EXCERPTED FROM

Exploring International Human Rights: Essential Readings

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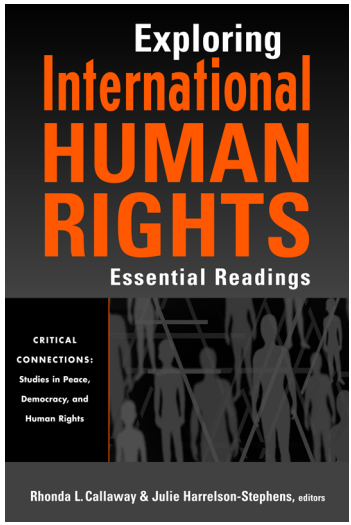
ISBNs: 978-1-58826-412-1 hc
978-1-58826-437-4 pb



LYNNE RIENNER PUBLISHERS
1800 30th Street, Ste. 314
Boulder, CO 80301
USA
telephone 303.444.6684
fax 303.444.0824

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1 What Are Human Rights?

1.1 Introduction

The Editors

Since the Holocaust, human rights have increasingly emerged as an international norm. Atrocities committed by the Nazi regime led the international community to examine the idea of human rights and prompted world leaders to begin to recognize limits on the sovereignty of states. As a result, states have become more attentive to the values of human rights and, in much of the world, to their actual realization. Citizens are also more apt to claim such rights as theirs, not on the basis of their legal status or the color of their skin, but merely because they are human. Thus, in the last half century, human rights have become increasingly accepted in international discourse and increasingly claimed by citizens and world leaders alike.

The transformation toward an acceptance of human rights has been accompanied by an increase in scholarly research devoted to the study of those rights. Although the study of human rights is still seen as a fringe topic by many international relations scholars, research devoted to its study has increased, particularly since the 1980s. Research in human rights today examines a variety of questions, including what is meant by human rights, what are the causes of gross human rights violations, and how are these rights important in formulating foreign policy?

This section seeks to address a fundamental issue: What are human rights? This question remains highly contested within both political discourse and the field of human rights research. Before we can engage in a meaningful dialogue regarding human rights, we must first agree on what we mean by human rights. In the first selection, Julie Harrelson-Stephens and Rhonda L. Callaway illustrate the difficulty in defining and conceptualizing human rights. We begin with a discussion of the evolution of human rights as an international norm since the end of World War II. Cold War divisions resulted in a theoretical rift in terms of economic and political rights, positive and negative rights, and first generation

and second generation rights. In practice, the resulting typologies have been used to further political agendas and undermine certain types of rights in favor of others. That rift continues today, with developed states advocating security rights while developing states promote subsistence rights. This debate leads to the fundamental question in human rights research today: Are human rights universal or culturally relative? We examine the arguments on each side of this debate and discuss the prospects for the future realization of human rights.

David Beetham's piece specifically addresses the Cold War ideological division pitting economic and social rights against civil and political rights. He argues that economic and social rights should be included in the conception of human rights and then turns to the question of the resulting duties correlated to the realization of human rights. Beetham affirms a duty related to economic and social rights as the primary responsibility of a citizen's government. To the extent that the government is unable to fulfill this duty, he argues that the developed world has an obligation to support these individuals through international organizations.

Henry Shue also questions whether there is a hierarchy of rights. He challenges the prevailing typologies of human rights, asserting instead that there are certain basic rights. Basic rights are those rights that are necessary for the enjoyment of other rights and therefore must be provided by society. Ultimately, Shue argues that both security rights and subsistence rights are basic rights in that a denial of these rights precludes the enjoyment of all other rights.

While the previous articles survey the typologies of human rights, Jerome Shestack addresses what is meant by human rights from a philosophical perspective. To fully explore this, he examines possible sources of human rights claims, including the moral basis encompassing both religion and natural law. For instance, Shestack argues that most religions are based on the idea that man is created in God's image and therefore has intrinsic value. From this perspective, human rights flow naturally from religion. By contrast, natural law suggests that individuals have inherent rights based on their humanity rather than a divine gift. He moves beyond these traditional sources to include theories where the state is the source of human rights based on legal positivism or Marxism, as well as sociological and utilitarian approaches to human rights. For a positivist, human rights are based in law, rather than derived from what "ought" to be. Similarly, Marxism also recognizes rights as those granted by the state, emphasizing duty to society rather than individuality. Next, Shestack addresses the current sociological approach, which emphasizes prevailing social and economic conditions and the resulting societal preferences for specific rights. Last, utilitarianism is based on the idea that governments should promote the greatest happiness for the greatest number. Thus, individual rights are sometimes sacrificed for collective welfare.

This section explores the difficult and continuously divisive question of what we mean by human rights, specifically how individuals in different cul-

tures and distinct political systems around the world may come to very different conclusions. Each of the above pieces illustrates the difficulties in conceptualizing and realizing human rights around the world. The remaining articles in this book deal with specific stories and issues in the study of human rights. The typologies, philosophical foundations, and ideological divisions discussed in this section will continue to come up in the remaining articles in this book.

1.2

What Are Human Rights? Definitions and Typologies of Today's Human Rights Discourse

Julie Harrelson-Stephens and Rhonda L. Callaway

The issue of human rights is frequently discussed in international discourse, among world leaders, and in the international media. At any given time, there are world conferences on human rights, speeches from presidents and popes alike about the need for tolerance and respect for human rights, and media outlets airing one program after another on the poverty and poor living conditions around the world. Although what is exactly meant by human rights remains controversial and ambiguous, it is increasingly clear that there is some international concept of human rights. In societies where citizens are by and large free to participate in the political process and express opposition to their government, where they do not simply disappear in the blink of an eye and are generally free from hunger and poverty, human rights may never be a chief consideration or concern. Unfortunately, this only describes the situation of a minority of the world's population.

The acknowledgment of human rights as an issue by the international community has led to the creation of a vast network of laws, treaties, and international organizations. Moreover, most states today recognize some limits to their sovereignty and, at least ostensibly, acquiesce to treaties and covenants designed to protect those rights. Prior to World War II, such a concept would have been deemed untenable, as state sovereignty remained the norm of international relations. This meant that states were the final arbiter in the treatment of their citizens and other states should refrain from intervening in their affairs. The Holocaust and atrocities associated with the Nazi regime served as a catalyst for the human rights movement, propelling the issue into the international arena. After the Nazis attempted to systematically eliminate the Jewish population from Europe, as well as targeting gypsies, the handicapped, elderly, and homosexuals, the world's response was one of horror. It was the extermination of over six million people by the Nazi regime that created the political will to mount the first true challenge to the idea of sovereignty with respect to human rights.

However, while international discourse on the importance of human rights has continually increased since the end of World War II, many states continue to violate a wide range of rights. In fact, some of the worst human rights violations have occurred in modern times: the atrocities committed by the Khmer

Rouge in Cambodia, the ethnic cleansing in the former Yugoslavia, the slaughter in Rwanda, and the current genocide in the Darfur region of Sudan. Food insecurity, lack of clean water, and lack of basic healthcare continue to be everyday realities for much of the world. Slavery is on the rise today: in Eastern Europe, women are trafficked as sex slaves; in the Democratic Republic of Congo, children are being forced to fight in wars; and in Nepal, children are being forced to work in sweatshops for subsistence wages instead of attending school. For many people, the lack of human rights is a daily reality. This suggests that while citizens in parts of the world are experiencing greater respect for human rights, the majority have yet to realize and enjoy the full spectrum of human rights. The disjuncture between the discourse on human rights and the realization of human rights is one of the important paradoxes of the study of human rights.

Beyond a Definition of Human Rights: Developing a Human Rights Regime

The beginning of any formal recognition of the human rights regime came in 1948 when the UN General Assembly unanimously adopted the Universal Declaration of Human Rights (UDHR).[1] This declaration (Preamble, 1948), which still provides one of the most sweeping guarantees of human rights worldwide, begins with the recognition of "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." At least theoretically, states would no longer be allowed to hide behind the veil of sovereignty regarding the treatment of citizens. A new generation of international cooperation was forming with the UN serving as a forum to push for the advancement of human rights in existing as well as newly emerging states.

The major dilemma facing the international community, however, is the term itself. What are *human rights*? The inability to come to any consensus has led to definitions of convenience as states carve out meanings and conceptions that serve their best interests. From a theoretical and philosophical perspective, we find one prevalent definition of human rights as simply the rights one has because one is human (Donnelly 1989, 1998). Donnelly (1998, 18) further explains that human rights "are held by all human beings, irrespective of any rights or duties individuals may (or may not) have as citizens, members of families, workers, or parts of any public or private organization or association. They are universal rights." This definition suggests that human rights apply to all people in all states; however, it still fails to provide any specificity of what actually constitutes a human right.[2]

In a more pragmatic fashion, states have consequently turned to the international treaties and opted for the types of enumerated rights that reflect their

respective ideologies. In fact, the UDHR had little chance of progressing beyond a declaration to become a binding treaty. It didn't take long for a dichotomy of rights to emerge out of the UDHR with the fault lines approximating not only the ideological schisms of the Cold War but also the perceived role of the state. In the West, for example, there is a tendency for states to emphasize civil and political rights while marginalizing economic and cultural rights. This is supported by an ideology that is based on liberalism and democracy and which focuses on the rights of the individual in both the political and economic arenas. The ideology of communist states, by contrast, called for an emphasis on economic and social equality, eschewing the needs of the individual for the greater good. This preference has since been expressed by developing countries, often to the extent that they support a short-term suppression of civil and political rights in order to ensure stability necessary for economic prosperity. Ultimately, these divisions provoke a good deal of debate and disagreement over what are, in fact, human rights.

This divide would lead the UN to create two more statements on human rights: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both of which went into force in 1976. These three documents together are collectively known as the International Bill of Human Rights.[3] The *International Covenant on Civil and Political Rights* encompasses, among other rights, the right to self-determination, the right to a fair trial, freedom of expression, and freedom of religion. This covenant also affirms the right to life and includes protections against torture, slavery, or forced servitude. These rights are sometimes referred to as first generation rights. This designation acknowledges the liberal philosophical heritage experienced in Western societies that first extended political and civil rights to society at large.[4] The idea is that civil and political rights are realized first, resulting in the demand for additional types of rights. Weston (1992, 19) points out that the common denominator in these types of rights is the emphasis on the notion of liberty, "a shield that safeguards the individual, alone and in association with others, against the abuse and misuse of political authority. This is the core value." In general, this statute continues to be emphasized and championed by the West, although many non-Western states have adopted this covenant as well.[5]

The *International Covenant on Economic, Social and Cultural Rights* includes the right to work, equal remuneration for work, and the right to fair compensation, as well as the right to join trade unions. The right to an education, along with the right to food, clothing, and shelter, is also specified in the covenant. These rights are often referred to as second generation rights and were championed by Eastern Bloc states during the Cold War. Today, developing countries tend to underscore the importance of these types of rights. From the Western perspective, the demands associated with economic and social rights came after their political and civil rights were achieved. Conversely,

socialist states, and now many non-Western states, focus on the primacy of these types of rights as part of the reaction against the liberal emphasis on individual rights.

Some states, as well as certain groups within states, contend that there is yet a third generation of rights, or solidarity rights. In succinct terms, these types of rights are sought after by groups or collectivities and are closely related to the development of the nation-state (Weston 1992). As such, groups claim the right to self-determination and economic development as well as more abstract objectives such as the right to a healthy environment and peace. Examples of the quest for self-determination sought after by groups include the Kurds in Iraq and Turkey, Palestinians in Israel, as well as the Chechens in Russia. The realization of third generation rights requires, in part, the cooperation of institutions beyond the state, and as a result, they tend to be more difficult to obtain.

Beyond the divisions that seem to flow naturally out of the UDHR and related documents, researchers often distinguish between positive and negative rights. Positive rights are those rights that require the state to be proactive in the provision of something, such as the right to food or healthcare. In terms of the two UN covenants, positive rights are mostly reflected in the *International Covenant on Economic, Social and Cultural Rights* and, as previously discussed, advocated and pursued by developing states. Negative rights, by contrast, are those rights that require the government to refrain from some action, such as torture or genocide. These types of rights are, again, typically championed by the West and are articulated in the *International Covenant on Civil and Political Rights.* However, Donnelly (1998) makes a stinging critique of such divisions, arguing that most rights can be conceived as both positive and negative. Moreover, he argues that "the moral basis of the positive-negative distinction is also questionable. Does it really make a moral difference if one kills someone through neglect or by positive action?" (Donnelly 1998, 25). Attempts to create such a hierarchy of rights are often motivated by political and ideological differences. For instance, Western states often make the distinction between positive and negative rights to reinforce their partiality for civil and political (and presumably negative) rights.

While each of the above typologies implies some hierarchy among rights, critiques, such as Donnelly's, suggest that it is useful to distinguish among basic types of rights, absent any such hierarchy.[6] Here, we can conceive of three broad categories of rights. The first is political rights such as the right of participation, assembly, and expression. These are generally found to be more fully realized in democratic states. A second category of rights is security rights. Security rights, which are sometimes referred to as rights respecting the integrity of the person, consist of the right not to be tortured, imprisoned for one's political views, disappeared, or murdered by your state. A final category of basic rights is basic human needs or subsistence rights, which take into account the

right to food, clothing, and shelter. Rather than a hierarchy, some scholars suggest that these rights are actually achieved somewhat simultaneously (Donnelly 1989; Milner, Poe, and Leblang 1999).

Universalism vs. Cultural Relativism

Perhaps the most important theoretical, if not the most prevailing, controversy in international human rights is the question of cultural relativism. In particular, the question is raised, do universal rights exist or are human rights culturally specific? Universalism suggests that human rights are inherent in the individual, regardless of his or her nationality, ethnicity, or socioeconomic standing. From this perspective, human rights are not granted by the state or law; rather such rights are intrinsic in humanity. Every individual is born with the same rights, regardless of where or when that birth takes place, making human rights inalienable for all human beings.[7] The UDHR, at its core, seems to support the idea that there are certain universal human rights that the international community has accepted.

While the adoption of the UDHR binds the states of the world together and seeks to address human rights under one umbrella, it does so only in a political and moral way. The legal weight it carries is not a heavy one. In addition, the developing countries are quick to dispute the universality of human rights, arguing three main points. First, developing countries had little input in the drafting of the document due to their colonial status at the time. Second, these same countries contend that the rights outlined in the declaration are ethnocentric, reflecting Western conceptions and omitting non-Western views on human rights. Last, critics contend that too much emphasis is placed on the rights of the individual often at the expense of the rights of groups and collectivities. As a result, many states pursue alternatives to the universal model of human rights.

Cultural relativism is the argument that human rights are culturally or historically defined and will likely change over time. According to this point of view, moral values, or what is socially acceptable, are defined by one's culture. As one example, slavery was once an accepted practice among most states in the West; however, today those same states argue that this is a violation of human rights. Moreover, cultural relativists contend that what one society calls a human rights violation, another society might claim as a legitimate cultural practice. Typically, cultural relativists argue that advocates of universalism are, by and large, propagating Western moral standards, and any attempt to establish or impose universal human rights standards amounts to cultural imperialism. As a consequence, we have witnessed the emergence of a variety of human rights perspectives, including Asian values, African values, and Islamic values.

Today, the international community is faced with specific examples of cultural practices leading to a perpetuation of the debate on the twin issues of sovereignty and the universality of human rights. In the twenty-first century, many states still view the human rights regime as an assault on their sovereignty, and many societies see this as a threat to their way of life. In Mauritania, for instance, chattel slavery continues as an accepted institution within its society. The removal of female genitalia (referred to as female circumcision or female genital mutilation) is a long-held tradition in places across Africa, Asia, and the Middle East. Many Islamic cultures prescribe subservient roles for females, often denying them basic civil rights. In the United States, many citizens believe in the right to utilize the death penalty as a punishment. These are just a few cases where strongly held cultural beliefs deny the existence of universal human rights.

The resulting tension between cultural relativity and universalism continues to dominate the human rights debate around the world. While great strides have been made in human rights in the past few decades, there continues to be contention among states and groups as to what constitutes human rights; what types of rights, if any, are the most important; and to what extent the international community can enforce these rights on sovereign states. These issues will inform the rest of the readings in this book.

Notes

1. Notably, several countries, including South Africa, Saudi Arabia, and the Eastern Bloc states, abstained from the vote.

2. For a complete discussion of the definition of human rights, see Cranston (1973), Shue (1980), Donnelly (1989, 1998), Howard (1983), and Forsythe (2006).

3. Additional international human rights covenants include the *United Nations Convention on the Prevention of and Punishment for the Crime of Genocide* (1951), *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), and *Convention on the Rights of the Child* (1989). For an exhaustive list of all international treaties and covenants pertaining to human rights, see the website of the Office of the United Nations High Commissioner for Human Rights at www.ohchr.org/english/law.

4. This bifurcation of rights into three generations was first articulated by French jurist and human rights scholar Karel Vasek (1977), who associated these three generations of rights with the French slogan *liberté, égalité et fraternité.* First generation rights reflect the notion of liberty, second generation rights encompass the idea of equality, while third generation rights, according to Vasek, signal the rights of the community (Claude and Weston 1992, 6).

5. As of November 2006, there are 160 parties to the covenant and 67 signatories. A complete listing can be found at the Office of the United Nations High Commissioner for Human Rights (www.ohchr.org/english/countries/ratification/4.htm).

6. Shue (1980) offers a complete discussion of basic rights that can be found later in this chapter.

7. As previously mentioned, this very idea is embodied in one of the most popular definitions of human rights, that human rights are rights that one has because one is human (Donnelly 1989).

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1.3

What Future for Economic and Social Rights?

David Beetham

Corresponding Duties

Among the most substantial objections which the theory of human rights has to face is that it is impossible to specify the duties which correspond to rights claimed, to show who should fulfill them or to demonstrate that they can realistically be fulfilled. In the absence of a satisfactory theory of obligation, it is urged, human rights must remain merely 'manifesto' claims, not properly rights. This objection is held to be particularly damaging to economic and social rights, which require from individuals and governments, not merely that they refrain from harming others or undermining their security, but that they act positively to promote their well-being. This requirement not only presupposes resources which they may not possess. It also contradicts a widely held moral conviction to the effect that, while we may have a general negative duty not to harm others, the only positive duties we have are *special* duties to aid those to whom we stand in a particular personal, professional or contractual relationship. There can be no general duty to aid unspecified others; and, insofar as it presupposes such a duty, the inclusion of economic and social rights in the human rights agenda is basically flawed.

This formidable charge-sheet rests, I hope to show, on a number of fallacies. Easiest to refute is the assumption of a principled difference between the two sets of rights in the character of the obligations each entails, negative and positive respectively. As many commentators have shown, this difference will not hold up.[1] Certainly the so-called 'liberty' rights require the state to refrain from invading the freedom and security of its citizens. However, since governments were established, according to classical liberal theory itself, to protect people from the violation of their liberty and security at the hands of one another, it requires considerable government expenditure to meet this elementary purpose. Establishing "the police forces, judicial systems and prisons that are necessary to maintain the highest achievable degree of security of these (sc.

Excerpted from David Beetham, "What Future for Economic and Social Rights?" *Political Studies* 43, Special Issue. © 1995 Blackwell Publishing. Reprinted with permission. Some of the author's notes have been omitted.

civil and political) rights . . . is enormously expensive and involves the maintenance of complex bureaucratic systems."[2]

Henry Shue has developed this argument furthest in his distinction between three different kinds of duty that are required to make a human right effective. There is, first, the duty to *avoid* depriving a person of some necessity; the duty to *protect* them from deprivation; and the duty to *aid* them when deprived. All three types of duty, he argues, are required to secure human rights, whether these be civil and political, or social and economic. Personal security, for example, requires that states refrain from torturing or otherwise injuring their citizens; that they protect them from injury at the hands of others; and that they provide a system of justice for the injured, to which all equally have access. Similarly, subsistence rights require that states do not deprive citizens of their means of livelihood; that they protect them against deprivation at the hands of others; and that they provide a system of basic social security for the deprived. The examples are entirely parallel. The difference is not between different categories of *right*, but between different types of *duty* necessary to their protection, Shue concludes. "The attempted division of rights, rather than duties, into forbearance and aid . . . can only breed confusion. It is impossible for any basic right—however 'negative' it has come to seem—to be fully guaranteed unless all three types of duties are fulfilled."[3]

Shue's argument is persuasive. However, two opposite conclusions can be drawn from it. One (the conclusion which Shue and others who argue similarly, invite us to draw) is that economic and social rights have to be considered as equally solid as civil and political rights, since there is no difference of principle between the state's provision of security for the vulnerable and social security for the deprived. Those who are prepared to defend the one have to treat the other with equal seriousness. The opposite response, however, is to conclude that Shue's argument makes civil and political rights every bit as precarious as economic and social ones. If the most that can realistically be required from governments with limited resources, as from individuals with limited moral capacities, is duties of restraint or avoidance of harm to others; and if these negative duties are on their own insufficient to guarantee any human rights, as Shue has ably demonstrated: then no human right can be regarded as secure, since they all remain unanchored by the full range of corresponding duties. In other words, to make the case for human rights it is not enough simply to show what range of duties *would be* required to make the rights effective; it has also to be shown that these are duties which appropriate agents can reasonably be expected to fulfil.

The argument has therefore to be engaged at a deeper level, and a second assumption—that we have no general duty to aid others—needs examination. This is particularly important to economic and social rights, because the suspicion remains, despite all Shue's endeavors, that the two sets of rights are not after all symmetrical. More seems able to be achieved comparatively in the

civil and political field by government abstention; and more seems required comparatively in the economic and social sphere by way of positive aid and provision. Moreover, while the provision of defence and law and order can readily be presented as a public good, from which all benefit, key elements of a basic economic and social agenda more readily assume the aspect of a particular good, which benefits definable sections of the population through transfer from the rest. Examining the logic of duties, therefore, is particularly necessary in respect of economic and social rights.

The argument that the only general duties we owe to unspecified others are negative ones, to refrain from harming them, not positively to give aid, is rooted not merely in liberal categories of politics, which prioritize non-interference, but also in a basic moral intuition about what we can reasonably be held responsible for. The objections to holding people responsible (and therefore morally reprehensible) for all the good that they could do, but do not, as well as for the harm they actually do, are twofold. Whereas the latter, sins of commission, are clearly assignable (to *our* actions), and to avoid them entails a clearly delimited responsibility (we can reasonably be required to take care not to harm others, and it is usually evident what this involves), a general duty to aid others is both potentially *limitless*, and also *non-assignable* (why us rather than millions of others?). By contrast, special duties to give aid—to family, friends, clients, etc.—derive their moral weight precisely from the fact that they are both clearly assignable and delimited, and in this they share with the general negative duty to avoid harming others the necessary characteristics of *circumscription* for a duty which a person can reasonably be required to fulfil.[4]

There is much force in these considerations. Most of us remain unconvinced by philosophical arguments which show that inaction is simply another form of action, and omissions therefore as culpable as commissions. A morality which requires us to go on giving up to the point where our condition is equal to that of the poorest of those we are aiding is morality for saints and heroes, perhaps, but not for ordinary mortals; and not one, therefore, on which the delivery of basic rights can rely. However, it does not follow from these arguments that there can be *no* general duty to aid the needy, or that such a duty cannot be specified in a form sufficiently circumscribed to meet the criteria outlined above.

Consider an elementary example. All would surely agree that children have a variety of needs which they are unable to meet by themselves, and that a duty therefore falls on adults to aid and protect them. In most cases this responsibility is fulfilled by their parents or other close relatives as a 'special' duty by virtue of their relationship. However, where there is no one alive to perform this duty, or those who have the responsibility are incapable of meeting it, then it falls as a general duty on the community as a whole. Here is an example of a general duty to aid the needy, whose ground lies in the manifest needs of the child. Yet it is neither limitless nor unassignable. It is not a duty

to all children, but only those for whom no one is able to care as their 'special' duty; they are, so to say, a residual rather than a bottomless category. And the duty falls upon members of the society in which they live as those most appropriately placed to help, just as when someone is in danger of drowning those most appropriately placed to help, and therefore with the duty to do so, are those present at the incident. In the case of children, however, those responsible will typically fufil their duty, not as individuals in an *ad hoc* manner, but collectively, by establishing arrangements whereby the children are placed in the care of professionals or foster parents, and paid for by a levy on all members capable of contributing. A publicly acknowledged duty so to aid those in need, with whom we stand in no special relationships, forms one of the principles of the modern welfare state.[5]

It is mistaken therefore to assume that, if there is a general duty to aid those in need, it can only be unlimited and unassignable, and so must be either unrealistically burdensome or inadequate to guarantee any universal rights. We incur general duties to aid the needy in a social world already structured with special relationships and special duties, and in which most people meet their basic needs for themselves either individually or collectively. . . .

As the ICESCR recognizes, it is governments that have the overarching duty to ensure a division of labour in the matter of positive duties, and one that is both appropriate to their own societies and sufficient to ensure that the rights are effectively secured. This is an obligation on all states, but one with quasi-legal or contractual status for the 130 (as of 1994) that have ratified the Covenant. As the so-called Limburg principles of interpretation of the Covenant insist, states are "accountable both to the international community and to their own people for their compliance with the obligations under the Covenant."[6] In other words, the obligations corresponding to the rights are not merely derivable from a general moral duty, on the part of both individuals and governments, to aid those in need; they are also publicly acknowledged by international agreement.

But what if states are unable to meet their obligation to realize a minimum agenda of basic rights? Whose duty does it then become to assist them, and to aid the deprived to realize their rights? By a logical extension of the general duty to aid those in need, and the principle of a division of labour in fulfilling that duty, it clearly falls to other governments with the resources to do so, coordinated by an international body such as the UN and its agencies. A prior duty to aid those within our own country—whether we argue this on the 'kith and kin' principle, or, more plausibly, from the logic of a world organized into territorial citizenships[7]—does not absolve us of any wider duty. This is indeed publicly acknowledged in internationally agreed aid targets for the developed countries, in their contributions to UN agencies, in the continuous public support for the work of NGOs, in the massive (if spasmodic) public response to emergency appeals, and so on. These may be all insufficient, but the duty is at least generally acknowledged.

A clear answer can thus be given to the objection that economic and social rights remain unanchored by any corresponding duties. The ground of the duty is the same as for the rights themselves: in human needs. The general duty to aid those in need is, however, neither unlimited nor unassignable. It falls in the first instance upon governments, from societal resources, to ensure that basic rights are realized where individuals, families or groups prove insufficient by themselves; and to the international organizations in turn, from the resources of the developed world, to support this effort where national resources prove insufficient. Such duties are widely acknowledged.

Notes

1. S. M. Okin, 'Liberty and welfare: some issues in human rights theory,' in J. R. Pennock and J.W. Chapman (eds), *Human Rights: Nomos XXIII* (New York: New York University Press, 1981), pp. 230–56; R. Plant, 'A defence of welfare rights,' in R. Beddard and D. M. Hill (eds), *Economic, Social and Cultural Rights* (Basingstoke: Macmillan, 1992), pp. 22–46; R. Plant, *Modern Political Thought* (Oxford: Blackwell, 1991), pp. 267–86; H. Shue, *Basic Rights: Subsistence, Affluences and U.S. Foreign Policy* (New Jersey: Princeton University Press, 1980), ch. 2.

2. Okin, 'Liberty and welfare,' p. 240.

3. Shue, *Basic Rights*, p. 53.

4. See P. Foot, *Virtues and Vice* (Oxford: Blackwell, 1978); H. L. A. Hart, 'Are there any natural rights?', *Philosophical Review* (1955) 64:2, 175–191.

5. R. E. Goodin, *Protecting the Vulnerable* (Chicago: University of Chicago Press, 1985), pp. 134–144; see also Plant, *Modern Political Thought*, pp. 284–285.

6. UN Doc. E/C/1987/17, Annex, principle 10.

7. R. E. Goodin, 'What is so special about our fellow countrymen?', *Ethics.* 98 (1988). 663–686.

1.4

Basic Rights

Henry Shue

Basic Rights

Basic rights, then, are everyone's minimum reasonable demands upon the rest of humanity. They are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept. Why should anything be so important? The reason is that rights are basic in the sense used here only if enjoyment of them is essential to the enjoyment of all other rights. This is what is distinctive about a basic right. When a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself. Therefore, if a right is basic, other, non-basic rights may be sacrificed, if necessary, in order to secure the basic right. But the protection of a basic right may not be sacrificed in order to secure the enjoyment of a non-basic right. It may not be sacrificed because it cannot be sacrificed successfully. If the right sacrificed is indeed basic, then no right for which it might be sacrificed can actually be enjoyed in the absence of the basic right. The sacrifice would have proven self-defeating.

In practice, what this priority for basic rights usually means is that basic rights need to be established securely before other rights can be secured. The point is that people should be able to *enjoy*, or *exercise*, their other rights. The point is simple but vital. It is not merely that people should "have" their other rights in some merely legalistic or otherwise abstract sense compatible with being unable to make any use of the substance of the right. For example, if people have rights to free association, they ought not merely to "have" the rights to free association but also to enjoy their free association itself. Their freedom of association ought to be provided for by the relevant social institutions. This distinction between merely having a right and actually enjoying a right may seem a fine point, but it turns out later to be critical.

What is not meant by saying that a right is basic is that the right is more valuable or intrinsically more satisfying to enjoy than some other rights. For

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example, I shall soon suggest that rights to physical security, such as the right not to be assaulted, are basic, and I shall not include the right to publicly supported education as basic. But I do not mean by this to deny that enjoyment of the right to education is much greater and richer—more distinctively human, perhaps—than merely going through life without ever being assaulted. I mean only that, if a choice must be made, the prevention of assault ought to supersede the provision of education. Whether a right is basic is independent of whether its enjoyment is also valuable in itself. Intrinsically valuable rights may or may not also be basic rights, but intrinsically valuable rights can be enjoyed only when basic rights are enjoyed. Clearly few rights could be basic in this precise sense. . . .

Security Rights

If we had to justify our belief that people have a basic right to physical security to someone who challenged this fundamental conviction, we could in fact give a strong argument that shows that if there are any rights (basic or not basic) at all, there are basic rights to physical security:

> No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right. Such threats to physical security are among the most serious and—in much of the world—the most wide-spread hindrances to the enjoyment of any right. If any right is to be exercised except at great risk, physical security must be protected. In the absence of physical security people are unable to use any other rights that society may be said to be protecting without being liable to encounter many of the worst dangers they would encounter if society were not protecting the rights.
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> A right to full physical security belongs, then, among the basic rights—not because the enjoyment of it would be more satisfying to someone who was also enjoying a full range of other rights, but because its absence would leave available extremely effective means for others, including the government, to interfere with or prevent the actual exercise of any other rights that were supposedly protected. Regardless of whether the enjoyment of physical security is also desirable for its own sake, it is desirable as part of the enjoyment of every other right. No rights other than a right to physical security can in fact be enjoyed if a right to physical security is not protected. Being physically secure is a necessary condition for the exercise of any other right, and guaranteeing physical security must be part of guaranteeing anything else as a right. . . .

Subsistence Rights

By a "right to subsistence" I shall always mean a right to at least subsistence. People may or may not have economic rights that go beyond subsistence rights, and I do not want to prejudge that question here. But people may have rights to subsistence even if they do not have any strict rights to economic well-being extending beyond subsistence. Subsistence rights and broader economic rights are separate questions, and I want to focus here on subsistence.

I also do not want to prejudge the issue of whether healthy adults are entitled to be provided with subsistence *only* if they cannot provide subsistence for themselves. Most of the world's malnourished, for example, are probably also diseased, since malnutrition lowers resistance to disease, and hunger and infestation normally form a tight vicious circle. Hundreds of millions of the malnourished are very young children. A large percentage of the adults, besides being ill and hungry, are also chronically unemployed, so the issue of policy toward healthy adults who refuse to work is largely irrelevant. By a "right to subsistence," then, I shall mean a right to subsistence that includes the provision of subsistence at least to those who cannot provide for themselves. I do not assume that no one else is also entitled to receive subsistence—I simply do not discuss cases of healthy adults who could support themselves but refuse to do so. If there is a right to subsistence in the sense discussed here, at least the people who cannot provide for themselves, including the children, are entitled to receive at least subsistence. Nothing follows one way or the other about anyone else. . . .

The same considerations that support the conclusion that physical security is a basic right support the conclusion that subsistence is a basic right. Since the argument is now familiar, it can be given fairly briefly.

It is quite obvious why, if we still assume that there are some rights that society ought to protect and still mean by this the removal of the most serious and general hindrances to the actual enjoyment of the rights, subsistence ought to be protected as a basic right:

> No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essential for a reasonably healthy and active life. Deficiencies in the means of subsistence can be just as fatal, incapacitating, or painful as violations of physical security. The resulting damage or death can at least as decisively prevent the enjoyment of any right as the effects of security violations. Any form of malnutrition, or fever due to exposure, that causes severe and irreversible brain damage, for example, can effectively prevent the exercise of any right requiring clear thought and may, like brain injuries caused by assault, profoundly disturb personality. And,

> obviously, any fatal deficiencies end all possibility of the enjoyment of rights as firmly as an arbitrary execution.
>
> Indeed, prevention of deficiencies in the essentials for survival is, if anything, more basic than prevention of violations of physical security. People who lack protection against violations of their physical security can, if they are free, fight back against their attackers or flee, but people who lack essentials, such as food, because of forces beyond their control, often can do nothing and are on their own utterly helpless.

The scope of subsistence rights must not be taken to be broader than it is. In particular, this step of the argument does not make the following absurd claim: since death and serious illness prevent or interfere with the enjoyment of rights, everyone has a basic right not to be allowed to die or to be seriously ill. Many causes of death and illness are outside the control of society, and many deaths and illnesses are the result of very particular conjunctions of circumstances that general social policies cannot control. But it is not impractical to expect some level of social organization to protect the minimal cleanliness of air and water and to oversee the adequate production, or import, and the proper distribution of minimal food, clothing, shelter, and elementary health care. It is not impractical, in short, to expect effective management, when necessary, of the supplies of the essentials of life. So the argument is: when death and serious illness could be prevented by different social policies regarding the essentials of life, the protection of any human right involves avoidance of fatal or debilitating deficiencies in these essential commodities. And this means fulfilling subsistence rights as basic rights. This is society's business because the problems are serious and general. This is a basic right because failure to deal with it would hinder the enjoyment of all other rights.

Thus, the same considerations that establish that security rights are basic for everyone also support the conclusion that subsistence rights are basic for everyone. It is not being claimed or assumed that security and subsistence are parallel in all, or even very many, respects. The only parallel being relied upon is that guarantees of security and guarantees of subsistence are equally essential to providing for the actual exercise of any other rights. As long as security and subsistence are parallel in this respect, the argument applies equally to both cases, and other respects in which security and subsistence are not parallel are irrelevant.

It is not enough that people merely happen to be secure or happen to be subsisting. They must have a right to security and a right to subsistence—the continued enjoyment of the security and the subsistence must be socially guaranteed. Otherwise a person is readily open to coercion and intimidation through threats of the deprivation of one or the other, and credible threats can

paralyze a person and prevent the exercise of any other right as surely as actual beatings and actual protein/calorie deficiencies can. Credible threats can be reduced only by the actual establishment of social arrangements that will bring assistance to those confronted by forces that they themselves cannot handle.

Consequently the guaranteed security and guaranteed subsistence are what we might initially be tempted to call "simultaneous necessities" for the exercise of any other right. They must be present at any time that any other right is to be exercised, or people can be prevented from enjoying the other right by deprivations or threatened deprivations of security or of subsistence. But to think in terms of simultaneity would be largely to miss the point. A better label, if any is needed, would be "inherent necessities." For it is not that security from beatings, for instance, is separate from freedom of peaceful assembly but that it always needs to accompany it. Being secure from beatings if one chooses to hold a meeting is part of being free to assemble. If one cannot safely assemble, one is not free to assemble. One is, on the contrary, being coerced not to assemble by the threat of the beatings.

The same is true if taking part in the meeting would lead to dismissal by the only available employer when employment is the only source of income for the purchase of food. Guarantees of security and subsistence are not added advantages over and above enjoyment of the right to assemble. They are essential parts of it. For this reason it would be misleading to construe security or subsistence—or the substance of any other basic right—merely as "means" to the enjoyment of all other rights. The enjoyment of security and subsistence is an essential part of the enjoyment of all other rights. Part of what it means to enjoy any other right is to be able to exercise that right without, as a consequence, suffering the actual or threatened loss of one's physical security or one's subsistence. And part of what it means to be able to enjoy any other right is not to be prevented from exercising it by lack of security or of subsistence. To claim to guarantee people a right that they are in fact unable to exercise is fraudulent, like furnishing people with meal tickets but providing no food.

1.5

The Philosophical Foundations of Human Rights

Jerome J. Shestack

Sources of Human Rights

Religion

To be sure, the term "human rights" as such is not found in traditional religions. Nonetheless, theology presents the basis for a human rights theory stemming from a law higher than that of the state and whose source is the Supreme Being.

If one accepts the premise of the Old Testament that Adam was created in the "image of God," this implies that the divine stamp gives human beings a high value of worth. In a similar vein the Quran says, "surely we have accorded dignity to the sons of man." So too, in the Bhagavad-Gita, "Who sees his Lord/Within every creature/ Deathlessly dwelling/Amidst the mortal: That man sees truly. . . ."

In a religious context every human being is considered sacred. Accepting a universal common father gives rise to a common humanity, and from this flows a universality of certain rights. Because rights stem from a divine source, they are inalienable by mortal authority. This concept is found not only in the Judeo-Christian tradition, but also in Islam and other religions with a deistic base.[1]

Even if one accepts the revealed truth of the fatherhood of God and the brotherhood of all humans, the problem of which human rights flow therefrom remains. Equality of all human beings in the eyes of God would seem a necessary development from the common creation by God, but freedom to live as one prefers is not. Indeed, religions generally impose severe limitations on individual freedom. For most religions, the emphasis falls on duties rather than rights. Moreover, revelation is capable of differing interpretations, and some religions have been quite restrictive toward slaves, women, and nonbelievers, even though all are God's creations. Thus, at least as practiced, serious incompatibilities exist

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Excerpted from Jerome J. Shestack, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 20 (2): 201–234. Some of the author's notes have been omitted.

between various religious practices and the scope of human rights structured by the United Nations.

However, religious philosophers of all faiths are engaged in the process of interpreting religious doctrines toward the end of effecting a reconciliation with basic human rights prescriptions. This process is largely via hermeneutic exercise, namely reinterpretation of a religion's sacred texts through both historical explication and a type of prophetic application to modern conditions.

Thus, religious doctrine offers a promising possibility of constructing a broad intercultural rationale that supports the various fundamental principles of equality and justice that underlie international human rights. Indeed, once the leap to belief has been made, religion may be the most attractive of the theoretical approaches. When human beings are not visualized in God's image then their basic rights may well lose their metaphysical *raison d'être*. On the other hand, the concept of human beings created in the image of God certainly endows men and women with a worth and dignity from which the components of a comprehensive human rights system can flow logically. . . .

Natural Law: The Autonomous Individual

Natural law theory led to natural rights theory—the theory most closely associated with modern human rights. The chief exponent of this theory was John Locke, who developed his philosophy within the framework of seventeenth century humanism and political activity, known as the Age of Enlightenment. Locke imagined the existence of human beings in a state of nature. In that state men and women were in a state of freedom, able to determine their actions, and also in a state of equality in the sense that no one was subjected to the will or authority of another. However, to end the hazards and inconveniences of the state of nature, men and women entered into a "social contract" by which they mutually agreed to form a community and set up a body politic. Still, in setting up that political authority, individuals retained the natural rights of life, liberty, and property. Government was obliged to protect the natural rights of its subjects, and if government neglected this obligation, it forfeited its validity and office.

Natural rights theory was the philosophic impetus for the wave of revolt against absolutism during the late eighteenth century. It is visible in the French Declaration of the Rights of Man, in the US Declaration of Independence, in the constitutions of numerous states created upon liberation from colonialism, and in the principal UN human rights documents.

Natural rights theory makes an important contribution to human rights. It affords an appeal from the realities of naked power to a higher authority that is asserted for the protection of human rights. It identifies with and provides security for human freedom and equality, from which other human rights easily flow. It also provides properties of security and support for a human rights system, both domestically and internationally.

From a philosophical viewpoint, the critical problem that natural rights doctrine faced is how to determine the norms that are to be considered as part of the law of nature and therefore inalienable, or at least prima facie inalienable.

Under Locke's view of human beings in the state of nature, all that was needed was the opportunity to be self-dependent; life, liberty, and property were the inherent rights that met this demand. But what about a world unlike the times of Locke, in which ample resources are not available to satisfy human needs? Does natural law theory have the flexibility to satisfy new claims based on contemporary conditions and modern human understanding? Perhaps it does, but that very potential for flexibility has formed the basis for the chief criticism of natural rights theory. Critics pointed out that most of the norm setting of natural rights theories contain *a priori* elements deduced by the norm setter. In short, the principal problem with natural law is that the rights considered to be natural can differ from theorist to theorist, depending upon their conceptions of nature. . . .

Positivism: The Authority of the State

Classical positivist philosophers deny an *a priori* source of rights and assume that all authority stems from what the state and officials have prescribed. This approach rejects any attempt to discern and articulate an idea of law transcending the empirical realities of existing legal systems. Under positivist theory, the source of human rights is found only in the enactments of a system of law with sanctions attached to it. Views on what the law "ought" to be have no place in law and are cognitively worthless. The theme that haunts positivist exponents is the need to distinguish with maximum clarity law as it is from law as it ought to be, and they condemned natural law thinkers because they had blurred this vital distinction. In its essence, positivism negates the moral philosophic basis of human rights.[2]

By divorcing a legal system from the ethical and moral foundations of society, positive law encourages the belief that the law must be obeyed, no matter how immoral it may be, or however it disregards the world of the individual. The anti-Semitic edicts of the Nazis, although abhorrent to moral law, were obeyed as positive law. The same is true of the immoral apartheid practices that prevailed in South Africa for many years. The fact that positivist philosophy has been used to justify obedience to iniquitous laws has been a central focus for much of the modern criticism of that doctrine. Critics of positivism maintain that unjust laws not only lack a capacity to demand fidelity, but also do not deserve the name of law because they lack internal morality.

Even granting the validity of the criticism, the positivist contribution can still be significant. If the state's processes can be brought to bear in the protection of human rights, it becomes easier to focus upon the specific implementation that is necessary for the protection of particular rights. Indeed, positivist thinkers such as Jeremy Bentham and John Austin were often in the vanguard

of those who sought to bring about reform in the law. Always under human control, a positivist system also offers flexibility to meet changing needs. . . .

Marxism: Man as a Specie Being

Marx regarded the law of nature approach to human rights as idealistic and ahistorical. He saw nothing natural or inalienable about human rights. In a society in which capitalists monopolize the means of production, Marx regarded the notion of individual rights as a bourgeois illusion. Concepts such as law, justice, morality, democracy, freedom, etc., were considered historical categories, whose content was determined by the material conditions and the social circumstances of a people. As the conditions of life change, so the content of notions and ideas may change.

Marxism sees a person's essence as the potential to use one's abilities to the fullest and to satisfy one's needs.[3] In capitalist society, production is controlled by a few. Consequently, such a society cannot satisfy those individual needs. An actualization of potential is contingent on the return of men and women to themselves as social beings, which occurs in a communist society devoid of class conflict. However, until that stage is reached, the state is a social collectivity and is the vehicle for the transformation of society. Such a conceptualization of the nature of society precludes the existence of individual rights rooted in the state of nature that are prior to the state. The only rights are those granted by the state, and their exercise is contingent on the fulfillment of obligations to society and to the state.

The Marxist system of rights has often been referred to as "parental," with the authoritarian political body providing the sole guidance in value choice. The creation of such a "specie being" is a type of paternalism that not only ignores transcendental reason, but negates individuality. In practice, pursuit of the prior claims of society as reflected in the interests of the Communist state has resulted in systematic suppression of individual civil and political rights. . . .

The Sociological Approach: Process and Interest

To many scholars, each of the theories of rights discussed thus far is deficient. Moreover, the twentieth century is quite a different place from the nineteenth. Natural and social sciences have developed and begun to increase understanding about people and their cultures, their conflicts, and their interests. Anthropology, psychology, and other disciplines lent their insights. These developments inspired what has been called the sociological school of jurisprudence. "School" is perhaps a misnomer, because what has evolved is a number of disparate theories that have the common denominator of trying to line up the law with the facts of human life in society. Sociological jurisprudence tends to move away from both *a priori* theories and analytical types of jurisprudence. This approach, insofar as it relates to human rights, sometimes

directs attention to the questions of institutional development, sometimes focuses on specific problems of public policy that have a bearing on human rights, and sometimes aims at classifying behavioral dimensions of law and society. In a human rights context, the approach is useful because it identifies the empirical components of a human rights system in the context of the social process.[4]

A primary contribution of the sociological school is its emphasis on obtaining a just equilibrium of interests among prevailing moral sentiments and the social and economic conditions of time and place. In many ways this approach can be said to build on William James' pragmatic principle that "the essence of good is simply to satisfy demand."[5] This approach also was related to the development in twentieth century society of increased demands for a variety of wants beyond classical civil and political liberties—such matters as help for the unemployed, the handicapped, the underprivileged, minorities, and other elements of society. . . .

Rights Based on the Value of Utility

Utilitarianism is a *maximizing* and *collectivizing* principle that requires governments to maximize the total net sum of the happiness of all their subjects. This principle is in contrast to natural rights theory, which is a *distributive* and *individualizing* principle that assigns priority to specific basic interests of each individual subject.

Classic utilitarianism, the most explored branch of this school, is a moral theory that judges the rightness of actions affecting outcomes in terms of securing the greatest happiness to all concerned. Utilitarian theory played a commanding role in the philosophy and political theory of the nineteenth century and continues with some vigor in the twentieth.

Jeremy Bentham, who expounded classical utilitarianism, believed that every human decision was motivated by some calculation of pleasure and pain. He thought that every political decision should be made on the same calculation, that is, to maximize the net produce of pleasure over pain. Hence, both governments and the limits of governments were to be judged not by reference to abstract individual rights, but in terms of what tends to promote the greatest happiness of the greatest number. Because all count equally at the primary level, anyone may have to accept sacrifices if the benefits they yield to others are large enough to outweigh such sacrifices.

Bentham's happiness principle enjoyed enormous popularity and influence during the first half of the nineteenth century when most reformers spoke the language of utilitarianism. Nonetheless, Bentham's principle met with no shortage of criticism. His "felicific calculus," that is, adding and subtracting the pleasure and pain units of different persons to determine what would produce the greatest net balance of happiness, has come to be viewed as a practical, if not a theoretic, impossibility.

Later utilitarian thinkers have restated the doctrine in terms of "revealed preferences."[6] Here, the utilitarian guide for governmental conduct would not be pleasure or happiness, but an economically focused value of general welfare, reflecting the maximum satisfaction and minimum frustration of wants and preferences. Such restatements of utilitarian theory have an obvious appeal in the sphere of economic decision making. Even then, conceptual and practical problems plague utilitarian value theory: the ambiguities of the welfare concept, the nature of the person who is the subject of welfare, the uncertain basis of individual preference of one whose satisfaction is at issue, and other problems inherent in the process of identifying the consequences of an act and in estimating the value of the consequences. . . .

The essential criticism of utilitarianism is that it fails to recognize individual autonomy; it fails to take rights seriously. Utilitarianism, however refined, retains the central principle of maximizing the aggregate desires or general welfare as the ultimate criterion of value. While utilitarianism treats persons as equals, it does so only in the sense of including them in the mathematical equation, but not in the sense of attributing worth to each individual. Under the utilitarian equation, one individual's desires or welfare may be sacrificed as long as aggregate satisfaction or welfare is increased. Utilitarianism thus fails to treat persons as equals, in that it literally dissolves moral personality into utilitarian aggregates. Moreover, the mere increase in aggregate happiness or welfare, if abstracted from questions of distribution and worth of the individual, is not a real value or true moral goal.

Hence, despite the egalitarian pretensions of utilitarian doctrine, it has a sinister side in which the well-being of the individual may be sacrificed for what are claimed to be aggregate interests, and justice and right have no secure place. Utilitarian philosophy thus leaves liberty and rights vulnerable to contingencies, and therefore at risk.

Notes

1. *See generally* Simon Greenberg, *Foundations of a Faith* (1967); Leonard Swidler, *Religious Liberty and Human Rights: In Nations and in Religions* (1986); Ann Elizabeth Mayer, *Islam and Human Rights* (1991).

2. *See, e.g.,* Herbert Lionel Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1955); John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed., 1985).

3. Karl Marx, *The Economic and Philosophic Manuscripts of 1844* (Martin Milligan trans., Dirk J. Struik ed., 1969).

4. *See* Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962).

5. William James, *Pragmatism* (1975).

6. *See* Joseph Raz, *The Morality of Freedom* 267–87 (1986).