairs*, Nov./Dec. 2002; and, Stewart Patrick, “A New Lease on Life for Humanitarianism: How Operation Odyssey Dawn Will Revive RtoP,” *Foreign Affairs*, March, 2011. For an historical overview, see, Charles Homans, “Responsibility to Protect: A Short History,” *Foreign Policy*, November, 2011.

To be clear, I recognize that there can be valid instances for foreign intervention, but there can also be cases where human rights rhetoric is misused.

⁵⁷ For example, the United States had noble humanitarian intentions when it sent its army into Somalia to alleviate starvation, but it ended up killing thousands of Somali civilians. In the “Black Hawk Down” incident, hundreds of Somali civilians were killed by helicopter gunships to prevent the slaughter of trapped Army Rangers. See Mark Bowden, *Black Hawk Down: A Story of Modern War* (Penguin, 1997).

⁵⁸ On Smuts’ contribution to the Preamble of the UN Charter, see Charles R. Beitz, “Human Dignity in the Theory of Human Rights, op. cit. note 2. Jan Smuts was Prime Minister of South Africa and one of the major architects of Apartheid.

⁵⁹ Don Habibi, "The Politicization of the International Human Rights Movement: A Utilitarian Critique," *Journal of Human Rights*, 6:1 (2007), pp. 7-35.

⁶⁰ See for example, Asher Ahuvia Fredman, "Asleep at the Wheel: Comparing the Performance of Human Rights NGO's on Sudan and Arab-Israeli Issues," *NGO Monitor*, August 26, 2004.
<http://www.ngo-monitor.org/article.php?id=221>.

⁶¹ See the Annual Reports of Amnesty International and Human Rights Watch, which document most of these charges. Interestingly and inexplicably, neither AI nor HRW regard China's takeover of Tibet or portions of Assam, India, or Russia's seizure of the Kurile Islands from Japan and Karelia from Finland as 'occupied territory.' Similarly, they do not regard the Turkish occupation of northern Cyprus or Morocco's occupation of land seized from Mauritania. The United Nations has no room on its agenda to consider any of these problems.

⁶² UN General Assembly, Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Libyan Arab Jamahiriya" (4 January, 2011)
<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-15.pdf>

⁶³ On this, see Habibi, "The Politicization of the International Human Rights Movement," op. cit., note 59.

⁶⁴ See Sarah Leah Whitson, "Tripoli Spring: How Libya's behind-the-scenes reformer is actually, well, reforming," *Foreign Policy*, May 27, 2009.
http://www.foreignpolicy.com/articles/2009/05/26/tripoli_spring

For a short analysis of Ms. Whitson's perceptions, see "HRW's Sarah Leah Whitson and Libya: Marketing Qaddafi," *NGO Monitor*, February 27, 2011.

http://www.ngo-monitor.org/article/hrw_s_sarah_leah_whitson_and_libya_marketing_qaddafi

⁶⁵ H.L.A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64 (1955). Incidentally, Hart makes clear that *if* there is such a thing as a natural right, then the only one he sees is: "The equal rights of all men to be free." The toe-hold he offers is simply a thought experiment. Hart is making a case for the bedrock principle of Western liberal political philosophy.

⁶⁶ "Elements," 326-7; *Justice*, p. 363, "Global," section 2.

⁶⁷ On this point, see Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (Boston and New York: Little Brown, 2002). On identifying 'injustice' and his bottom up approach, see chapter two. Interestingly, a widely accepted injustice which he used for an example is torture; yet, in chapter 52 Dershowitz actually defends torture under certain extreme conditions.

⁶⁸ "Elements," p. 319; *Justice*, pp. 364-6.

⁶⁹ Onora O'Neill, "The Dark Side of Human Rights," *International Affairs* 81:2 (2005, p. 430).