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Amanda Alexander ^{1,*}

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*Correspondence: amanda.alexander@anu.edu.au

¹ College of Law, Australian National University, Australia

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AMANDA ALEXANDER

College of Law, Australian National University

amanda.alexander@anu.edu.au

Introduction

Utilitarianism, especially in the classical form advocated by Jeremy Bentham, is frequently and fiercely attacked for its inability to acknowledge and guarantee rights. Whether the example proffered is the punishment of the innocent, torture, murder or any other repugnant act, the accusation remains the same: Jeremy Bentham does not respect rights. Bentham himself would have assented to this statement – and with enthusiasm. *Nonsense Upon Stilts*, his response to the 1789 French *Declaration of the Rights of Man and the Citizen* (the *Declaration*), is a devastating philosophical and political critique of the concept of natural rights. Indeed, Bentham's destruction of the natural foundations of rights was so thorough that no one has managed to restore them.

Yet, despite their failure to acknowledge or refute Bentham's arguments, his contemporary critics nevertheless proudly produce as their concluding and conclusive argument a restatement of their premise. Bentham, they repeat, does not appreciate rights, he does not understand that human beings have certain *a priori*, imprescriptible rights as a consequence of their humanity. As a result, the debate about Bentham, utilitarianism and rights is reduced to a simple dichotomy, which sets a Kantian vision of humans as ends in themselves against a utilitarian conception that exploits humans as a means to an end. Those who wish to rescue Bentham from such criticism usually attempt to portray him as more amenable to Kantian ideas of humanity and the principles of rights than his critics suggests. Yet, by defending Bentham in this manner, they adopt the same dichotomy and collude in the repositioning of the debate around issues and within parameters that are quite foreign to Bentham's argument and which ensure its defeat.

Nevertheless, although the advocates of rights emerge victorious from this encounter, their triumph is somewhat ambivalent. It has not so much been won through the defeat of Bentham's ideas, as it has been built upon them. Bentham, in his long battle against Nature, had freed humanity from the authority and dictates of

natural law, creating a human subject that was the source, measure and legislator of law. His success in this endeavour has made it possible for the current debate about rights to develop – a debate in which Bentham’s questions about the source of rights are replaced with an accepted, unassailable claim about their location in humanity. Unfortunately for Bentham, his success in destroying Nature and transferring her power to humanity meant that he assumed her role as humanity’s new enemy. Thus, the relationship between human rights and Bentham is less like a clearly defined battle than an uneasy, problematic and paradoxical alliance.

Round One: Bentham vs. Natural Rights

Revolutionary Rights

On 26 August 1789, the National Assembly of France adopted the *Declaration of the Rights of Man and the Citizen*, which proclaimed equality and freedom, the sovereignty of the people, and the natural, inalienable and sacred rights of man.¹ With hindsight, the *Declaration* appears as one of the defining features of the French Revolution and, indeed, the modern world. It marked the point where France broke away from absolutism, when the *ancien regime* came to an end and a new order, based on ideals of individualism, popular government and rights, emerged.

The precise influences that shaped this momentous event are the subject of ongoing historical debate. This is partly because there was a significant amount of disagreement, controversy and opposition surrounding the content and even the idea of rights within the National Assembly. Natural rights were not as self-evident to their drafters as they have become since. It took many drafts and compromises before the *Declaration* was completed.² Nevertheless, it is possible to point to some of the influences that inspired the *Declaration*. The idea of a declaration of rights was advocated by Lafayette who, after his experiences in the American revolution, was inspired by the American proclamation of the right to ‘life, liberty and the pursuit of happiness’.³ Yet the tradition of thought about natural rights can be traced back further to Locke’s attempt to undermine despotic authority and to prove that people

¹ J. Waldron, *‘Nonsense Upon Stilts’: Bentham, Burke and Marx on the Rights of Man*, London and New York, 1987, p. 26.

² K. M. Baker, ‘The Idea of a Declaration of Rights’ in *The French Revolution: Recent Debates and New Controversies*, ed. Gary Kates, London & New York, 1998, p. 95.

³ *Ibid.*, p.113.

have been endowed by God with a form of natural equality, the desire to preserve themselves and the duty not to harm others.⁴ Closer to home, the *Declaration* reveals the influence of the French enlightenment *philosophes*. Rousseau's discursion on an ideal social contract informed the idea of popular sovereignty,⁵ while Montesquieu's support for the separation of powers also left its mark on the *Declaration*.⁶

As an articulation of these various influences the *Declaration* was an important philosophical statement – but it was also much more. The clauses which echoed and corrected the established complaints about the abuses of the French monarchy provided a retrospective justification of the revolution and a source of legitimacy for the new government.⁷ The *Declaration* also declared the aims and ideals of a state founded on the general will, without privilege or despotism.⁸ Finally it was an effective plan for positive political and social change.⁹ Thus, while the *Declaration* was revolutionary in a political, ideological and moral sense, it was the product of many varied and competing influences, which represented the ideals and exigencies of its time.

Nonsense Upon Stilts

Such a radical document was bound to incite criticism. One of the earliest, harshest and most effective critics was Jeremy Bentham. Although Bentham was originally a supporter of the French Revolution, he had soon become horrified at its excesses.¹⁰ His particular distaste for natural rights, however, had a much longer history. He had been disappointed by the American rhetoric of rights, complaining that '[w]ho can help lamenting that so rational a cause should be rested upon reasons, so much fitter to beget objections than to remove them?'¹¹ This entrenched dislike for rights was based on Bentham's aversion to natural law, an attitude that inspired his earliest works.¹² Both natural law and natural rights were designated as imaginary fictions in

⁴ Waldron, *Nonsense Upon Stilts*, pp.12-13.

⁵ *Ibid.*, p.21.

⁶ Article 16, 1789 *Declaration of the Rights of Man and the Citizen 1789* in Waldron, *Nonsense Upon Stilts*, p. 27.

⁷ W. Doyle, *Origins of the French Revolution*, 2nd ed., Oxford, 1988, p. 205.

⁸ N. Hampson, *Prelude to Terror: The Constituent Assembly and the Failure of Consensus, 1789-1791*, Oxford, 1988, p. 66.

⁹ *Ibid.*, p.185.

¹⁰ R. Harrison, *Bentham*, London, 1983, p.79.

¹¹ Waldron, *Nonsense Upon Stilts*, p. 32.

¹² *A Fragment on Government* in Jeremy Bentham, *Selected Writings on Utilitarianism* (Ware, 2000), p.38.

his system of logic. It was these political objections to the ‘angry passions’ and philosophical objections to the ‘weakness of the understanding’ that attended natural rights that from 1795 to 1796 compelled Bentham to write *Nonsense Upon Stilts*, his attack on the ‘pestiferous and pestilential’ *Declaration*.¹³

Philosophical Criticism

Bentham’s most categorical and damning criticism of natural rights is the claim that they simply don’t exist. If natural rights means rights that are anterior to government and imprescriptible then, Bentham states, they are nothing but a fallacy.¹⁴ Although it has been suggested that Bentham’s arguments for this proposition have to be sought in his broader body of work,¹⁵ he does provide several persuasive arguments for the non-existence of rights within *Nonsense Upon Stilts*. His specific achievement here is to show that the existence of rights cannot simply be postulated or assumed. Just because we may desire rights that does not mean they exist. Want, he points out, is not supply; hunger is not bread.¹⁶ Thus, the onus is placed upon the advocates of rights to prove their existence.

Bentham then proceeds to destroy all the potential grounds for such proof. First he shows that the existence of rights cannot be garnered from the actual conditions in which people live. Bentham repeatedly highlights the distance between the descriptive claims of the *Declaration* and the actual structure of society. When the *Declaration* states that all men are born free, Bentham responds with amused contempt for this ‘absurd and miserable nonsense’.¹⁷ On the contrary, he argues, it is clear that men are born into subjection, bound to their families, their social position, or even in the actual bonds of slavery. Indeed, he asks, how can it be claimed that all men are born free when, at the same time, it is complained that so many men are born slaves?¹⁸ The same applies to the claim that ‘all men are equal’. Is the apprentice then equal to his

¹³ ‘Nonsense Upon Stilts’ in *Rights, Representation and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution*, ed. P. Schofield, C. Pease-Watkin, and C. Blamires, Oxford, 2002 (*The Collected Works of Jeremy Bentham*), p. 364 (hereafter *Representation and Reform (CW)*). It was, however, only published in 1816 and then in France. An English edition first appeared in the Bowring edition in 1843. Waldron, *Nonsense Upon Stilts*, p. 32.

¹⁴ *Ibid.*, p.329.

¹⁵ W. L. Twining, ‘The Contemporary Significance of Bentham’s Anarchical Fallacies’ in *Bentham: Moral, Political and Legal Philosophy Vol.1*, ed. G.J. Postema, Dartmouth, 2002, p. 327.

¹⁶ *Representation and Reform (CW)*, p. 330.

¹⁷ *Ibid.*, p. 323.

¹⁸ *Ibid.*, p. 324.

master, Bentham suggests, or a wife to her husband? Do the rich and the poor have the same rights?¹⁹

This argument is sometimes taken as evidence of Bentham's support for social distinctions or the subjection of women or, more kindly, as a recognition of the need to consider people in their social context.²⁰ I do not think, however, that this passage should be read as any type of normative claim. All Bentham has done here is to portray the reality of his society in an ironic tone in order to ridicule the blindness, foolishness or hypocrisy of the framers of the *Declaration*, who have attempted to locate a foundation for rights in a fantastical depiction of society.

Once Bentham has established that society can provide no evidence of natural rights, he turns his sights onto a second possible ground for natural rights. This is the argument that humanity in a state of nature possesses rights that are lost or corrupted in society. Bentham is equally derisive about this suggestion. It is impossible, he argues, to have rights without a government or without law. Pointing to the eighteenth-century understanding of 'savage' society, he shows that in such a community there is no security, no property and no rights.²¹

The final possible foundation of natural rights for Bentham's audience was the idea of a social contract. Yet, Bentham destroys this possibility too, arguing that the origination of governments from contract is a pure fiction or falsehood.²² There is, he states, no evidence of any society that has been created in this way. On the contrary, all societies are formed by force and established by habit.²³

In addition to this sweeping destruction of the possible foundations of natural rights, Bentham engages in an unrelenting attack on the specific drafting of the *Declaration*. He describes the *Declaration* as a 'perpetual abuse of words'.²⁴ He questions the meaning of the words used, criticises the descriptive language that doesn't describe reality, the abstract propositions that lead to confusion and fallacy, the ambiguities and the contradictions.²⁵ This criticism is not just pedantic nitpicking. As Bentham himself states, what he is attempting to attack is not the execution of the

¹⁹ *Ibid.*, p. 326.

²⁰ N. Lacey, 'Bentham as Proto-Feminist? Or an Ahistorical Fantasy on "Anarchical Fallacies"', *Current Legal Problems*, li. (1998), p. 457.

²¹ *Representation and Reform (CW)*, p. 329.

²² *Ibid.*, p. 331.

²³ *Ibid.*, p. 332.

²⁴ *Ibid.*, p. 321.

²⁵ *Ibid.*, p. 320.

design but the design itself – a design that is so meaningless that it cannot be expressed logically.²⁶ Thus, his criticism draws on and exposes the impossibility of drafting non-legal rights. On the one hand, such boundless rights are so broadly conceived as to be ridiculous nonsense that has to be masked in abstraction and ambiguity. On the other hand, they are then circumscribed, which means that they become virtually meaningless.²⁷

Twining suggests that Bentham's criticism of the wording of the *Declaration* is unduly harsh and deliberately obtuse.²⁸ It is true that Bentham often seems to purposely misunderstand the intention of the clauses and is determined to find the worst possible interpretation of them. Yet, if his interpretations are unkind, they are nevertheless based very precisely on the material in the *Declaration*. Moreover, the discomfort and calls of unfairness that his interpretation provokes simply highlights the usual complacency about the meaning and implications of rights. Twining also argues that the defects that Bentham observes are not inevitable in a declaration of rights.²⁹ If, however, these problems are the consequence of the attempt to conceptualise absolute rights in a society that could not contain or function with such rights then they must be inevitable. Certainly, modern declarations of rights contain the same paradoxical oscillation between boundless rights and pragmatic limitations.

Bentham's destruction of the foundations and the very possibility of rights means that even within the body of *Nonsense Upon Stilts* he has constructed a considerable obstacle to belief in natural rights. These arguments are difficult to refute and, except for the suggestion that Bentham's criticism is excessive, his critics have not really attempted to refute them.³⁰ There have, however, been attempts to understand *Nonsense Upon Stilts* as an example of Bentham's general methodological approach and criticise it as such. Bedau, in particular, examines Bentham's attack on natural rights in the context of his theory of fallacies.³¹

²⁶ *Ibid.*, p. 333.

²⁷ *Ibid.*, p. 342.

²⁸ Twining, 'Contemporary Significance', p. 332.

²⁹ *Ibid.*, p.339.

³⁰ New attempts to construct social contracts or to seek evidence of rights in human behaviour or intuition either do not deal with Bentham's basic ontological criticisms or, as will be shown, have a different starting point.

³¹ H. A. Bedau, "'Anarchical Fallacies': Bentham's Attack on Human Rights', *Human Rights Quarterly*, xxii. (2000), p. 261.

Fallacies, for Bentham, are arguments used for the purpose or with the probability of deceiving or encouraging misunderstanding.³² The idea of fallacies, and the attempt to expose and discredit them, is a persistent theme in Bentham's work.³³ His *Book of Fallacies*, which outlined the various types of fallacy, was only published in 1824 but it had been in his mind from before 1806.³⁴ It should, however, be borne in mind that even this earlier date is some ten years after Bentham wrote *Nonsense Upon Stilts*. Moreover, his discussion of fallacies in *Nonsense Upon Stilts* is limited to a few passing jeers at rights as 'anarchical fallacies'. Thus, despite the importance of fallacies in Bentham's thought, the customary association between *Nonsense Upon Stilts* and fallacies must be explained by its traditional title of *Anarchical Fallacies* - a title chosen not by Bentham but by his French editor - rather than the actual content of the work. Nevertheless, it is still necessary to consider the relationship between rights and fallacies here, both because Bentham did describe rights as fallacies and in order to analyse the criticism this description has attracted.

Bedau, who incidentally acknowledges that his criticisms would apply better if the French title had been Bentham's choice, attempts to argue that Bentham was so mistaken in attacking rights as fallacies that it undermines the whole premise of *Nonsense Upon Stilts*.³⁵ Bedau points out that, according to Bentham's definition, fallacies are a type of argument. Yet, rights, Bedau argues, are not an argument but a manifesto.³⁶ Moreover, he continues, Bentham's fallacies are invoked for the purpose of deception. This, he claims, is neither the intention nor the effect of the *Declaration*.

These criticisms are somewhat misguided. First, as was shown above, Bentham's criticism of rights does not rely on the portrayal of natural rights as fallacies. Whether or not rights could be described as fallacies would not weaken Bentham's other criticisms. Even so, Bentham's passing description of rights as anarchical fallacies is an understandable consequence of his conception of rights. Rights, for Bentham, are a form of argument - and a particularly pernicious and deceptive form of argument at that. The language of rights, the use of the words 'can' and 'cannot' are an argument in themselves for the validity of rights. They have the effect of confusing the listeners, inflaming them and bringing them over to the side of

³² 'The Book of Fallacies', in *A Bentham Reader*, ed. M. Mack, New York, 1969, p. 331.

³³ J. H. Burns, 'Bentham's Critique of Political Fallacies', in *Jeremy Bentham: Ten Critical Essays*, ed. Bhikhu Parekh, London 1974, p. 154. Twining, 'Contemporary Significance', p. 328.

³⁴ Burns, 'Bentham's Critique', p. 157.

³⁵ Bedau, 'Bentham's Attack', p. 262.

the speaker. Moreover, once the existence of rights is established through such disingenuous means, they can then be used as an argument for resistance to all laws and governments.³⁷ Bentham even had a special category for such fallacies, which he termed ‘begging the question’.³⁸ This is when an abstract proposition like rights is used as proof for an argument, such as the need for revolution, when it is the original proposition that demands proof.³⁹ Whether or not Bentham was correct in predicting such an outcome, it shows that he was able to describe rights as fallacies in his system.

Bedau also attacks another general aspect of Bentham’s methodology. This is Bentham’s use of *paraphrasis* to show that rights don’t exist. *Paraphrasis* was Bentham’s way of determining whether a fictitious term – that is, a term depicting an entity which is neither physical nor sensory – had any virtue or use.⁴⁰ If a fictitious entity could be replaced in a phrase by a real entity, without any loss of meaning, it showed that the fictitious entity had some import.⁴¹ This could not be done for rights unless they were accompanied by an obligation that could be enforced with sanctions and pain. Rights, therefore, could be dismissed as ‘absurd in logic’.⁴²

Bedau tries to adopt this method of *paraphrasis* with which Bentham had so neatly rejected rights. His aim, however, is to undermine Bentham’s results by outlining what he calls Bentham’s ‘eudaemonist’, ‘legalist’ and ‘utilitarian’ theses. Yet, rather than actually replacing fictitious entities with real entities, Bedau seems to be just restating the same proposition with initials in the place of the original terms. For example, he reformulates Bentham’s ‘legalist thesis’ that all rights must be conferred by law in the following way:

Person A has a right, R, in society S to do some act x if and only if there is a law L in S that permits A to do x by conferring on A the right to so act.⁴³

³⁶ *Ibid.*, p.265.

³⁷ Bentham, *Representation and Reform* (CW), p. 331.

³⁸ *Ibid.*, p.320.

³⁹ *Ibid.*, p.320.

⁴⁰ J. Dinwiddy, *Bentham*, Oxford, 1989, p. 43.

⁴¹ *Ibid.*, p. 44.

⁴² ‘Pannomial Fragment’ in *The Works of Jeremy Bentham*, ed. J. Bowring, 11 vols, Edinburgh, 1843, iii. p. 217.

⁴³ Bedau, n.31 above, p.270.

Where is the *paraphrasis* here? There is no mention of obligation or any other real entity that would lend the statement meaning. Thus, Bedau's purported use of *paraphrasis* is inherently flawed.

Bedau then repeats this *paraphratic* process – again without resort to a real entity – to outline Bentham's 'utilitarian' thesis, arguing that it shows that if, according to the dictates of utility, the lawmaker thinks it advantageous to introduce rights, he or she should do so and there would then be natural rights. However, even if legislation were promulgated in such a way the result would be *legal* rights, not natural rights.

Nevertheless, Bedau concludes from his formulation of these two theses that there is an inherent contradiction in Bentham's work between his positivism, which states that whatever laws are in existence are operative, and his utilitarianism, which suggests that a law that fails the test of utility is not genuine. There is, however, no such conflict in Bentham's work. His positivism is descriptive and his utilitarianism is normative. It may be *right* that a law should be introduced but that does not make it a right.⁴⁴ Moreover, he never denies that unpleasant laws are not genuine. Indeed, he says that there are many laws he would be glad to see abolished or even be willing to resist - but that does not make them void.⁴⁵

Bedau quest for a conflict where none exists is not just the result of his flawed use of *paraphrasis*. It is also due to the peculiarity of his attack on Bentham, which is exemplified by his initial resort to *paraphrasis*. Rather than trying to deal with Bentham's substantive dismissal of rights or seek to find an alternative natural foundation for rights, Bedau prefers to manipulate Bentham's logic in an unsuccessful attempt to find a basis for rights therein. Thus, Bentham's attack on the possibility of natural rights stands unchallenged.

Political Criticism

The other strand of Bentham's attack is based on his political abhorrence for rights.⁴⁶ Bentham repeatedly asserts that natural rights are the tool of the anarchist and the road to revolution⁴⁷ - fears which have been mocked by his critics. Bedau describes his

⁴⁴ *Representation and Reform* (CW), p. 330.

⁴⁵ *Ibid.*, p.328.

⁴⁶ E. Halévy, *The Growth of Philosophic Radicalism*, trans. Mary Morris, London, 1972, p. 175.

⁴⁷ *Representation and Reform* (CW), p. 331.

statement that the *Declaration* encourages insurrection as ‘startling’,⁴⁸ saying that there is no such radical language in the declaration, except for the right to resist oppression, which is not found in other declarations of rights and is therefore not an integral part of rights documents. Twining makes a similar point, adding that Bentham’s interpretation of ‘resistance to oppression’ is hardly reasonable.⁴⁹ Twining, however, leaves the question of whether rights encourage insurrection to the historians,⁵⁰ while Bedau claims that there is no evidence that the idea of natural rights caused the French Revolution or that the *Declaration* led to future rebellions or anarchy.⁵¹

These criticisms are based on an antiseptic view of rights and a flawed reading of Bentham. As was shown above and recognised by Bentham himself, one of the objects of the *Declaration* was to justify the revolution.⁵² Indeed, Mirabeau described the *Declaration* as an ‘act of war against tyrants’,⁵³ a description that was fulfilled during the period of revolutionary Terror that shaped Bentham’s response to the revolution. Several historians have suggested that one of the reasons why revolutionary politics degenerated into terror was because the revolution was based on such high ideals, in particular the belief, stated in the *Declaration*, that government was based on the general will.⁵⁴ This idea is blamed for leading the revolutionary government to believe that all dissenters were tyrants and all setbacks were caused by conspiracy.⁵⁵ Even if this relationship is treated with caution, it is undeniable that rights were an inspiration for later bourgeois revolutions and other rebellious movements such as decolonisation.⁵⁶ To deny rights their revolutionary potential is surely to deny them power or purpose. The very willingness to do so reveals a very different conception of rights to that which was prevalent in Bentham’s world.

It should also be pointed out that Bentham’s argument that rights are anarchical is not merely based on the right of resistance to oppression. Although he does argue that the phrase is dangerous because people will consider all unwelcome laws or acts

⁴⁸ Bedau, ‘Bentham’s Attack’, p. 267.

⁴⁹ Twining, ‘Contemporary Significance’, pp. 339-40.

⁵⁰ *Ibid.*, p. 340.

⁵¹ Bedau, ‘Bentham’s Attack’, p. 268.

⁵² *Representation and Reform (CW)*, p. 320.

⁵³ C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, Oxford, 2000, p. 89.

⁵⁴ Baker, ‘Declaration of Rights’, p. 135

⁵⁵ Hampson, *Prelude to Terror*, p. 190.

⁵⁶ D. A. J. Richards, ‘Rights and Autonomy’, *Ethics*, xcii. (1981), p. 4

of power as oppressive and liable to resistance,⁵⁷ he spends less polemic on this phrase than on many of the other articles. He appears equally, if not more disturbed by Article 5, which states that the government can only prohibit acts which are harmful to society, and Article 16, which declares that governments that do not guarantee rights have no constitution. These clauses provoke harsh replies from Bentham. He declares that the first will promote insurrection against any government that fails to fulfil these expectations,⁵⁸ while the second proclaims that there is no government at all.

These are the characteristics of rights that, for Bentham, give rise to their anarchical potential. The belief in natural rights as the source and ideal of government and as the inalienable property of individuals gives rise to expectations that no government could fulfil. Every government will fall short and, when it does so, its subjects, thinking in terms of their individual due rather than the good of society, befuddled by the deceptive language of rights and motivated by their absolute, romantic promise, will be inspired to revolt rather than to engage in careful debate and reform. Moreover, they will have no qualms in doing so, since the *Declaration* has created an authority higher than law or government to which the people can have recourse. For Bentham, it is this foundation of political legitimacy on a utopian, unachievable fiction that makes rights so dangerous.

Thus, Bentham's critics have failed to address his actual arguments. They have not answered his challenge to the existence of natural rights, they have tried but failed to undermine his logic and they have disregarded his political fears on the grounds of a distorted view of rights. As a result, Bentham emerges as the winner of round one.

Round Two: Human Rights vs. Utilitarianism

Bentham may have won round one but round two is a very different fight. The adversaries have shifted position and changed their character; now utilitarianism has been put on the defence against the onslaught of human rights, the successor to natural rights. Moreover, the strategy has changed. Those critics who failed or omitted to defeat Bentham on his own turf now attempt to deliver a new, knockout blow. They declare that Bentham and his utilitarian philosophy are defective because they fail to

⁵⁷ (CW), p. 342.

⁵⁸ *Ibid.*, p.336.

appreciate humans as Kantian individuals or to understand the value and purpose of extra-legal rights.

Human rights, in their contemporary form, are usually understood and justified in terms of some kind of a version of the Kantian individual.⁵⁹ Although this individual is seen and used in different ways, it is generally agreed that it is a rational, autonomous, moral agent, endowed with dignity and personal worth. Rights spring from, recognise and/or strengthen these features. Utilitarians, however, can neither properly appreciate nor safeguard such an individual. Indeed, as Bedau suggests, utilitarianism incorrectly privileges happiness rather than dignity or autonomy.⁶⁰ As a result, utilitarianism is accused of simply seeing people as replaceable possessors of sensory experiences, rather than valuable in themselves and beyond their capacity for happiness or suffering.⁶¹ It is also argued that utilitarianism is unable to recognise individuals as separate beings.⁶² Instead, it treats them as though they were all one person and considers their wellbeing only to the extent that it increases or diminishes the happiness of society. Consequently, there is no reason why the rights of some people should not be violated if it increases the welfare of the rest.⁶³ Thus, it is concluded that utilitarianism treats people as means to a social end, rather than as a Kantian end in themselves.

As a result of utilitarianism's defective conception of the individual, it follows that it cannot understand or appreciate the importance of rights that are founded on such an individual. Utilitarians cannot understand that doing certain things to people – killing them, torturing them, imprisoning them on false pretexts – is just *wrong*, irrespective of the suffering it may cause.⁶⁴ Moreover, it is argued, because people are only seen as means to social ends, even if there are rights in place there would always be a danger that a utilitarian would be willing to dispense with them if a calculation proved that it was in the best interests of the community as a whole. Indeed, Lyons claims that even the legal rights that Bentham recognised would not be sacrosanct.⁶⁵

⁵⁹ L. A. Mulholland, 'Rights Utilitarianism and the Conflation of Persons', *Journal of Philosophy*, lxxxiii. (1986), p. 323.

⁶⁰ Bedau, 'Bentham's Attack', p. 274.

⁶¹ H. L. A. Hart, 'Between Utility and Rights' in *The Idea of Freedom*, ed. A. Ryan, Oxford, 1979, p. 79.

⁶² Richards, 'Rights and Autonomy', p. 5.

⁶³ J. Rawls, *A Theory of Justice*, Oxford, 1972, p. 26.

⁶⁴ Twining, 'Contemporary Significance', p. 349.

⁶⁵ D. Lyons, 'Utility as a Possible Ground of Rights', *Noûs*, xiv. (1980), p. 19.

By arguing that utilitarianism must necessarily take the form of act-utilitarianism,⁶⁶ he concludes that any application of a legal right could be subject to a calculation of the general welfare that would, in certain circumstances, result in the right being abrogated. Therefore, utilitarianism is dismissed as an inadequate moral theory.

There have been various attempts to salvage utilitarianism from this condemnation. In these attempts, however, the defenders of utilitarianism have accepted many of the assumptions of rights advocates. This is shown particularly in their acknowledgment of the Kantian individual. Kantian philosophy had no influence on the *Declaration* or on Bentham's critique.⁶⁷ Indeed Bentham was only marginally concerned with the nature of humanity in *Nonsense Upon Stilts*. Nevertheless, only the staunchest utilitarians question the provenance or accuracy of the Kantian individual and when they do so it is usually for a purpose other than a contribution to this debate.⁶⁸ Those who wish to defend utilitarianism against the criticisms of rights advocates generally take for granted that the human subject of rights is, or should be, endowed with the intrinsic worth of the Kantian individual and then argue about the way that utilitarianism deals with this subject.

Thus, the defenders of utilitarianism refute the claim that it neglects individuals for the happiness of the community, calculated as an aggregate or average. Rather, Rosen argues, it is meant to be distributive; the happiness of each person is to be maximised.⁶⁹ Indeed, he argues that Bentham was aware of the potential dangers of a majority oppressing a minority and sought ways to avoid it, by substituting the 'greatest happiness principle' for the 'greatest happiness of the greatest number'.⁷⁰

This acquiescence to the assumption of a Kantian individual leads inexorably to the acceptance of the contingent claims: that rights are necessary and good, that utilitarianism is potentially antagonistic to rights, and that it must be shown to be compatible with rights in some way if it is to be an acceptable theory. Thus, the defenders of utilitarianism make great efforts to show that utilitarianism does not entail the loss of principles or the circumvention of rights, legal or moral. One such

⁶⁶ Act utilitarianism is when each act is judged according to the extent to which it contributes to the general welfare.

⁶⁷ Waldron, *Nonsense Upon Stilts*, p. 15.

⁶⁸ Singer does not accept that there is intrinsic worth in the biological fact of being human, but his alternative version of rights provokes the same sort of controversy as Bentham. Peter Singer, *Practical Ethics*, 2nd ed., Cambridge, 1993, p. 88.

⁶⁹ F. Rosen, 'Individual Sacrifice and the Greatest Happiness: Bentham on Utility and Rights', in *Moral, Political and Legal Philosophy Vol.1*, ed. Postema, p. 374.

⁷⁰ *Ibid.*, p. 375.

defence claims that the importance of security and expectations in Bentham's thought means that even an act-utilitarian would adopt near stringent rights to protect the general welfare.⁷¹ Alternatively, utilitarians defend their theory by insisting that it takes the form of rule utilitarianism, as opposed to Lyon's act utilitarianism. Rosen argues in this way that Bentham's theory was a 'bottom-up' approach to utilitarianism, in which secondary principles would be chosen for their ability to contribute to the general happiness and adhered to. Since a society will be better if there are principles that prevent the punishment of the innocent and that maintain respect for the life and dignity of humans, such principles would exist in a utilitarian community.⁷² Indeed, some even go so far as to suggest that utilitarianism may be better than a belief in natural rights for protecting people, since it avoids the subjectivism of most moral theories and provides grounds for weighting various rights when they conflict.⁷³

By answering the challenges of rights advocates in this way, the defenders of utilitarianism have colluded in the construction of a new debate which makes their defeat inevitable. Utilitarians simply cannot provide the absolute protection for rights that rights advocates demand and, if they were following Bentham, they should know that it can't be done. Yet the fact that they attempt to do so means that even their small successes become huge defeats. The more that they try to show how closely utilitarianism approximates human rights principles, the more it becomes obvious that it falls short and, more importantly, that it falls short of an accepted standard. In this way rights lose the revolutionary potential that the *Declaration* represented and become, as Bentham warned, a conservative force, the proof for all propositions, an accepted article of faith that constrains the arguments and possibilities of future generations.⁷⁴ It is for this reason that advocates of rights like Bedau cannot understand why Bentham perceives rights to be dangerous; rights turn from radical to conservative once their legitimacy is assured. When this happens, when human rights become the answer rather than the question, a new debate is established that Bentham cannot win.

⁷¹ P. J. Kelly, 'Utilitarian Strategies in Bentham and John Stuart Mill' in *ibid.* p. 253.

⁷² F. Rosen, 'Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine', *Utilitas*, ix. (1997), p. 32.

⁷³ T. L. S. Sprigge, 'Utilitarianism and Respect for Human Life', *Utilitas*, i. (1989), p. 18.

⁷⁴ Bentham, *Representation and Reform (CW)*, p. 331.

Round Three: Humanity vs. Nature

Should we then conclude that Bentham has lost the fight that consumed so much of his thought and energy? Or at least that he has failed to establish the keep the debate within the parameters where his triumph is possible? Although this may seem to be the result of round two, I would suggest that both Bentham's defeat and the triumph of rights are inherently ambivalent.

The repositioning of the modern debate may have led to Bentham's disgrace but it nevertheless owes a debt to Bentham's work. As has been shown, Bentham's target was not the Kantian claim that people are endowed with dignity and rationality, his enemy was not just the idea of rights, and his aim was not to deprive people of protection.⁷⁵ His true archenemy throughout his long career was the idea of *natural* rights, *natural* laws and Nature herself. This antagonism towards the idea of Nature as the source of law is seen quite clearly in *Nonsense Upon Stilts*, where Bentham cannot mention Nature without a sarcastic or insulting epithet. He refers to nature as the 'goddess' of the revolutionaries,⁷⁶ the 'pretended' laws of nature⁷⁷ as the invention of 'poets, rhetoricians, and dealers in moral and intellectual poisons', which release 'a bastard brood of monsters, "gorgons and chimeras dire"'.⁷⁸ Moreover, he is enraged that Nature, rather than the sensible arguments of utility, is used as the source and measure of law. All 'the advantage in the world' are lost when set against 'the sacred and inviolable rights of man derived from the unenacted and unrepealable laws of Nature'.⁷⁹

Bentham aimed to seize this power from Nature, to annihilate Nature as the source, legislator or measure of law. In her place, he wanted to set humanity. The utilitarian person, rational, feeling, autonomous, capable of self-government and self-direction, was to be the measure and source of all things. It was through humans and their experience of pain and pleasure that the virtue or evil of law would be calculated. A human legislator was to assess, create and promulgate law.

This endeavour to replace Nature with humanity is one of the most distinctive and significant features of Bentham's thought. It was not simply an inevitable result

⁷⁵ Bentham's interest in securities is testament to this. Jeremy Bentham. 'Securities Against Misrule' in *Securities Against Misrule and Other Constitutional Writings for Tripoli and Greece*, ed. P. Schofield, Oxford, 1990 (CW).

⁷⁶ *Representation and Reform* (CW), p.331.

⁷⁷ *Ibid.*, p.332.

⁷⁸ *Ibid.*, p.400.

⁷⁹ *Ibid.*, p.375.

of his utilitarianism. Utilitarianism, at the time, could happily exist alongside a belief in Nature or God.⁸⁰ In fact, among Bentham's utilitarian predecessors in England were the religious leaders, Priestley and Paley, who associated utilitarianism with God's will.⁸¹ Nor was utilitarianism necessarily hostile to natural rights. On the contrary the two were frequently linked. Priestley, whose pamphlet converted Bentham to utilitarianism,⁸² referred to natural rights and unalienable rights as rights 'founded on a regard to the general good'.⁸³ Meanwhile, utilitarianism was equally influential on those who supported natural rights, as was shown by the idea of a right to 'the pursuit of happiness'.⁸⁴ Even the *Declaration* mentions 'utility' and the 'common good'.⁸⁵ Taking into account this intellectual climate, Bentham's severance of utilitarianism and rights, law and nature, can be seen as a major milestone and an important legacy.

Indeed, the precise terms of this legacy stand out even amidst the general burgeoning of individualism and emphasis on humanity in the Enlightenment. Bentham was not alone in his concerns. Halévy points out that the common feature in Bentham, Kant and Rousseau is individualism.⁸⁶ Arendt elaborates on this statement, locating Bentham and Kant at the same juncture in intellectual history and attributing to them a similar role.⁸⁷ She suggests that they were both responding to utilitarianism, and its incessant creation of means that turned the world into a collection of ephemeral objects, by finding an end in humanity and separating it from the world and nature.⁸⁸ This implies that Bentham was involved in a much wider and more complex project than the contemporary dichotomy posed by rights advocates would suggest.

Amidst this general focus on humanity, Bentham's specific contribution was to apply these concerns in his own pedantic and obsessive way to law and legislation. It was in this area that he was particularly successful. The events and ideas of history

⁸⁰ G. I. Molivas, 'The Influence of Utilitarianism on Natural Rights Doctrines', *Utilitas*, ix. (1997), p. 197.

⁸¹ Geoffrey Scarre, *Utilitarianism*, London & New York, 1996, p. 60.

⁸² A. V. Dicey, *Lectures on The Relation Between Law and Public Opinion in England During the Nineteenth Century*, London, 1905, p. 131.

⁸³ Halévy, *Philosophic Radicalism*, p. 138.

⁸⁴ Waldron, *Nonsense Upon Stilts*, p. 16.

⁸⁵ Preamble, Article 1 1789 *Declaration of the Right of Man and the Citizen* in *ibid.*, p.26.

⁸⁶ Halévy, *Philosophic Radicalism*, p. 504.

⁸⁷ H. Arendt, *The Human Condition*, New York, 1959, p. 136

⁸⁸ *Ibid.* pp. 281-2.

attest to his triumph.⁸⁹ While his utilitarian philosophy may have lost some support, it remained popular for long enough to inspire legal reform,⁹⁰ while his positivism has continued to be dominant.⁹¹ It was these developments in the concept and functions of law that have had repercussions, albeit obscure and problematic repercussions, on modern human rights doctrine. Unlike the rights of the revolutionary era, with their emphasis on nature and their ambiguous relationship with the ‘Supreme Being’, modern human rights, like Bentham’s utilitarianism, have been severed from nature. The *Universal Declaration of Human Rights* makes no reference to ‘nature’ or ‘natural rights’. Rather, the rights come from the ‘inherent dignity’ of all members of the ‘human family’.⁹² Commentators on these rights rarely resort to Nature to support them. Even alternative accounts of rights, ‘natural’ or otherwise make little use of nature. Hart’s argument that humans have a right to freedom is based on observation of human actions and discourse,⁹³ while Rorty’s relativist view of rights sees them as an artefact of human culture.⁹⁴

This development may have been immanent in the revolutionary declarations of rights, with their emphasis on humanity,⁹⁵ but its complete realisation nevertheless represents a significant shift. It is especially noteworthy since, while this is a shift that should increase rather than solve the ontological problems attending rights, the claim that rights are based in humanity is generally unapologetic, unashamed and unquestioned. This possibility of such an implicit consensus is due, at least in part, to Bentham. Having liberated humanity from Nature, having depicted an individual, autonomous person as the source and measure of law, this vision of humanity became available for appropriation by human rights advocates. This debt to Bentham’s work is not diminished just because the human source of rights is seen in Kantian rather than Benthamite terms. Before a Kantian philosophy could be used to provide a source for rights in humanity, it had to be possible to *want* to find such a source, to think it possible to find one and admirable to seek it. It is for this reason that Bentham’s critics cannot or do not refute his attack on the natural foundation of rights.

⁸⁹ Dicey, *Law and Public Opinion*, p. 126.

⁹⁰ J. Plamenatz, *The English Utilitarians*, Oxford, 1958, p. 46.

⁹¹ L. Henkin, *The Rights of Man Today*, London, 1979, p. 16.

⁹² 1948 *Universal Declaration of Human Rights*, Preamble. <http://www.un.org/Overview/rights.html>.

⁹³ H. L. A. Hart, ‘Are there Any Natural Rights?’ in *Theories of Rights*, ed. J. Waldron, Oxford, 1984, p. 90.

⁹⁴ R. Rorty, ‘Human Rights, Rationality and Sentimentality’ in *On Human Rights: Oxford Amnesty Lectures*, ed. S. Shute & S. Hurley, New York, 1993, p. 123.

⁹⁵ Douzinas, *End of Human Rights*, p. 93.

They do not wish to defend Nature against Bentham; they are the beneficiaries of his attack. To this extent, Bentham has won a paradoxical, maybe pyrrhic, victory.

Conclusion

Utilitarianism and natural rights are depicted as old, predestined enemies, endlessly replaying the same battle. Yet by examining this contest, it becomes clear that there is no simple, straightforward battle between these parties – or even a set of definitive parties. The terms and assumptions of the debate as well as the aims, loyalties and functions of the parties have undergone significant changes. The difference between the questions asked and the answers given by the contemporary debate and Bentham show that they represent specific, historically located concerns rather than an established, ongoing tradition. These changes and shifts in the debate, however, actually show more about the contribution of Bentham than his actual role in the debate, whether as protagonist or victim. The willingness of the present participants in the debate to ignore Bentham's criticisms of the natural foundations for rights while attacking his neglect of the human foundations for rights, is an oblique validation of his endeavours and achievements in liberating humanity from natural law. Bentham fought the danger of revolutionary rights based on nature and won, but his triumph was commemorated in the emergence of conservative rights based on humanity that are preserved against the danger of utilitarianism. Thus, the three rounds presented here do not constitute one battle, but rather reveal a paradoxical melange of collaboration, exclusion and distortion that underlies current ideas about humanity law and rights.

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