Chapter 5

Normative jurisprudence, utilitarianism, and theories of justice

5.1 Introduction

Normative jurisprudence encompasses general questions about values and law. It deals with the relations between law, politics and morality, including debates between and among positivists and others about the relationship between law and morals, whether law is at its core a moral enterprise, and about political obligation and civil disobedience. It includes questions about the existence, scope, and status of natural, moral, and non-legal rights; the relationship between needs, rights, interests, and entitlements; theories of justice; constitutionalism and democracy; and standards for guiding and evaluating legal institutions, rules, practices and decisions. Normative jurisprudence now occupies a central place on the agenda of Anglo-American jurisprudence as is illustrated by the attention given to Bentham, Dworkin, Finnis, Rawls, Raz, and modern critical theory. Whether normative theories of reasoning and rationality, and questions of scepticism and relativism about them, are subsumed under normative or analytical jurisprudence is largely a matter of convenience.

This is a vast terrain, rooted in a great heritage of texts, issues, theories, controversies and ideas, many of which are regularly contested. Rather than try to be comprehensive, I shall focus on some familiar mainstream ideas within the Western tradition in order to show how adopting a global perspective requires at least some adjustment of the focus and agendas and debates of normative legal theory. By way of illustration this chapter concentrates on Utilitarianism as exemplified by Bentham and Singer, Kantianism as exemplified by Rawls and Pogge, and modified utilitarianism as exemplified by Hart and Sen. Chapters 6, 7 and 13 focus on what is probably the most developed arena of contemporary debate, human rights. After considering ‘internal’ Western debates about human rights, we shall consider various kinds of

1 On the disputed idea of a ‘canon’ in taught jurisprudence in common law countries see three surveys of taught jurisprudence in UK by Barnett and Yach (1985), Cotterrell and Woodliffe (1974), and Barnett (1995), discussed in Chapter 1, n. 42. The last survey included Australian and Canadian law schools. For the sake of exposition, this chapter treats Hart, Dworkin, Rawls, Natural Law, and Benthamite utilitarianism as ‘canonical’ for present purposes, but acknowledges that pedagogical practice is more varied than that.
scepticism about human rights law and ideas of human rights as moral rights, including the recent debate about ‘Asian values’. Chapter 7 considers recent philosophical responses to comprehensive scepticism about human rights and selective criticisms about the over-use and abuse of the discourse of rights and the ebullient and incoherent proliferation of human rights claims.

In these and other chapters I argue that:

(a) a genuinely cosmopolitan discipline of law needs a normative jurisprudence that addresses issues of value at all levels of legal ordering, not just the nation state and classical public international law;
(b) at the level of metaethics, it needs to treat pluralism of beliefs, issues of universalism and particularism, religion, secularism, and multiculturalism, as central;
(c) we need to relate normative jurisprudence directly to great issues of the time, such as poverty reduction, environmental justice, and the relationship between human rights and responses to threats to security;
(d) we can no longer afford to ignore and be ignorant about the traditions of thought and contemporary ideas of other civilisations, including Islamic, Chinese, Japanese, Hindu, Jewish jurisprudence, and about ‘customary law’ in communities and social arenas in which it is important; and
(f) we should take into account the interests and concerns of the least advantaged, whether they are expressed in the language of utility, justice, or rights or in the idioms of other traditions.

5.2 The Western heritage

Normative jurisprudence has experienced a lively period in recent years, but most enquiries and controversies have taken place within the framework of Western traditions of thought and with explicit or implicit reference either to Western societies or to international relations perceived from Western points of view. Switching from an Anglo-American or more broadly a Western perspective to a global perspective (although still from the standpoint of a Western jurist) has important implications, but it does not necessarily require abandonment of the concepts, methods and learning of our heritage for several reasons. First, normative jurisprudence has already to some extent been responding to the processes of ‘globalisation’ as is illustrated by increasing interest in international ethics, universalism and relativism, and transnational justice and rights. Critical reappraisals have been undertaken of the underlying theoretical assumptions of specialist fields of law with a transnational

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2 Chapter 13 on ‘Human Rights: Southern Voices’ examines the treatment of human rights by four ‘Southern’ jurists, whose work is accessible to Western readers because they were trained in the common law and write in English. This is just a modest first step towards broadening the canon of significant texts for General Jurisprudence.
dimension, such as international law, comparative law, and environmental law. Furthermore, increasingly some of our canonical texts have been translated into other languages where they have been read and looked at with fresh critical eyes. Second, there has been continuous interaction between different legal traditions at many levels. In this respect practice has often been ahead of theory. Third, Western ideas have been dominant, but not unchallenged, in international arenas such as the United Nations (UN) system, the World Trade Organisation (WTO), international financial institutions (IFIs), various human rights regimes, and transnational NGOs. The interests of non-Western governments and peoples have often been articulated in the language of utility or rights or justice. As we shall see the Universal Declaration of Human Rights (UDHR) is often treated as an emblem of ‘universally’ accepted values, but its origins, wording, and interpretations raise questions about its significance and whether it represents a genuinely worldwide consensus.

Issues about universality and generality in respect of values have concerned philosophers throughout history. Western jurisprudence has a long tradition of universalism in ethics. Natural law, classical utilitarianism, Kantianism, and modern theories of human rights have all been universalist in tendency. These have, of course, been subjected to persistent challenges from various forms of scepticism, relativism, subjectivism and, lately, in a different way, communitarianism. During the last half-century, debates about legal positivism and liberal political theory have dominated our legal philosophy, especially in the Anglo-American tradition. Thus, at first sight, there seems to be less need of a revival in respect of general normative jurisprudence than in respect of analytical and empirical approaches. However, this is only partly true, for three main reasons.

First, in jurisprudence, most juristic discussions of justice, positivism, law and morals, and obedience to law have been almost exclusively concerned with the municipal law of nation states. For the most part they barely address questions of value in relation to other levels of legal ordering (public international law is a partial exception) nor in relation to the phenomena of normative and legal pluralism. As we shall see, a particularly clear example is Rawls’ theory of justice. This is explicitly, and unconvincingly, limited to nation states as notionally self-contained communities, and, as a secondary matter, to relations between such states. It is difficult to defend a theory of justice

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3 On international law and comparative law see Chapter 1, n. 28 above; on environmental justice Bullard (2005), Ebbeson and Okowa (2008); on transitional justice e.g. Teitel (2000), Bell, Campbell, and Ni Aolain (2006) and publications of the Transitional Justice Institute, University of Ulster.

4 On normative and legal pluralism, see GLT, pp. 82–8 and 224–33 and Chapter 16.2 on the web.

5 Rawls uses such phrases as ‘more or less self-sufficient’ (1971) at p. 4, ‘self-contained national community’ (ibid., p. 457), and ‘a closed system isolated from other societies’. (ibid., at p. 8). The fullest critique of this aspect of his theory is Pogge (1989), see also (2001b). See GLT, pp. 69–75. Since then, Rawls has defended and refined his position in The Law of Peoples (1999c), but very few find his arguments any more convincing; see for example, the Symposium in 110 Ethics (2000) 669ff. (See section 5(6) in this chapter.)
restricted to liberal, self-contained societies, when no such entities exist. Just because Rawls’s theory is concerned with basic practical principles of institutional design, questions about its extension or adaptation to institutions concerned with ordering at other levels are of particular significance. For example, Rawls seems to have almost nothing to say about regional integration or the just regulation of exploitation of unappropriated minerals on this or other planets.6

Second, in the face of challenges from multi-culturalism, pluralism, and various kinds of relativism, some leading liberal thinkers have beaten a partial retreat into a kind of particularism.7 In recent times liberal democratic political and legal theorising has tended either to be geographically indeterminate or to place some limits on their geographical claims. A great deal of recent Anglo-American normative jurisprudence has been relatively local in respect of provenance, audience and even focus.8 For example, most writings about the new communitarianism, critical race theory, and republicanism have been explicitly or implicitly or unselfconsciously American or at least American-influenced.9 Feminist jurisprudence has only recently begun to be genuinely transnational.10

Thirdly, nearly all Western modern normative jurisprudence is either secular or explicitly Christian. Post-Enlightenment secularism has deep historical roots in the intellectual traditions of Western Christianity.11 Even those theories that claim universality have proceeded with only tangential reference to, and in almost complete ignorance of, the religious and moral beliefs, values, and traditions of the rest of humankind.12 When differing cultural values are discussed, even the agenda of issues tends to have a stereotypically Western bias.13 When such issues

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6 On ius humanitatis see p. 171 below and GLT, p. 240.
7 There are some important exceptions to the trend towards greater geographical particularity. The field of international ethics, exemplified by Peter Singer, Brian Barry, Henry Shue, Onora O’Neill, Martha Nussbaum, Amartya Sen, and Thomas Pogge, among others, addresses transnational issues from a global perspective. There have been lively debates about human rights and cultural relativism, and about universalism versus contextualism, and I discuss these below. In practice, the most politically influential ideas, are probably still the ideological assumptions underlying the ‘Washington Consensus’ which links free market economics to the seductive catch-phrase ‘human rights, good governance, and democracy’. However, this is sometimes interpreted as a cover for unfettered capitalism. See Chapter 11.3(c) below.
8 GLT, pp. 128–9.
9 GLT, pp. 58–60. Critical legal scholars have recently turned their attention to comparative law, Latin America (‘Lat-Crits’) and issues of globalisation, but it is too early to assess the significance of these developments. On ‘New Approaches to International Law’ (NAIL) see Riles (2004), Rajagopal (2003).
12 It is notoriously difficult to estimate the numbers of adherents of world religions. With the normal caveats, The Oxford Atlas of the World (1994) estimates that Christian ‘adherents’ represent about 40–43 per cent of the world population, Muslims about 25 per cent, and other religions the rest. No figure is given for atheists and agnostics.
13 This tendency is well caught by the quotation from Ahdaf Soueif’s novel The Map of Love (1999 at p. 6), cited at the start of Chapter 13.
as the relationship between law and morals (positivism), multi-culturalism, religious toleration, and cultural relativism have been discussed, the enquiries and debates take place largely within the framework of Western traditions of thought, often with explicit or implicit reference either to Western societies or to international relations as perceived from Western points of view. A genuinely cosmopolitan general jurisprudence will need to do better than that.

Before considering two central strands of our Western heritage in detail, let me touch briefly on three matters that I shall treat as tangential to my argument: legal positivism, universalisability, and debates about universalism and cultural relativism.

5.3 Positivism, universalisability, universalism and relativism

(a) Positivism revisited

Here, I shall deal briskly with issues of legal positivism. As explained in Chapter 1, I am prepared to accept the label of a legal positivist in the tradition of Bentham, Hart, Llewellyn, and MacCormick.14 I subscribe to a version of the separability thesis, that is to say that in some contexts it is useful for clarity of thought to hold to a distinction between law as it is and law as it ought to be. I probably count as a ‘weak’ positivist, in that I accept that there are some contexts in which a sharp distinction between ‘is’ and ‘ought’ breaks down – for example, in some kinds of argumentation about questions of law and questions of fact.15

Nor is it necessary here to dwell on fallacious views that suggest that this kind of legal positivism is immoral or amoral or indifferent to questions of morality or justice, or commits one to rejection of values associated with human rights or the rule of law. On the contrary, for many positivists, including myself, a positivist position arises in large part out of moral concerns. Bentham distinguished the ‘is’ and the ‘ought’ for the sake of the ought – in order to criticise and construct. Herbert Hart emphasised the distinction for the sake of clarity of thought both in respect of a descriptive theory of law and in dealing with issues of political morality.16 I agree with positivists such as Joseph Raz and David Lyons that questions about fidelity to law, political obligation, and civil disobedience are important moral issues, but that these issues can be addressed and argued about more clearly if one starts with a distinction between law and morality.17

14 GLT, Chapter 5. On MacCormick’s move away from positivism in Institutions of Law (2007) see Chapter 1 above, n. 96.
15 ‘Weak’ is not used here in the sense of the recent debate about the rule of recognition. See p. 27 above.
16 On the underlying concerns of Hart’s positivism, see Lacey (2004) 196–209. On Hart as a modified utilitarian see Chapter 5.7 below.
17 GLT, p. 118 (see GLT for references).
For me the crucial point is one of vocabulary: understanding law needs to encompass ideals and aspirations on the one hand, and what actually happens on the other. We need to have vocabularies for both aspiration and reality and that requires a distinction between ought and is in some contexts. One needs a vocabulary that describes actual institutions and practices, not least because of the many awful things that are done in the name of law by those who exercise power. This is partly a matter of standpoint: it may be appropriate for a judge to expound and justify interpretations of the law in terms of Dworkinian principles, but this mode of discourse will not do for Amnesty International, Human Rights Watch, local reformers, or other observers and critics, for they need clear distinctions between aspirational standards and descriptions of actual practices.\(^{18}\) Suffice to say here, it is my view that moral concerns are an essential, but not a sufficient, part of the enterprise of understanding law.

(b) Universalisability

It is important to distinguish between universalisability, a technical term in ethics, and the highly ambiguous terms, ‘universalism’ and ‘relativism’. A simple version of The Golden Rule ‘Do not do unto others, what you would not have them do unto you’ is often expressed in terms of ‘universalisability’, suggesting that moral terms imply ‘universal’ application to any relevant similar situation. The central point is that morality is a matter of following rules and that it involves consistency in moral decision making.\(^{19}\) Principles such as ‘treat like cases alike’ leave scope in theory and in practice for very restricted interpretations: for example, a ‘principle’ that there shall be no discrimination in employment in respect of locals, which excludes aliens or immigrants. While some versions of universalisability explicitly cover all human beings, the precise scope of most versions of The Golden Rule is not a central concern. It typically leaves open such questions as: What cases are relevantly similar? Who count as others? – Members of one’s own family or community or race? All humankind? Animals? All sentient beings? And so on. Here I shall treat it as a purely formal requirement of most ethical theories.

(c) Universalism

The *Oxford English Dictionary* lists seventeen primary meanings of ‘universal’, apart from its technical usages in logic and philosophy. Here we are mainly concerned with claims that certain basic values or moral principles are applicable at all times and in all places, for example the claim that natural law

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\(^{18}\) GLT, pp. 46, 114, 120, 134.

principles, derived from universal human nature, are unchanging and invari-
ant; or the claim that human rights exist for all humankind by virtue of their humanity.

It is important to distinguish this usage from other usages and to recognise that there are varieties of universalism in this sense. For example, Jeremy Bentham is sometimes interpreted as a universalist utilitarian in contrast with egoistic utilitarianism.\(^\text{20}\) For the egoistic utilitarian the only relevant consequences are those that affect one’s own happiness directly or indirectly; the universalist, on the other hand, should always weigh the consequences for the whole community in question or for humankind or for all sentient beings.\(^\text{21}\) Both egoistic and universalistic utilitarianism treat utility as a universal principle in the sense used here. There are other logical, theological, and philosophical usages that do not apply here.

Claims to universality also take different forms. In the present context it is useful to distinguish between five varieties:

(a) **Normative universalism**: a claim that there is one, and only one, set of correct or true or valid moral principles or values applicable at all times and in all places.

(b) **Descriptive universalism**: a claim that the same fundamental values or moral principles are in fact shared by (nearly)\(^\text{22}\) all cultures. For example, that all known cultures have incest taboos or prohibitions about killing. This contrasts with the idea that it is a social fact that there are fundamental differences and disagreements about values across and within cultures (belief pluralism).\(^\text{23}\)

(c) **Consensual universalism**: a claim that there is a consensus in fact about certain values or principles at a given time. Such a historically contingent consensus may be arrived at by negotiation or convergence or persuasion or even by acceptance brought about by coercion or imposition.\(^\text{24}\) For example, the fact that almost all the members of the UNs have subscribed to the Millennium Development Goals; that genocide is ‘universally’ accepted as prohibited by *ius cogens* as part of public international law; that ‘dignity’ is universally treated as a fundamental human value; and more controversially, that gender equality is ‘universally’ accepted in principle, even if it is interpreted differently in different societies and cultures.

\(^{20}\) Smart (1967) at 207.

\(^{21}\) The interpretation of Bentham as a universalist in this special sense is historically correct and, in my view, part of the least vulnerable interpretation of utility. See p. 135 below and Dinwiddy (2004) Chapter 3.

\(^{22}\) Descriptive and consensus universalism are more easily defended if allowance is made for some deviants and exceptions. It is reasonable to allow universalist claims some margin of appreciation.

\(^{23}\) This formulation assumes that cultures are sufficiently monolithic to be treated as comparable units. This simplifies exposition, but of course beliefs can vary considerably within a culture.

(d) *Ethnocentric universalism*: a claim or assumption that one’s own values and moral principles are either superior to those of others or are shared by them.\(^{25}\)

(e) *Surface universalism*: this applies to a situation where (nearly) all relevant parties have agreed to a verbal formulation that is so ambiguous or vague that it probably conceals profound differences beneath the surface. A claim that gender equality is universally recognised as an aspiration is often given as a standard example of surface universalism. More controversially, some maintain that the Universal Declaration of Human Rights falls within this category. The converse of this is surface diversity – where apparently different beliefs/values can be shown to be fundamentally similar.\(^{26}\)

These categories overlap. There are distinctions and refinements within each of them. For present purposes, the most important distinction is between empirical and normative claims and those that combine the two elements, such as claims about moral principles derived from the nature of man.

### (d) Relativism

In normative jurisprudence, universalism is most often contrasted with relativism. Ethical relativism also takes many forms. Here I shall focus on cultural relativism, that is to say the view that there are no universal values or moral principles independent of context, because beliefs about such matters are relative to culture and historical context and that there are no criteria for evaluating cultures from the outside.

In any discussion of ‘relativism’ it is important to ask what is relative to what? As Haack puts it, ‘relativism’ refers not to a single thesis, but to a whole family.\(^ {27}\) In the present context we are primarily concerned with moral values (as opposed, for example, to meaning or truth or reality) in relation to beliefs of a culture or community or individual. A universalist claim that some values or moral principles are universal can be interpreted as a claim that they are applicable at all times and in all places. The converse is a moral relativist claim

\(^{25}\) In ordinary usage ‘ethnocentrism’ means ‘Culturally biased judgment’ (Levine (2001)). William Graham Sumner employed the term as an explicitly sociological concept as part of a theory about internal and external relations:

*Ethnocentrism* is the technical name for this view of things in which one’s own group is the center of everything, and all others are scaled and rated with reference to it. Folkways correspond to it to cover both the inner and outer relation. (Sumner (1906) at 12–13).

Sumner’s view has been criticised as being too broad and for drawing boundaries between groups too sharply. In a weaker form, ethnocentrism is the tendency to look at other cultures through the filter of one’s own cultural presuppositions Barfield (1997) p. 55. On ethnocentrism and human rights, see pp. 204 and 215 below.

\(^{26}\) On dignity as ‘a placeholder concept’, see McCrudden (2008); on ‘surface law’ see Chapter 10 below.

\(^{27}\) Haack (1998), p. 149.
that ‘there exist diverse, incompatible moral systems and there are no over-
arching criteria to decide between them’.

But there are several different kinds of moral relativist claim, some of which are the converse of normative, descriptive, and consensual universalism. For our purposes, it is important to distin-
guish between descriptive and normative kinds of moral relativism and between strong and weak versions of each type.

Descriptive moral relativism takes the form of claims that beliefs and judg-
ements about moral values and their application differ from culture to culture and time to time. This diversity of beliefs is an empirical fact, and even when there seems to be some convergence, as in relation to prohibitions against incest or killing human beings, these can be shown to be open to different, often incompatible, interpretations in different cultures. The converse position is empirical moral universalism, which claims that behind apparent diversity there lie shared values, many of which are grounded in facts about human nature. For example, all human beings need food, water, and shelter in order to survive; and that human beings have shared sexual, aggressive, and altruistic urges and possibly spiritual needs, even if these are realised in different ways in different cultures; and that there is almost universal agreement that ‘dignity’ is an important value.

Such descriptive claims are au fond empirical and interpretive. But they are of different kinds. That food is a precondition for survival is an uncontroversial biological fact about human beings. However, some interpretations of ‘human nature’ are highly controversial, typically involving a mixture of scientific ‘truths’ (e.g. about sexual urges), contested theories (e.g. nature versus nurture), and interpretations that involve a strong normative element (e.g. about the ends or the ‘perfectability of man’).

Furthermore, there is considerable room for disagreement about the relevance of empirical findings about human beings to ethical beliefs. For example, it is a widely held view that one cannot validly infer normative principles from empirical facts (‘the naturalistic fallacy’): if one accepts that human beings have both aggressive and altruistic urges, what follows from that in relation to both individual and political morality? But others maintain that there is no fundamental dichotomy between human beings as they are and as they ought to be. Empirical universalism and relativism have stimulated extensive research about beliefs and values. And, of course, exploration of ‘human nature’ is a central concern of cultural

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31 Useful overviews are Peacock (2001) and Rezsohazy (2001). A central theme in the history of social anthropology has been the search for cultural universals and responses to it. A classic example is The Royal Anthropological Institute’s Notes and Queries in Anthropology (6th edn., 1950) which for a period became a handbook for fieldwork. Some Natural lawyers, for example, Father Thomas Davitt SJ, sought to base natural law principles on generalisations about
anthropology, psychology, biology, socio-biology, and other life sciences. But
there continue to be profound disagreements both about ‘human nature’ and
about the appropriateness of grounding ethical theories on purportedly empiri-
cal assumptions about it.32

These are matters of perennial controversy in Western moral philosophy.
Here I shall confine myself to two observations.

First it is difficult to deny that belief pluralism is a fact.33 There may be strong
disagreements about both the extent and the significance of such diversity and
whether such divergences in respect of values are ‘fundamental’34 or ‘incommen-
surable’.35 There may also be disagreements about the prospects, the processes,
and the desirability of convergence. I shall proceed on the assumption that at this
period in history one of the major issues facing mankind as a whole is how to
work out frameworks, institutions, and processes that support co-existence,
co-ordination, and co-operation in a situation where there are extensive and
deeply rooted differences of belief that are not amenable in the foreseeable future
to consensus being arrived at by rational debate and persuasion. Acceptance of
this fact as a working assumption does not necessarily involve commitment to a
sceptical epistemology. This assumption, which is open to challenge, tends to
point to placing due weight on tolerance and open mindedness and on agreement
about fair procedures for negotiation and decision rather than attempting to try
to reconcile irreconcilable substantive beliefs.36

Second, each version of relativism and universalism varies significantly in
terms of strength and weakness. There is a long tradition, especially with regard
to human rights, to talk of a divide between universalism and cultural or other
relativism.37 But there is also a widespread tendency to treat such talk as

human nature derived from anthropological findings (Davitt (1964)). A contemporary example
is empirical justice research pioneered by Peter H. Rossi (Rossi and Nock (1982), Rossi and Berk
(1997)) and continued by Guillermina Jasso and associates whose stated aim is ‘To describe and
understand the human sense of (in)justice theoretically and empirically’. (e.g Jasso and Wegener
(1997) and (1998)). This work is interesting, but it raises conceptual, interpretive and
methodological problems that are not pursued here.

32 See n. 30 above.
33 John Tasioulas has usefully characterized value pluralism as ‘an ethical doctrine, one that
claims objective correctness, according to which: (i) there are many irreducibly distinct values;
(ii) these values come into conflict in particular situations; (iii) some of these conflicts are
incommensurable in that responses to them are not subject to a complete ranking (i.e. they
cannot all be ranked as better or worse than each other, nor yet as equally good) and (iv) at the
level of individual and collective forms of life, there are many different ways of responding to
these values, which also are not subject to a complete ranking. An implication of (iv) is that the
idea of the single best way of individual or collective life, even given “ideal” conditions, is a
34 Brandt (1967) pp. 75–8. Recently Ronald Dworkin (2006b) Chapter 4, has subtly defended the
holistic ideal (integrity) against moral pluralism as advanced by Isaiah Berlin.
35 On incommensurability see p. 81 above.
36 Hampshire (1989). See further below the discussion of Rawls on overlapping consensus at p. 158
and Sen on discourse ethics at Chapter 7.4 below.
involving a false dichotomy. Aristotle, and modern Aristotelians such as Nussbaum, quite explicitly allow for differences between cultures; they merely insist on the universality of underlying principles.38 Another universalist, Alan Gewirth, argues that universalism can justify certain kinds of ethical particularism, in the sense that ‘one ought to give preferential consideration to the interests of some persons against others, including not only oneself, but also other persons with whom one has special relationships’.39 Similarly, Joseph Raz, a committed universalist, has written sensitively and illuminatingly about the ‘truth in particularism’ and about the important challenges presented by multiculturalism to moral understanding.40 He sees ‘the universal and the particular to be complementary rather than antagonistic’ and ‘at the heart of multiculturalism lies the recognition that universal values are realised in a variety of different ways in different cultures and that they are all worthy of respect’.41

Indeed, among serious thinkers there seem to be very few strong universalists or extreme cultural relativists. And, of course, ‘relativism’ is a highly ambiguous concept.42 There is a widespread view that polarising the debate merely serves to obscure a complex variety of issues that need to be differentiated. So are we faced again with the problem of a soggy middle ground? Happily, I think not. In respect of human rights there is a rich body of literature that explores important issues in detail and depth and these will be dealt with in Chapters 6, 7 and 13.

Against this background, we can now consider the implications of adopting a global perspective for two of the dominant normative theories in mainstream Anglo-American jurisprudence: classical utilitarianism and Rawlsian Justice.

38 E.g. Nussbaum (2000).
39 Alan Gewirth, in an important paper on ‘Ethical Universalism and Particularism’ states: ‘The ethical particularism with which I am concerned here, then, is confined to preferences for or partiality towards various groups, ranging from one’s family and personal friends to larger pluralities of one’s community, nation, and so forth.’ (Gewirth (1988) at p. 286). Gewirth sums up his argument respecting ‘country and compatriots’ as follows: ‘This justification can be summarized in three steps. First, the universalist principle of human rights, in its component of basic well-being, justifies the general moral principle that minimal states, each operating within a particular territory, may be established. Second the subprinciple justifies that the state provides equal protection of the basic well-being of all persons within its particular territory. Third, this protection, in turn, justifies the particularistic, preferential concern that each of the state’s members has for its particular interests, in recognition of the protection which he or she receives from the state.’ (Gewirth (1988) at p. 301). Gewirth treats this as involving a different justification from preferential concern with voluntary associations. On utilitarianism and loyalty see GLT, pp. 66–7 and 131; cf. Fletcher (1993).
41 Raz (1998) at p. 204 (citing earlier writings). Raz acknowledges that morality can change, but not radically, and only against an unchanging background of continuing moral principles that explain the change. ‘Since … radical moral change is impossible, it follows that social relativism is untenable.’ (1999) at p. 180. An even stronger universalist might argue that it is not fundamental moral principles that change, but our understanding of them.
5.4 Classical utilitarianism: Jeremy Bentham

(a) Utility

Utilitarianism is a species of consequentialism – the kind of moral theory that makes evaluations entirely (or almost entirely) by reference to factual outcomes. There are many kinds of utilitarianism. I shall focus on Jeremy Bentham’s version of what is often called ‘classical utilitarianism’, but in the process of interpreting Bentham I shall refer to distinctions that indicate some of the differences among utilitarians: utility as a principle of individual ethics (‘morals’) or public morality (‘legislation’); the ambiguity of ‘pleasure’ (desire, satisfaction, and choice or preference); average and aggregate utility; the differences between egoistic and altruistic utilitarianism; and between act- and rule-utilitarianism.

I have chosen Bentham because he is widely regarded as the most important jurist in the Anglo-American tradition: Bentham’s views are nearly always challenging and perceptive; sometimes they are persuasive, sometimes they are out-dated or just plain wrong. He wrote on a vast range of topics. Throughout this book he features as a reference point on particular issues that are topical: general jurisprudence, the concept of law, sovereignty, the extent of our moral concern, corruption, torture, capitalism and the welfare state, security, democracy, and his critique of non-legal rights. Some of the less well-known works – on international law, codification, and matters of place and time in legislation – are directly relevant to matters that we shall be considering. Despite the breadth of his interests, almost everything that he wrote had the same starting point: utility.

A particular reason why Bentham is interesting is because there are some illuminating tensions and ambiguities within his utilitarian theory. Some of these have led to radically different interpretations that illustrate the variety and

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44 ‘Consequentialism differs from utilitarianism, one of its species, mainly in the greater breadth of its value theory. Utilitarians assess outcomes by looking at individual well-being. Consequentialists look either at well-being or at moral goods such as equality, respect for rights, fidelity to one’s word, and so on, or, indeed, commonly at both.’ Griffin (1996) at p. 161, n.7 This long note contains an excellent discussion of consequentialism in general (ibid., at pp. 161–6).

45 On ‘satisfaction’, ‘preference’, ‘desire’ and choice, see n. 52 below.


complexity of utilitarian ideas. Bentham advanced the principle of utility – the greatest happiness principle – as the sole criterion for evaluation of both individual behaviour (morals) and of political practices, policies, institutions, and laws (legislation).\footnote{This distinction is explicit in the title Introduction to the Principles of Morals and Legislation. A very high proportion of the literature on utilitarianism, and much of the criticism, focuses on utility as a principle of individual ethics. Jurisprudence is mainly concerned with utility as a principle of public morality. It is important in this context to bear in mind that ‘legislation’ is interpreted broadly to refer to all aspects of societal management, not solely to making positive laws. In a famous essay A. J. Ayer argued that the principle of utility as a guide to the legislator is less vulnerable to criticism than utility as a guide to the individual actor. (Ayer (1948) at pp. 245–59). However, this assumes that the principle has a different meaning in each of the two contexts.} The principle serves as a guide to decision and action and as a criterion for evaluation (including retrospective assessment) of decisions, actions, practices, institutions and laws. Here we are mainly concerned with utility as a principle of political morality and only incidentally as a principle of individual ethics. The salient and most controversial features of the theory are that it is generally forward looking, it is only concerned with actual or likely consequences, and that it claims to be the sole test of good and bad, right and wrong.\footnote{‘The principle of utility once adopted as the governing principle, admits of no rival, admits not even an associate.’ (Comment on the Commentaries 27 (ed. Burns and Hart, CW, 1977).}

The principle of utility prescribes that the right action is to promote pleasure or to avoid or reduce pain so that the outcome is the maximisation of happiness, (i.e. an aggregate surplus of pleasures over pains). ‘It is the greatest happiness of the greatest number that is the measure of right and wrong.’\footnote{Jeremy Bentham, A Fragment on Government, Preface in A Comment on the Commentaries and A Fragment on Government (ed. Burns and Hart, CW, 1977) at p. 363.} A particularly revealing formulation of utility from the point of view of the legislator is as follows:

The only right and proper end of government is the greatest happiness of the members of the community in question: the greatest happiness – of all of them without exception, in so far as possible: the greatest happiness of the greatest number of them, on every occasion on which the nature of the case renders the provision of an equal quantity of happiness for every one of them impossible, by its being a matter of necessity, to make the sacrifice of a portion of the happiness of a few, the greater happiness of the rest.\footnote{Parliamentary Candidate’s Proposed Declaration of Principles (1831) cited by Dinwiddy (2004) at p. 31. Dinwiddy uses this passage, first as an example of Bentham adopting a social standpoint, and to make the point that although Bentham sets up aggregate happiness as the criterion, and seemingly is prepared to sacrifice the happiness of a minority, he considers the optimal goal to be ‘the provision of an equal quantity of happiness for everyone’. Thus equality is linked (albeit subject to exceptions) to distribution of happiness. This point is bolstered by Bentham’s recognition of the operation of diminishing marginal utility (discussed below). It is fairly clear that Bentham did not favour a principle of average utility (which directs maximising the average utility per capita rather than the aggregate – an important issue in relation to issues concerning (over)-population). For a sustained critique of average utility, see Rawls (1971) at pp. 161–75.}
Some interpretations and criticisms of Bentham involve misunderstandings, even caricatures. Other interpretations are still contested by Bentham scholars. For example, Bentham is sometimes referred to as a 'hedonistic' utilitarian, only interested in self-regarding pleasures of the flesh. This is a caricature, for Bentham included in his list of 'pleasures' benevolence, amity, power, and revenge – in short anything that can form part of the motivation ('the springs of action') of human beings. However, there is a fundamental ambiguity about 'pleasure' in this context – does it refer to desires, preferences, or satisfaction? This leads to three significantly different interpretations of the basic principle: (i) 'give as many people as possible as much as possible of what they desire'; (ii) 'give as many people as possible as much as possible of what they in fact (or would) choose or prefer'; or (iii) 'give as many people as possible as much as possible of what will in fact satisfy them'. These are three different, though overlapping ideas. Here, I shall treat Bentham as a preference utilitarian (i.e. 'maximise choice'), but acknowledge that there is scope for other interpretations or for charging him with inconsistency.

Another misreading of Bentham, advanced by some scholars, is that his principle was self-regarding or selfish (egoistical): that the principle prescribes that the right action for the agent is to maximise his own self-interest. In this view even amity and benevolence are self-interested. The better interpretation, which is also less vulnerable to criticism, is that utility prescribes that the goal for individual actors as well as legislators should always be to maximise the aggregate happiness of the whole community in question (i.e the general welfare rather than individual self-interest).

A distinction sometimes drawn by modern commentators (but not found in Bentham) is between act- and rule-utilitarianism. In the context of discussions of punishment, for example, it has been suggested that utility provides a general justification for the institution of punishment (deterrence, prevention etc.) but not for the punishment of the individual (why punish this man? – because he is guilty). This purported limitation of utility to justifying general

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52 'Satisfaction' can occur with or without prior desire; 'preference utilitarianism' is ambiguous in that it can refer to an attitude or to actual choice. The important distinctions are between, desire, actual satisfaction, and choice.

53 Ayer (1948) treats Bentham as a 'preference utilitarian', but this does not fit all of the texts.

54 Lyons (1973/1991); see also Richard Layard (2005a) and (2005b) (arguing that happiness is measurable and that the best route to individual happiness is to be concerned for the happiness of others). Gearty criticises Layard in that having suggested that individuals seek their own happiness, he makes a number of prescriptions about what individuals ought to do in regard to respect for others, empathy for the stranger, and concern for the community that would lead to their own happiness. (Gearty (2006) at pp. 51–54.)


56 The distinction can be traced back as least as far as John Rawls' classic article 'Two concepts of rules' (Rawls (1955), but some trace it to earlier debates. On the history see Smart (1967). Bentham scholars disagree as to whether Bentham was a consistent act- or rule-utilitarian, see the next note.
rules, institutions and practices would meet some standard criticisms, for example, that utilitarianism justifies too much in respect of punishing the innocent and promising; but, in my view, this distinction is both historically and analytically dubious. Act-utilitarianism has a place for rules, as guidelines and rules of thumb, but these are pragmatic rather than absolute principles. There is no room for absolute or exceptionless rules in utility.

Bentham outlined seven dimensions of pleasure and pain: the intensity as experienced by an individual; its duration; its certainty or likelihood in the future; its propinquity in point of time; its fecundity, its purity, and its extent, (i.e. the number of people whose pleasures and pains are to be taken into account in making a calculation). Of these dimensions of value, Bentham felt that four were quantifiable, but he acknowledged that intensity was ‘not susceptible of precise expression; it not being susceptible of measurement’. For our purposes, the most significant is extent, because this relates to the range of our moral concern, especially to strangers and others who are not members of one’s immediate community.

The Benthamite utilitarian calculates by ‘weighing’ pleasures and pains and aggregating the total with ‘happiness’ as the bottom line. This ‘felicific calculus’ has attracted much criticism, but it was also the starting-point for sophisticated forms of cost–benefit analysis. If one takes the calculus literally, it is open to some obvious objections: First, how can one measure pleasures and pains? Some of the dimensions of utility – extent, duration, propinquity, are in principle measurable, but others, especially intensity, are not. Second, there is the problem of inter-subjectivity: how can one compare one person’s pleasures and pains with another’s? Third, are not many pleasures and pains of different

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57 Gerald Postema has argued that Bentham was an act-utilitarian, in that in the last resort judges should decide individual cases directly on the basis of utility even contrary to codified law (Postema (1986)). However, Paul Kelly has argued strongly that Bentham was an indirect (i.e. rule-) utilitarian as evidenced by his writings on civil law (Kelly (1990)). Both scholars may be correct in relation to the texts on which they concentrated, but Postema has been criticised for ignoring the context of Equity Despatch Court. See Dinwiddy (2004) at pp. 155–62. In my opinion, the distinction is not tenable analytically and the debate involves an anachronistic reading into Bentham of a dubious distinction that was developed after his time. So here I treat Bentham as an act-utilitarian, but the historical issue has yet to be resolved.

58 On a utilitarian argument in support of the ‘absolute’, (i.e. not subject to suspension or exceptions) prohibition on torture in Article 3 of the European Convention on Human Rights, see p. 212 below.

59 ‘The magnitude of a pleasure, supposing it present, being given, – the value of it, if not present, is diminished by whatever it falls short of being present, even though its certainty be supposed entire.’ Codification Proposal (1822/in Bentham 1998b) at 251. This argument is analogous to the idea that a bird in the hand is worth two in the bush.

60 ‘Its fecundity, or the chance it has of being followed by sensations of the same kind: that is pleasures, if it be a pleasure; pains if it be a pain.’ (IPML, p. 39).

61 ‘Its purity, or the chance it has of not being followed by sensations of the opposite kind: that is, pains, if it be a pleasure: pleasures, if it be a pain.’ (IPML, p. 39).


kinds, so that they are incommensurable? Is this not like weighing apples and oranges?

Bentham was well aware of these difficulties. He acknowledged that intensity cannot be measured. He discussed how far pleasure and pain in general could be measured by a common metric, such as money. He recognised that people measure money differently in different circumstances and that each addition to a rich man’s wealth is less valuable than the previous one – what later was labelled the principle of diminishing marginal utility. However, from the point of view of the legislator some assumptions have to be made about the similarities of people’s preferences:

This addibility of the happiness of different subjects, however, when considered rigorously may appear fictitious, is a postulatum without the allowance for which all political reasonings are at a stand.

In short, we have to proceed as if such comparisons and calculations are possible, while recognising their artificiality and fallibility. On this view the idea of a calculus is a metaphor. It may not be an exact measure, but the dimensions of utility provide a checklist of factors that are relevant to making judgements about the consequences of different courses of action. This may be rough and ready, but what is the alternative? In short, the calculus is a metaphor that models the nearest that we can come to rationality in making practical decisions. The admitted difficulties have continued to plague the theory of cost–benefit analysis, but have not inhibited its extensive use and abuse in practical life.

(b) Principles subordinate to utility

It is sometimes objected that the principle of utility is too abstract to give clear guidance in particular situations. This hardly applies to Bentham, who was given to drawing up lists that concretised the applications of utility, sometimes in relentless detail. His most important list deals with the ‘subordinate ends of government’: subsistence, abundance, equality, security. These refer to intermediate goals to be pursued to maximise the greatest happiness of the greatest number. Prioritising these goals is still one of the main battlegrounds of political economy.

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66 See pp. 138–9 below.


68 This list is discussed in several places, including Principles of the Civil Code (1838–43) 1 Works 302–13 (1843) (trs. From Dumont’s Traité with additions) and Pannomial Fragments (3 Works at 224–30). There are good discussions of the subordinate ends of government in Harrison (1983) at pp. 244–60 and Quinn (2008).
By security Bentham meant more than what is commonly referred to as ‘law and order’. Security, sometimes called ‘the non-disappointment principle’, differs from other objects of law in that it concerns the future as well as the present (‘extension in point of time’)

and it covers all interests protected by law, including life, person, reputation, property, and status. Thus vested property is an aspect of security, so is liberty – an enclave of individual choice created and protected by law. Subsistence refers to the bare necessities of existence; the goal of abundance refers to wealth creation; and equality refers to amounts of happiness.

Bentham recognised that the subordinate ends of government regularly compete with each other. Perhaps surprisingly, he ranked them: other things being equal, subsistence and security are prior to abundance and equality:

Without security, equality itself could not endure a single day. Without subsistence, abundance cannot exist. The first two ends are like life itself: the two last are the ornaments of life.

Equality is important only insofar as it does not undermine the other three. Subsistence is an aspect of security, but it is sufficiently important to deserve separate treatment. These generalisations are more like rules of thumb than strict principles prescribing a form of lexical priority. For utility always requires the calculation of pleasures and pains in the circumstances of the particular situation.

Equality clearly comes last in this list, but its importance in Bentham’s scheme is often underestimated. It comes into play in several ways. First, in the felicific calculus each person’s happiness counts for one. There is no differentiation according to status, wealth, power, gender, race, age, or deserts. Second, ceteris paribus, equality is important itself when it is not in competition with other subordinate ends. Third, Bentham pioneered the idea that is now known as ‘diminishing marginal utility’:

The effect of wealth in the production of happiness goes on diminishing, as the quantity by which the wealth of one man exceeds that of another goes on increasing: in other words, the quantity of happiness produced by a particle of

69 Codification Proposal, 251–4.
70 Dinwiddy (2004) at p. 85; Quinn (2008); Zedner, (2003) (exploring some of the ambiguities and complexities of the concept of security when it is invoked in contemporary political discourse). The concept of ‘security’ has also been problematic in development circles. For a good discussion see Busumtwi-Sam (2002).
71 Bentham’s treatment of liberty, especially his linking it closely to security, has been controversial. A good short discussion is Rosen (1983) at pp. 68–75. See now, Schofield (2006) at pp. 67–9, pp. 234–40).
72 ‘Subsistence’ is variously interpreted: it can mean enough for physical survival or what at a given time are thought of as ‘necessities’ or sufficient to enable an individual to live as an autonomous agent (Griffin). See Chapter 6, n. 34 below. Cf. conceptions of poverty discussed in Chapter 11.
73 E.g. Principles of the Civil Code, Chapter III. Relations between these objects. (1 Works pp. 302–3.)
74 1 Works p. 303.
wealth (each particle being of the same magnitude) will be less and less at every particle; the second will produce less than the first, the third than the second, and so on.\textsuperscript{75}

Equality thus plays a significant role in Bentham’s scheme, but it is subject to important limitations. He generally opposed compulsory redistribution of wealth because this leads to disappointed expectations; similarly, in his view, equality should not substantially reduce incentives for wealth creation (abundance). However, since inheritance need not involve vested interests and settled expectations, he supported the abolition of primogeniture and entails. He also suggested that where a person dies without any close relatives, 50 per cent should go to the public purse,\textsuperscript{76} and he would probably have supported a much more radical scheme of limited inheritance than has ever existed in Britain.\textsuperscript{77} He generally favoured other ways of bringing about relatively painless re-distribution and, in his later writings, he explicitly attacked the delusion that ‘the maintenance of property was the only end of government’.\textsuperscript{78}

Bentham had clear views on the role of law in respect of the subordinate ends of government. The primary role of law is to create and protect security;\textsuperscript{79} it is less important for subsistence: as one of the most important modifications of well being, legislation is generally not needed.\textsuperscript{80} However, as his writings on the Poor Laws show, Bentham favoured public support for the indigent, even at the expense of abundance.\textsuperscript{81}

Bentham’s views on the role of the legislator in promoting abundance are more complex. In some writings, notably A Defence of Usury, he went further than Adam Smith in opposing governmental intervention in the market. However, while maintaining that government had a limited role in directly promoting economic growth, he advocated intervention in a number of specific areas, and he regularly emphasised the indirect role of promoting abundance by providing stable conditions for economic activity (i.e. security).

Given the complexity and shifting emphasis of Bentham’s writings on political economy, it is perhaps not surprising that he has been claimed as a precursor by proponents of laissez faire, of the modern welfare state, and of the

\textsuperscript{75} 3 Works p. 229.
\textsuperscript{77} ‘After the death of an individual, how ought his property to be disposed of? The legislature should have three objects: – 1st. To provide for the subsistence of the rising generation; 2dly, To prevent the pain of disappointment; 3rdly, to promote the equalization of fortunes.’ (Principles of the Civil Code, Chapter III Another Means of Acquisition – Succession 2 Works at p. 334; see Supply Without Burden.
\textsuperscript{78} 9 Works, p. 77.
\textsuperscript{79} On security he wrote: ‘This inestimable good is the distinctive mark of civilization: it is entirely the work of the laws. Without law there is no security; consequently no abundance, nor even certain subsistence. And the only equality which can exist in such a condition, is the equality of misery.’ (Principles of the Civil Code (1 Works at p. 307). Food Security is now an established term in development discourse, see e.g. Brown (2001), FAO (2005).
\textsuperscript{80} On well-being see n. 85 below. 81 Jeremy Bentham, Writings on the Poor Laws (2001).
idea of mixed economy. Like Adam Smith, Bentham’s views on political economy were much more complicated and balanced than his general image suggests.

This scamper over some of the difficulties of interpreting utility does not do justice to the complexities of Bentham’s thought, nor of utilitarianism in general. Here, I shall proceed on the basis that in discussing Benthamite utilitarianism we are referring to a form of universalist, prescriptive, aggregate, act-utilitarianism, concerned with the general welfare rather than egoism or egotism or narrowly hedonistic versions.

(c) Some standard criticisms of classical utilitarianism

Adopting the standpoint of the legislator, interpreting pleasure to mean preference or choice, making happiness refer to the aggregate of the welfare of the community rather than egoistic self-interest, and treating the felicific calculus as a metaphor all deflect some of the fiercest criticisms of utilitarianism. But there are still some standard objections to this version. One familiar critique is that of Rawls, which will be considered below, along with debates about utility and human rights. Here it is relevant to mention the economist Amartya Sen, who over many years moved away from classical utilitarianism, without completely rejecting it. In Sen’s view utilitarianism has two main strengths worth preserving:

(1) the importance of taking into account the results of social arrangements in judging them.
(2) The need to pay attention to the well-being of the people involved when judging social arrangements and their results.

Sen identifies the main limitations of the utilitarian perspective to be:

(1) Distributional indifference: The utilitarian calculus tends to ignore inequalities in the distribution of happiness (only the sum total matters – no matter how unequally distributed).
(2) Neglect of rights, freedoms and other non-utility concerns: The utilitarian approach attaches no intrinsic importance to claims of rights and freedoms (they are valued only indirectly and only to the extent they influence utilities).

82 ‘He has sometimes been presented as a proponent of laissez faire, sometimes as a herald of the welfare state, sometimes as a harbinger of collectivism or “statism”.’ (Dinwiddy (2004) at p. 92.)
83 On misuses of Adam Smith’s ideas see, for example, Stiglitz (2002) Chapter 3. On the relations between Bentham’s ideas and classical economics see the essays in Parekh (ed.) (1993) Vol. 4, Part I.
84 On Rawls see pp. 154–5 below; on utility and rights see Chapter 6 at pp. 187–9 below.
85 Sen (1999) at p. 60. For recent philosophical discussions of ‘well-being’ see Griffin (1986), debated in Crisp and Hooker (eds.) (2000).
Adaptation and mental conditioning: Even the view the utilitarian approach
takes of individual well-being is not very robust, since it is easily swayed by
mental conditioning and adaptive attitudes.\footnote{Ibid., at p. 62.}

Sen is especially significant for our purposes for several reasons: first, he has
been sympathetic to, but critical of, utilitarianism in relation to welfare eco-
nomics, an area in which this kind of thinking has been especially influential.
Second, although he has spent much of his career in the West, his roots are in
India and in much of his work he adopts a global perspective. His is a very
important ‘Southern voice’. Third, much of his writing has been concerned with
issues of development and rights; and, fourth, he finds merits and limitations in
each of the main strands of liberal democratic theory, utilitarianism, libertari-
anism (exemplified by Nozick) and Rawlsian justice. This has led him to
develop ‘a capabilities approach’, which has been very influential in recent
development theory, in particular in relation to human development indicators
and the Millennium Development Goals, which will be considered below in
Chapter 11.

(d) Bentham and globalisation\footnote{For a longer discussion see GJB, pp. 237–42.}

Besides being widely regarded as the greatest and most influential figure in
Anglo-American jurisprudence, Jeremy Bentham is more directly relevant to
globalisation than most other jurists. He was a universalist in ethics, and a
near universalist in respect of constitution-making and the transplantation
of laws; his criticisms of non-legal rights still have to be taken into account
by any serious theory of human rights;\footnote{See Chapter 6.5(a) below.} he pioneered general jurisprudence,
and he often (but not invariably) explicitly adopted the standpoint of ‘a (or the)
citizen of the world’, concerned with the welfare of humankind as a
whole.\footnote{Harrison (1983) at pp. 276–7.} In 1831, not long before his death, he wrote in his Memorandum
Book:

J.B.’s frame of mind.
J.B. the most ambitious of the ambitious. His empire – the empire he aspires
to – extending to, and comprehending, the whole human race, in all places – in all
habitable places, of the earth, at all future time.
J.B. the most philanthropic of the philanthropic: philanthropy the end and
instrument of his ambition.
Limits it has no other than those of the earth.\footnote{11 Works, p. 72. The writings on international law (more extensive than in Bowring) are
currently being edited for The Collected Works.}

Apart from Bentham’s utilitarianism and his theory of law, three works in
particular are directly relevant when considering law from a global perspective.
"Nonsense Upon Stilts" (until recently cited as *Anarchical Fallacies*) is still the best-known critique of natural and human rights theories, which are in some quarters the dominant discourse of public morality today. What is at stake here is not the underlying values (in criticising a right to food or development, a Benthamite is not denying that food or development are important); rather the thrust of the criticism is that such kinds of rights talk is unclear, misleading, meaningless or, in Bentham’s words, ‘pestilential nonsense’.

Bentham introduced the term ‘international law’ to refer to relations between sovereign states. In his theory of law all law emanates directly or indirectly from the sovereign. Yet he was acute enough to recognise that there are difficult issues about the illimitability and indivisibility of sovereignty, and unlike some of our contemporaries he acknowledged that sovereignty could be split. He also posed, but did not resolve, an issue that is a key one in international ethics. Is the duty of a national leader or government to give priority to the interests of his own people or does it extend to humankind as a whole?

Thirdly, a little known early work, *Essay on the Influence of Place and Time in Matters of Legislation* is potentially of great contemporary significance. To what extent law is or should be context- and culture-specific is a central issue in the study and practice of transnational diffusion, harmonisation and unification of law and in local law reform, where foreign models and the experience of other countries are under consideration. Bentham posed the basic issues as follows:

To give the question at once universal form, what is the influence of the circumstances of place and time in matters of legislation? What are the coincidences and what the diversities that ought to subsist between laws established in different countries and at different periods, supposing them in each instance the best to be established?

Seldom have the basic issues been posed so sharply and addressed so systematically. In his later years Bentham aspired to be Legislator of the World. In some of his later writings on codification, which were connected with his

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91 Recently re-published in the *Collected Works* as ‘Nonsense Upon Stilts’ in *Rights, Representation and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution* (CW, 2002).

92 See Chapter 6.1 below. 93 See Chapter 6.5(a) below.

94 ‘Would or would not the duty of a particular legislator, acting for one particular nation, be the same with that of the citizen of the world?’ *Principles of International Law* 2 *Works* 561 (1786–9).

Cf. Singer (2004), Preface (criticising the extreme prioritising of American interests in speeches by the Presidents Bush).

95 Written circa 1780, the text first appeared in French in *Traité de législation civile et pénale* (ed. Dumont) (1802) but not published in English until 1838 in a truncated version in 1 *Works*, pp. 171–94 (Bowring (ed.)). Philip Schofield has recently edited the manuscripts for *Place and Time* (hereafter *OPT*) and has kindly made them available to me. This youthful essay is ebullient and discursive, with some interesting comments on a range of topics. Unfortunately, for the modern reader it is marred by some potentially racist and explicitly islamophobic passages, which may distract attention from the central argument.

96 *OPT* at p. 1 (MS). The wording is only slightly different in the printed version, 1 *Works* 171.
unsuccessful attempts to sell his services as a codifier to a succession of foreign rulers and politicians, he gave the impression of being a near-universalist in legislation, a technocrat largely indifferent to local conditions and culture.  

However, in *Essay on the Influence of Place and Time*, he gave some weight to Montesquieu’s ideas on the importance of history, geography, and culture in the development of law, and advocated a quite moderate and gradualist approach to transplantation of laws. He argued that local sensibilities should be heeded and humoured, but that they should not be treated as insurmountable by the utilitarian legislator, who might need to rely more on ‘indirect legislation’ than direct imposition of new codes, at least in the short term. Bentham, like most modern exporters of law, concluded that ‘universally applying circumstances’ were much more important than ‘exclusively applying circumstances’, but his arguments are interesting and incisive. Bentham’s *Essay* is especially interesting in considering diffusion and harmonisation of laws, not least because it presents more of a challenge to modern contextualists, such as Lawrence Friedman and Pierre Legrand, than some of their standard targets.

5.5 Peter Singer: a modern Benthamite

Too much has happened since Bentham’s time in respect of international law and global ethics for Bentham’s relatively rudimentary texts on these topics to be a suitable starting point today. However, we have in Peter Singer an outstanding contemporary philosopher who has applied a form of Benthamite utilitarianism to a wide range of issues of practical ethics, many from a global perspective.

Peter Singer was born in Australia in 1946. He has held positions in philosophy in Australia, the United Kingdom and latterly (since 1999) at Princeton. He is a respected philosopher, but he is more widely known as a public intellectual and political activist. One of his early works, *Animal Liberation* (1975), attracted a great deal of attention and made an immediate impact on the

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97 Bentham, *Legislator of the World* (1998a). This volume is concerned with late works and does not include the early essay on place and time.

98 Ibid., at pp. 291–2.

99 See pp. 295 and 305 below.


101 As a philosopher Singer was strongly influenced by R.M. Hare. On the similarities and differences in their positions on utilitarianism see R.M. Hare, ‘Why I am Only a Demi-Vegetarian’ and Singer’s response in Jamieson (ed.) (1999).
animal movement. The book is a sustained and powerful argument that one owes a duty to animals not to cause suffering or death unnecessarily. The starting point is Bentham’s dictum: “The question is not, Can they reason? Nor, can they talk? But, can they suffer?”

The book exhibits three features that characterise much of Singer’s work. First, like Marx, Singer’s concern is not merely to understand the world, but to change it. In many of his writings Singer tries to persuade people to change their unconsidered beliefs and to act on their new ones. Indeed, Animal Liberation can claim many converts to vegetarianism and to opposition to animal testing.

Second, Singer takes facts seriously. One of the attractions of utilitarianism is that it focuses attention on actual situations and empirical consequences. The power of Singer’s arguments in Animal Liberation stems from combining simple principles with vivid pictures, detailed statistics, and other empirical data. Most of the book is taken up with marshalling evidence to support the thesis that current practices in carnivorous societies in fact involve immense cruelty to millions of animals and that this is unnecessary. The book is a straightforward application of the principle of utility to actual states of affairs and their consequences: Harming animals unnecessarily causes pain and is unacceptable; our practices harm animals unnecessarily; therefore, these practices are morally unacceptable.

Third, Singer believes that both individual ethics and informed, rational policy-making can bring about change. Singer’s ‘practical ethics’ are immediately practical. Much of his writing is concerned with individual ethics and he has generally shaped his life according to his beliefs: for example in his private life he is reported to be a vegetarian, to refuse to wear clothes made from animal skins, and to give a significant proportion of his income to causes in which he believes, especially those dealing with world poverty and animal welfare. In short, he acts as a role model for a particular kind of utilitarian.

102 Singer does not use the term ‘animal rights’ for reasons discussed below.
103 IPML, pp. 282–3n. The whole passage on ‘Interests of the inferior animals improperly neglected in legislation’ is well worth reading.
105 Singer wrote a short book on Marx (Singer (1980)), but he was never a Marxist. Marx was scornful of utilitarianism, mainly in regard to the utilitarian conception of ‘the general interest’ rather than the idea of maximising happiness (at p. 63). Singer’s judgement is that ‘Marx saw that capitalism is a wasteful, irrational system which controls us when we should be controlling it. That insight is valid, but we can now see that the construction of a free and equal society is a more difficult task than Marx realised’ (at p. 76).
106 I do not have figures but I know a number of vegetarians who claim that it influenced them.
107 Many commentators make similar claims about his influence. See Jamieson (1999) passim.

Practical Ethics (2nd ed 1993) is a very successful textbook. It addresses a wide range of contemporary issues of individual ethics and social policy, some of which have ‘global’ dimensions (e.g. equality, rich and poor, development assistance, killing (including genocide), treatment of outsiders, and the environment). One World, discussed below, is his main work that focuses specifically on global ethics.
He also has ‘the courage of his premises’, in that he firmly adopts and campaigns for positions that follow from his arguments, even if they are very unpopular.\textsuperscript{108} In some of his works Singer advances pure utilitarian arguments and takes radical, often controversial positions that follow from robust premises. Like Bentham, Singer has been more concerned to use utility as a critical weapon rather than to justify it.\textsuperscript{109} However, in his writings on famines and other ‘global’ issues and in his lectures on One World (discussed below) his concern is to persuade people with a wide range of ethical positions.\textsuperscript{110} Here his arguments are more ecumenical and less philosophically sophisticated, but underlying them is a consistent quite simple utilitarianism.\textsuperscript{111}

Singer has written about ‘global’ issues in many different contexts. For our purposes, two are of particular significance. First, in a well-known paper entitled ‘Famine, affluence and morality’ Singer stimulated a long-running debate around the question: who is my neighbour? – Bentham’s dimension of ‘extent’.\textsuperscript{112} The article was specifically about the allocation of responsibility for famines, but it raised important issues about what should be the extent of the moral concern of individuals, associations, and governments. Building on empirical evidence that nearly all modern famines have been avoidable,\textsuperscript{113} Singer argues that in an interdependent world utility imposes an obligation on all relevant moral actors to take measures to prevent famines:

If it is in our power to prevent something bad from happening, without sacrificing anything of comparable moral importance, we ought morally to do it.\textsuperscript{114}

This is a matter of duty, not charity. Famines are preventable and all involved moral agents have a duty to prevent them without regard to national boundaries, proximity, or distance. In today’s world almost everyone is involved.\textsuperscript{115} Singer acknowledges that the principle as formulated ‘does seem to require reducing ourselves to the level of marginal utility’.\textsuperscript{116} While he personally

\textsuperscript{108} The best known example of this is his view that parents of seriously disabled newborn babies should be able to decide, with medical advice, whether the child should live or die. This position is part of a wider thesis on euthanasia. In respect of this Singer has been attacked not only intellectually, but personally, including the cancellation of events and even death threats, especially in Germany. (For a full account see the Appendix to the third edition of Practical Ethics (1993). Singer stood by his general position and fought for his right to debate it.)

\textsuperscript{109} But see Singer (1979) and some of his early papers. He has acknowledged his debt to R.M. Hare and accepts much of his approach to moral issues in Jamieson (ed.) (1999) at p. 322.

\textsuperscript{110} Ibid., at p. 302. Compare Thomas Pogge’s use of ‘ecumenical arguments’ p. 172 below.

\textsuperscript{111} As we shall see, other thinkers, such as Pogge and Sachs, have pragmatically stressed the relatively small costs involved in preventing famine and in mitigating global poverty and, like Singer, have also appealed to self-interest.


\textsuperscript{114} Singer (1972) reprinted, with other contributions to the debate, in Beitz \textit{et al.} (eds.) (1985) Part V.

\textsuperscript{115} See p. 148 below on the idea of strengthening the perception of mankind as a community.

favours this strong utilitarian version, he points out that more moderate positions, which require less heroic sacrifices, would nonetheless result in ‘a great change in our way of life.’

Singer has dealt extensively with a number of objections to his thesis. For example, it has been argued that it is unrealistic because it sets too high a standard, requiring sacrifices that the better off will not in practice be prepared to make. Singer dismisses this objection as not being a moral argument. But it is psychologically important and Singer has made some concessions to it. A second objection is that there are ‘spheres of justice’ or limits to our moral concern that justify drawing quite sharp distinctions between our duties to members of our own community (and those who are closely related to us) and our duties to outsiders, especially unidentified and distant strangers. This raises very complex issues. A utilitarian may go some of the way towards meeting the objection by suggesting that families, friendship, close-knit communities, and other social institutions and associations probably generally promote aggregate happiness and this would justify giving some priority to friends, relatives, colleagues, club members, and fellow citizens. In the long run, utility is maximised by these arrangements. Similarly, one may be in a better position to make good calculations in respect of people one knows or one’s own social situation, because one has better information. But Singer challenges the idea that proximity, either physical or relational, in itself is a relevant moral consideration. Starting with an example of seeing a child drowning whom one could easily rescue at the cost of getting one’s clothes wet, he suggests that one has a positive duty to act to save the child. The fact that he is a stranger is irrelevant. Sometimes, too, claims to relational ties can be forms of discrimination: justifying inclusion by claiming a blood relationship, or shared citizenship, for example, can be merely an excuse for discriminating on racial, gender, or xenophobic grounds. Moreover, among those who defend the idea of spheres of justice, loyalty to one’s family is generally accepted to involve background constraints: in our culture, drugging the drinks of one’s son’s competitors in a tennis competition is generally condemned, paying for private education or schooling of one’s children in a welfare state is contested, giving birthday

117 Ibid.
119 Beitz et al. (1985); Fishkin (1985).
120 The fact that people will in practice be unwilling or reluctant to give up what they have because it is right to do so, does not affect the extent of their obligations. And, it has been pointed out, that many of the more extreme versions of human suffering in the modern world could be prevented or drastically reduced if, for example, individuals in rich countries gave a small part of their income to appropriate ‘charities’ or causes and all governments met the United Nations targets, modest and arbitrary as they are, for foreign aid, provided, of course, that the money was well spent.
121 The locus classicus is Walzer (1983); see the debate between Luban and Walzer in Beitz (et al.) (1985), Part II.
122 On Bentham’s dimension of ‘propinquity’ (in time) see n. 59 above.
presents to one’s family is generally accepted as a duty by utilitarians and non-utilitarians alike.\textsuperscript{123} Similarly, to use reciprocity as a basis for preferring members of one’s own group to outsiders, is not a coherent moral argument. Does it follow from this that we owe no duties to future generations? Once all the possible utilitarian considerations have been pared away the difference is that Singer is challenging the idea that ‘friendship, loyalty, familial ties, self-respect etc. are important independently of their contribution to the best overall state of affairs.’\textsuperscript{124}

A third line of attack is that Singer’s thesis is based on premises that are open to many of the standard criticisms of utilitarianism. This objection has been confronted by Onora O’Neill who, in her well-known essay ‘Lifeboat Earth’, develops a non-utilitarian position that both by-passes criticisms of simple utilitarianism and meets the point that theories of rights tend to beg questions of allocating responsibility for realising rights.\textsuperscript{125} Although O’Neill in fact agrees with many of Singer’s arguments, she constructs a moral position about global responsibility for extreme evils (her main example is deaths from famine) that transcends different ethical theories. The argument goes as follows: ‘any nonbizarre ethical theory which has any room for a notion of rights’ will include a right not to be killed.\textsuperscript{126} This right has a correlative obligation on everyone not to be involved in the killing of another without justification.\textsuperscript{127} In brief, she lays the responsibility not to contribute to unnecessary deaths on anybody who is involved in the world economy, which in effect means all of us – both as individuals, as citizens, and as participants in associations or corporate bodies, for example as shareholders, managers, or directors of large business enterprises. Later, we shall consider a similar argument by Thomas Pogge to the effect that the responsibilities of the better off, both individuals and governments, can be based on a duty not to cause harm quite apart from any positive duty there may be to help tackle radical poverty.\textsuperscript{128}

Several factors are combining to make this kind of thesis seem less utopian than it might have done even ten years ago: the rapid increase in interdependence; the immediacy of extreme problems such as famine, civil war, genocide,

\textsuperscript{123} There have been a number of case of parents who overstepped the bounds of loyalty (e.g. the headline in \textit{The Times} on July 20 2007 (News p. 3) ‘Families to sue gymkhana mother accused of doping rivals’ ponies’. In a recent German case a father was convicted of manslaughter in more tragic circumstances: he had drugged the drinks of his son’s competitors at tennis, one became sleepy, withdrew and died in a car crash.

\textsuperscript{124} Gruen, in Jamieson (ed.) (1999) at p. 141.


\textsuperscript{126} O’Neill in Beitz \textit{et al.} (1985) at p. 268, n.2.

\textsuperscript{127} This duty applies even though we (a) do not kill single-handedly those who die of famine; (b) do not kill instantaneously those who die of famine; (c) do not know the individuals who will die as result of the pre-famine and famine policies we support (unless we support something like a genocidal famine policy); (d) do not intend any famine deaths. \textit{Ibid.}, at p. 277.

\textsuperscript{128} See Chapter 12 below.
and climate change; and the increasing scope of an overlapping consensus at world level about what constitutes intolerable situations in other countries. All of these raise complex issues about sovereignty, the extent of our moral concern, and what constraints there should be on national leaders furthering national self-interest rather than broader concerns.

Singer addresses some of these issues in a book based on the Terry Lectures given at Yale in November 1999. The central thesis of One World is that issues arising from globalisation have a moral dimension and that, in order to create a stable world community, national leaders ‘need to take a larger perspective than of national self-interest’. The facts of increased interdependence make it increasingly important that efforts should be directed towards making humankind with legitimated political institutions evolve in the direction, not of centralised world government, but of a federal structure, perhaps modelled on the European union. For Singer, just as within a closed community the right action for individuals as for leaders is to promote the aggregate happiness of the community, so political leaders need to ‘think outside the box’ of short-term national interest. For this to happen the idea of humankind as a community needs to be greatly strengthened. Enlightened self-interest and charitable concerns may help in this regard, but on their own they are not enough. Singer roundly criticises President George W. Bush for such statements as ‘We will not do anything that harms our economy, because first things first are the people who live in America.’ He is also highly critical of American protectionist policies and the US stance on such matters as the Kyoto Protocol, the International Criminal Court, and UN reform of fair trade.

From a global perspective, a modern utilitarian might argue that for every national leader the extent of his or her moral concern should be humankind as a whole, but the structure of international society is such that it is in the interests of humankind that (democratic) leaders should generally represent and seek to advance the interests of their own constituents, except where the utilities clearly require some sacrifice or tempering of those. The utilitarian can also point out that very often pursuing policies that will generally benefit mankind will also be pragmatic, statesmanlike examples of ‘enlightened self-interest’. As we shall see, the proponents of the Millennium Development Goals have tended to emphasise this as well as pointing out how much can be achieved at relatively low cost. But such arguments can only take one so far. For there will inevitably be occasions when national interests will clash with those of humankind or less well-off parts of it. Furthermore, a democratically elected leader risks not being

129 On the consensus around the Millennium Development Goals see Chapter 11 below. On humanitarian intervention see Nardin and Williams (eds.) (2006).
130 Singer (2002).
134 See Chapter 11.4 below.
re-elected if she goes too far down the road of ‘statesmanlike’ concessions and sacrifices – human development strategies today are heavily dependent on mobilising public opinion in wealthier countries to support quite modest strategies, such as the Millennium Development Goals.

Singer discusses the arguments for and against ‘first things first’ stances. Many will disagree with his contention that sovereignty is of little or no moral significance. More will agree with the idea of strengthening our vision of humankind as a genuine or robustly imagined community, but concede that there is a long way to go. Moreover, as many have pointed out, the current world order is far from democratic, but it is mainly wealthier democracies who are asked to bear the main financial burdens of poverty alleviation, peace keeping, international institutions and so on. Singer states that there is a strong ethical case against leaders giving absolute priority to national interests, but acknowledges that there is a case for giving ‘some degree of priority’ to them. However, he leaves open the question what does ‘some degree of priority’ amount to? Like Bentham, Singer has posed the question how should national leaders behave, but also like Bentham he gives, at best, a vague answer. Nevertheless, he has made the case for taking the ethical dimensions of globalisation seriously and has identified some of the central issues.

Peter Singer is an outstanding example of a thinker who adjusts and extends classic arguments in the light of changed circumstances, including in relation to ‘globalisation.’ In Section 5.7, we shall see how Thomas Pogge has made a similar adjustment of the leading theory of justice of the twentieth century, but in a somewhat different fashion.

5.6 Modified utilitarianism

A modified utilitarian position accepts that utilitarian arguments can be valid, relevant, and cogent in making and assessing judgements of value, but rejects the claim that utility is the sole criterion of the right and the good. For example, Herbert Hart was generally sympathetic to utility as a principle of guidance and evaluation of legislation, but he also invoked ‘principles independent of utility’. For example, utility can provide the main general answers to the question: Why prescribe punishments? For the institution of punishment is generally justified by its intended consequences (deterrence, prevention, rehabilitation, etc.). But it cannot provide satisfactory answers to the question of distribution: Who should be punished? Classical utilitarianism is usually interpreted as justifying too much, such as collective punishments and punishing an innocent

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137 Hart (1968), Chapter 1. On the distinction between act- and rule-utilitarianism, see pp. 135–6 above.
individual in circumstances where the benefits outweigh the costs. Similar arguments can be made about promising and torture. Hart argued that punishment of the innocent involves a serious sacrifice of an important principle that is independent of utility: in this case an aspect of justice – punishment should be only inflicted on those who deserve it. In short, utility provides the general justifying aim of the institution of punishment (forward looking reasons) but the distribution of punishment should be governed by independent justice-based principles of responsibility and proportionality. As Lacey put it, Hart worked within the tradition of Benthamite Utilitarianism, but gave a place to justice, rights and fairness. Conversely, in discussing strict liability in criminal law, Hart argued that principles of responsibility place constraints on the general utilitarian aims of criminal justice, but in some circumstances – for example, in regard to some regulatory crimes – the benefits may sufficiently outweigh the costs to justify overriding these principles. However, he suggested, 'such arrangements are always made with a sense that a principle is being sacrificed: that a compromise is being made.'

A modified utilitarian position is different from one in which other values ‘trump’ utility. Natural lawyers and deontologists have not rejected all consequentialist arguments, rather they claim that there are values other than utility (even when broadly interpreted) and some of these values generally override consequentialist considerations. For example, when Ronald Dworkin asserts that rights ‘trump’ utility, he allows broad scope for arguments relating to the ‘general welfare’, for instance in regard to social policy and democratic legislation, but maintains that rights represent important enclaves of value that generally override utilitarian or other consequentialist arguments. Rights are not mere side-constraints, they are trumps.

Fred Rosen has argued that Bentham was not concerned with the problem of punishing the innocent and in discussing punishment for offences guilt is generally assumed and proportionality of punishment was built into the analysis. The issue came to the fore much later in connection with A.C. Ewing’s *The Morality of Punishment* (1929) and in this context two false assumptions were made: first, that utilitarians justify punishment by deterrence alone, and second, that utilitarianism is a ‘top down’ theory in which pleasure alone is the only good and which has no principle of distribution; but classical utilitarianism, exemplified by Bentham, built up to utility from secondary principles which take issues of desert and proportionality into account. This interpretation is likely to be contested on the ground that punishing the innocent undermines security. On ‘top down’ theories, see below p. 153. If Rosen’s historical argument is convincing, this is an important piece of revisionism, since he supports Paul Kelly’s interpretation of Bentham as a rule utilitarian (Kelly, 1990). But for those who interpret Bentham as an act-utilitarian it does not quite meet the point that in some circumstances inflicting pain on the innocent (and torture) may be judged to be the lesser of two evils in some circumstances.

Some might argue that there is little difference in practice between the position of a modified utilitarian and of a rights theorist, who allows some space for utilitarian arguments. For example, Stephen Guest interprets Dworkin’s position as saying ‘that claims of right are not defeated by a simple appeal to a marginal increase of welfare’. But he continues: ‘I say “marginal” to avoid the problems raised by the cases of catastrophe or emergency’. But the modified utilitarian may only be prepared to sacrifice an important principle if the utilitarian benefits significantly or substantially outweigh the costs. Is there a difference? I think that there is, but it may not lead to great differences of outcome. First, take the situation of competing rights (or moral values independent of utility). The modified utilitarian may argue: ‘Where rights conflict, utility determines’. Is the rights theorist committed to this? Well if she accepts some idea of lexical priority (such as Rawls’ priority of liberty) probably not, but some followers of Rawls (and Hart as a modified utilitarian) reject lexical priority – both involve dilemmas, but the non-utilitarian is not committed to only weighing consequences to resolve it. Similarly, in emergency situations or catastrophes, where the consequences are dire a rights theorist may be willing to sacrifice rights.

However, there are significant differences. For a modified utilitarian, utilitarianism has the following attractions:

(i) utilitarian arguments can be meaningful, valid and cogent;
(ii) consequences are normally relevant considerations to take into account in practical decision-making;
(iii) utilitarianism is consistently concerned with actual or likely consequences;
(iv) Bentham’s list of the ‘dimensions’ of utility helpfully pinpoints factors that are generally relevant in identifying and assessing consequences;
(v) the felicific calculus, interpreted metaphorically, approximately models the kind of practical reasoning involved in assessing consequences;
(vi) concepts such as ‘the general welfare’, ‘well being’, ‘the public interest’, and ‘happiness’, although vague, express important public and private goals.
(vii) value judgements are, up to a point, susceptible to rational appraisal and argument.

However, modified utilitarians have doubts about unconstrained utilitarianism such as Bentham’s, in one or more of the following respects:

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147 For an example of a wholesale rejection of utilitarian arguments as moral arguments see Milne (1974).
(i) doubts whether all considerations relevant to making value judgements can be reduced to a single criterion;
(ii) doubts whether all valid reasons in evaluation are forward-looking, leaving no room for considerations such as desert, fair procedures, or retribution;
(iii) doubts whether unmodified utilitarianism can accommodate such values as dignity (respect for persons), distributive justice, fairness, and a virtuous disposition;
(iv) doubts about the feasibility and appropriateness of ‘calculating’ consequences in all situations.148

Such concerns are brought to the surface by examples of situations in which utilitarianism seems to miss the point. For example, on one interpretation, Bentham suggests that what is wrong with convicting the innocent is that it creates alarm in others149 and that what is wrong with torture is its susceptibility to abuse.150 If this interpretation is correct, it suggests a deficiency in utilitarianism. What is wrong with punishing the innocent is that it is unjust; what is wrong with torture is not solely or mainly its consequences, or the dangers of misapplication, but the intuitive idea that people just should not be treated in this way. These are but two instances where non-consequentialist arguments are felt to be needed, even by those generally sympathetic to utilitarianism. The modified utilitarian makes space for such considerations in terms of principles independent of utility, but may concede that such principles may sometimes have to be sacrificed in exceptional circumstances.

In his discussions of punishment and responsibility Hart treated considerations of justice and proportionality as being grounded in principles independent of utility.151 In some instances utility must give way to justice, as in punishment of the innocent. However, in respect of strict liability utility considerations may be so strong as to override minor injustices, but even then there is a cost, the sacrifice of a principle independent of utility. As several commentators have pointed out, the trouble is that this form of modified utilitarianism gives no guidance on the scope or weight of the modifying principles. Lacey suggests that because utilitarian and justice-based principles ‘float in different philosophical systems’ Hart, unlike Rawls, ‘cannot give us any clues about

149 Bentham’s position on this issue is open to more than one interpretation: Compare e.g. p. vii, Works pp. 591–3 with A Treatise on Judicial Evidence (1825, (ed.) Dumont) at pp. 196–7.
150 Denman (1824) at p. 180 attributed the interpretation in the text to Bentham and attacked it in the Edinburgh Review. Compare, however, Rosen (1997) discussed above, at n. 138. Of course, the pain involved in punishment or torture has to be taken into account.
151 Twining and Twining (1973/4) at pp. 42–5, 79–90. Bentham’s insight that institutionalised torture is susceptible to abuse has much support in history and provides another strong argument for an absolute prohibition of torture in opposition to arguments from ‘the extreme case’, which tend to be advanced in particularist terms.
152 For a good discussion, see MacCormick (1981a) (2nd edn 2008).
how they should be traded off against each other.\footnote{Lacey (2004) at p. 283.} She concludes that Hart’s treatment of punishment and responsibility was symptomatic of a general tendency to tentativeness in his later work. Tasioulas, in arguing for a less ‘top-down’ approach to punishment based explicitly on ethical pluralism, criticises such hybrid theories more forcefully:

The resulting theory will be truly hybrid in character, assembled from the dismembered parts of incompatible general moral theories. But now a second defect is apparent, viz. that the theory arrived at is little better than an ad hoc compromise among radically different concerns. Proponents of hybrid theories can offer no coherent rationale for the principles they have combined – apart from the fact that they have been explicitly manufactured to yield results more attuned to our settled moral convictions – since one cannot at the level of underlying theory, endorse both consequentialism and deontology. They thereby violate the ‘no-shopping’ principle.\footnote{Tasioulas (2006) at p. 281, citing Stuart Hampshire (1983) at p. 148.}

Hart modified his utilitarianism to accommodate considerations of justice, rights, and fairness. But he acknowledged that, in his view, moral philosophy had yet to develop arguments in favour of rights that were ‘comparable in clarity, detailed articulation, and appeal to practical men’.\footnote{Hart (1982) p. 39. See his discussions of utilitarianism, rights, and justice in Hart (1983) Chapters 8–10.} In the next section, we shall examine first the attempts of Rawls and his successors to construct a well-grounded theory of justice for the modern world as an alternative to utilitarianism. Then Chapters 6 and 7 consider diverse attempts by theorists of human rights to meet Hart’s challenge.

## 5.7 Theories of justice: Rawls and Pogge


Rawls’ *Theory of Justice* is generally regarded as one of the most important contributions to moral and political theory of the twentieth century. It stands to Anglo-American normative jurisprudence as Hart’s *The Concept of Law* stands to analytical jurisprudence. It is regarded by many as having set the terms of
debate on justice and rights for nearly fifty years. I shall suggest that his two principles of justice (or some variant) are still strong candidates for providing widely acceptable standards for the design and appraisal of public institutions, but that Rawls’ own attempts to transfer his theory of domestic justice to the supra-national arena were a sad failure. In this regard, it is more illuminating to focus instead on the work of his pupil, Thomas Pogge, as the best attempt to date to develop an essentially Rawlsian theory of global justice.

Rawls began his career as a moral philosopher in the late 1940s. Although his magnum opus, A Theory of Justice was not published until 1971, a draft manuscript was in circulation by 1960 and was progressively refined over a decade. World War II, Hiroshima and Nagasaki, the Cold War and anti-communism, the War in Vietnam, draft evasion, the civil rights movement, and other issues of social justice in the United States were all part of the backdrop during the long gestation period of Rawls’ theory. During the 1950s and beyond, political philosophy was in a fallow period. Logical positivism, ‘the revolution’ in analytical philosophy, an atmosphere of general suspicion of both ‘grand theory’ and of Continental European philosophising, all discouraged engagement with substantive moral and political issues.156 One of the achievements of A Theory of Justice, an extraordinarily ambitious work for the period, was to reinstate substantive political philosophy as a reputable pursuit.

Initially Rawls seems to have been quite attracted to utilitarianism and, in a classic article published in 1958 entitled ‘Two Concepts of Rules’, he tried to meet some of the standard attacks on utility by distinguishing between justification of the legislator’s question (justifying a decision to make a general rule) and the judge’s question (Why punish this man?). Thus a rule prescribing punishment may be justified by its utilitarian purposes, but a decision to punish an individual under an established rule must be justified by a different non-consequentialist argument.157 However, Rawls decided that utilitarianism could not be rescued, even though he continued to admire its scope and rigour and its progressive influence on reform.158 So he developed his theory of ‘justice as fairness’ in the Kantian tradition of liberal individualism as a response and positive alternative to all forms of utilitarianism.159

He selected as his main target the version advanced in Henry Sidgwick’s The Methods of Ethics.160 Rawls interpreted this as defending the view ‘that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it’.161 In short, the main object of his attack and, in his view the least vulnerable form, was an aggregate satisfaction version of utility as applied to the design of institutions. In Chapter 5 of A Theory of Justice

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156 See Chapter 2 above.
157 Rawls (1955). This article was one starting-point for the contested distinction between act- and rule utilitarianism, that was discussed at pp. 135–6 and 150 above.
158 Rogers (1999) at p. 50 (a useful introduction). 159 TJ, p. 22.
160 Sidgwick (1907). 161 TJ, p. 22.
Rawls developed what is generally treated as the most important modern Kantian critique of classical utilitarianism. He argued that utilitarianism is inconsistent with the principles of justice as fairness in the following main respects:

(1) Justice as fairness requires that every individual has liberties and rights that take priority over the welfare of everyone else. By treating aggregate utility as the criterion, ‘Utilitarianism does not take seriously the distinction between persons.’162 Accordingly, it allows basic individual liberties and goods to be sacrificed to the general welfare.163

(2) In teleological theories the right is defined as that which maximises the good, whereas in justice as fairness the right takes priority over the good.164

(3) The priority of justice holds ‘that interests requiring the violation of justice have no value’.165 Utilitarianism, by contrast, does not distinguish between kinds or quality of satisfaction and allows pleasures of discrimination, or sadism, or a sense of superiority to be weighed favourably.166

(4) Utilitarianism and justice as fairness have different underlying conceptions of society:167 the former treats individuals as means to maximise aggregate utility; the latter provides a structure which enables individuals freely to choose their own ends to the extent that these do not conflict within a basic structure of individual liberties.168

Rawls’ central question was: What is the most appropriate moral conception of justice for a democratic society? Rawls considered other moral theories, but he developed his ideas primarily in response to utilitarianism. He insisted that ‘justice is the first virtue of social institutions’169 and that a theory of justice should be concerned with the basic structure of such institutions in a given society. Like Bentham, Rawls’ primary interest is in institutional design.

Rawls summarised his original theory as follows:

\[^{162} TJ, p. 27.\]
\[^{163} TJ, p. 24.\]
\[^{164} TJ, p. 24.\]
\[^{165} Ibid., at p. 31.\]
\[^{166} Ibid., at pp. 30–1.\]
\[^{167} Implicit in the contrasts between classical utilitarianism and justice as fairness is a difference in the underlying conceptions of society. In the one we think of a well-ordered society as a scheme of cooperation for reciprocal advantage regulated by principles which persons would choose in an initial situation that is fair, in the other as the efficient administration of social resources to maximize the satisfaction of the system of desire constructed by the impartial spectator from the many individual systems of desires accepted as given.’ (TJ, p. 33)\]
\[^{168} Compare Amartya Sen’s general critique of utilitarianism, cited above. Sen’s pluralist capabilities approach claims to pay due regard to the motivations of utilitarianism, libertarianism, and justice as fairness, while maintaining a distance from them: ‘In particular, the freedom-based perspective can take note of, *inter alia*, utilitarianism’s interest in human well-being, libertarianism’s involvement with processes of choice and the freedom to act, and Rawlsian theory’s focus on individual liberty and on the resources needed for substantive freedoms.’ Sen (1999), discussed further Ch. 7.4. below.\]
\[^{169} TJ, p. 3.\]
My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to think up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social co-operation that can be entered into and the forms of government that can be established. This way of regarding the principles I shall call justice as fairness.\(^\text{170}\)

The people in the original position would choose the following two principles:

**First principle:** ‘Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.’

**Second principle:** ‘Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle,\(^\text{171}\) [‘the difference principle’] and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.\(^\text{172}\)

These two principles have been variously interpreted, criticised and modified. Taken together they summarise Rawls’ careful balancing of liberty and equality in a democratic society. Individual liberty takes priority, but only so far as it is embodied in certain basic liberties (rights).\(^\text{173}\) Rawls’ treatment of equality disturbed both strong egalitarians and anti-egalitarians: large disparities of wealth are not wrong in themselves, but any distributive arrangement must benefit the worst off as much as possible in respect of ‘social primary goods’ (including liberty, opportunity, wealth, and self-respect). Furthermore, wealth should not be allowed to distort the balance of political power that is required in a democracy.\(^\text{174}\) The difference principle, based on game theory, is


\(^{171}\) ‘The just savings principle can be regarded as the understanding between generations to carry the fair share of the burden of realizing and preserving a just society.’ (*TJ*, p. 289) This allows for a suitable amount of real capital accumulation (*TJ*, p. 285).

\(^{172}\) *TJ*, p. 302. This formulation also contained two priority rules: The lexical priority of liberty and the Priority of Justice over Efficiency and Welfare. (*Ibid.*, 302–3).

\(^{173}\) Nigel Simmonds illuminatingly contrasts this with the broader libertarian principle that ‘liberty may be restricted only in order to maintain equal liberty’: ‘The first principle of justice differs from the classic liberal principle in that it protects, not liberty in general, but certain specific liberties.’ Simmonds (1986) at pp. 48–9 (original italics).

\(^{174}\) *TJ*, pp. 75–83.
sometimes referred to as ‘maximin’.\textsuperscript{175} It means that all inequalities should be arranged to benefit the least well off, subject to the priority of liberty. This has the effect of restricting the unfair ‘natural’ distribution of abilities, as well as wealth, and so limits the idea of equality of opportunity.\textsuperscript{176} One suggested modification, that we shall encounter later, is to weaken or abandon the lexical priority of liberty in favour of a strengthened difference principle in order to make space for at least basic social and economic rights.\textsuperscript{177} In A Theory of Justice Rawls controversially treated the state as neutral between forms of democratic government, but subsequently he became pessimistic about the idea of a capitalist welfare state, and suggested that his conception of justice could probably only be realised in ‘a property owning democracy’ or ‘a market socialist regime’.\textsuperscript{178}

A key to understanding Rawls’ conception of justice is that it is silent about virtue or what constitutes a good life or the path to salvation. In other words it is only one aspect of morality. It is primarily concerned with the distributive aspects of the basic structure and not with other virtues for social arrangements (social ideals) such as efficiency or wealth creation.\textsuperscript{179} In his later writings Rawls emphasised the idea of justice as a limited political concept concerned with fairness, reciprocity and public respect in the public realm as opposed to ‘comprehensive moral theories’, which must be confined to the private sphere in a diverse society.

The method by which Rawls derived these two principles has attracted a great deal of attention. Individuals decide on the basic structure of their society in the original position behind a ‘veil of ignorance’. This device is intended to remove all considerations of self-interest from the identification of basic principles. The principles are arrived at by testing one’s ideas and theories against one’s basic intuitions and judgements in particular cases and vice versa until they form a coherent whole in ‘reflective equilibrium’.\textsuperscript{180} Despite some of the methodological and interpretive difficulties, many people, myself included, agree with Rawls’ claim that most reasonable and reflective people would accept something like these principles, if they considered the issues free from vested interest and doctrinaire prejudices.

\textsuperscript{175} ‘The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcomes of which is superior to the worst outcomes of the others.’ (TJ, pp. 152–3).
\textsuperscript{176} Pogge advances a powerful argument that both clarifies and modifies Rawls’ opportunity principle. (RR, Chapter 4.)
\textsuperscript{177} See Pogge and Sen, discussed below.
\textsuperscript{179} TJ, pp. 9–10.
\textsuperscript{180} ‘The process of mutual adjustment of principles and considered judgments is not peculiar to moral philosophy.’ (Citing Goodman (1955) at pp. 65–8). (TJ, p. 20, n. 7) Goodman is sometimes given credit for coining the term, but it is clear that it was Rawls who gave it a wide currency.
A Theory of Justice was first published in 1971. It attracted a huge amount of attention. In the ensuing years Rawls clarified, modified and developed his position in a series of essays in response to numerous criticisms, but the core of the theory remained fairly constant. He then restated his position in Political Liberalism published in 1993. This version contains a number of ideas that are relevant to considering Rawlsian justice from a global perspective.

First, whereas in A Theory of Justice there is a consensus among its members about the appropriate moral basis for a well-ordered democratic society, Political Liberalism confronts the problem of belief pluralism. Its central question is:

How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines? Put another way: How is it possible that deeply opposed though reasonably comprehensive doctrines may live together and all affirm the political consequences of a constitutional regime?\footnote{PL, p. xviii. Later Rawls restated the question as follows: 'How is it possible for those affirming a comprehensive doctrine, religious or non-religious, and in particular doctrines based on religious authority, such as the Church or the Bible, also to hold a reasonable political conception of justice that supports a constitutional democratic society? The political conceptions are seen as both liberal and self-standing and not as comprehensive, whereas the religious doctrines may be comprehensive but not liberal.' See also the formulation in 'Commonweal Interview with John Rawls' (1998) reprinted in Papers (1999b) at p. 616, quoted at p. 162 below.}

Second, in response to this new concern, Rawls insisted that 'justice as fairness is political, not metaphysical'.\footnote{JT at p. 226., PL passim. See Joseph Raz: 'Four themes have to be distinguished, all of which are captured by the slogan “Justice as Fairness: Political not Metaphysical”. First the theory is of limited applicability; second, it has shallow foundations; third, it is autonomous; finally, it is based on epistemic abstinence.' Raz (1994) Chapter 4 at p. 62. This important paper targets the element of epistemic abstinence in “Rawls’ modest conception of political theory and suggests how the theory can be re-interpreted and adjusted to meet this line of criticism. See JFPM.}

It is a practical theory aimed at providing a moral foundation for political, social and economic institutions in a modern constitutional democracy in which the members have diverse, incompatible views. It is not a metaphysical or epistemological theory dealing with universal moral conceptions; nor does it apply to all societies.\footnote{PL, p. 40. Some critics have questioned whether such ideas can be kept separate from ‘comprehensive doctrines’. See the discussion by Abdullahi An Na’im of whether, from a Muslim point of view, religious toleration should be viewed as a secular or a religious doctrine.} It is a limited secular theory that can provide a basis for co-existence and co-operation in a diverse society independently of religious beliefs and ideologies. A key idea is that of an overlapping consensus: this does not refer to those doctrines that are common to the different belief systems in a given society, but rather to what free and equal citizens accept as a freestanding political view of society as a fair system of co-operation.\footnote{PL, p. 40. Some critics have questioned whether such ideas can be kept separate from ‘comprehensive doctrines’. See the discussion by Abdullahi An Na’im of whether, from a Muslim point of view, religious toleration should be viewed as a secular or a religious doctrine.
(b) The law of peoples

This last aspect of political liberalism is clearly relevant when we think about the institutions and practices needed for co-existence and co-operation in a world characterised by a diversity of belief systems, traditions, and cultures. On most interpretations of ‘globalisation’, which emphasise interdependence, the decline of sovereignty, and the permeability of borders, only one self-contained or closed society exists: the world.185 And there is a need for a well-constructed political theory, which provides a coherent moral basis for the design of structures and institutions that can ensure stable, orderly and fair arrangements for co-existence, co-ordination, and co-operation between its diverse members. In light of the critical issues of radical poverty and increasing inequalities, a theory that claims to deal with global justice is especially welcome.186

Unfortunately, Rawls did not fulfil such hopes. His later works mark a retreat into a position that, from a global perspective, is a huge disappointment. The Law of Peoples, which contains the fullest statement of his views on global justice, has probably done more damage to Rawls’ reputation than the posthumous Postscript of The Concept of Law has damaged Hart’s. It is an embarrassment to many of his admirers and a soft target for his detractors. Here it is enough to summarise Rawls’ main thesis in the Law of Peoples quite briefly. Instead of repeating the exercise in the original position with regard to principles of justice that individuals would choose to govern relations beyond their own society, Rawls constructed a more complex process in which representatives of peoples are substituted for individuals. If these representatives are from ‘well-ordered’ societies he suggests that they would choose the following principles:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense, but no right to instigate war other than for reasons of self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.187

Rawls presents these as ‘familiar and traditional principles of justice among free and democratic peoples’,188 derived ‘from the history and usages

185 See n. 194–9 below.
186 On issues of environmental justice from a global perspective see Ebbeson and Okowa (eds.) (2008).
187 TLP, p. 37. 188 Ibid.
of international law and practice’. Rawls’ principles only deviate from an uncritical rehash of classical positive international law in two significant respects: his list of human rights was considerably narrower than the rights recognised by the international human rights regime at the time (he deliberately omitted social, cultural, and economic rights) and he prescribed a limited duty of assistance to peoples living under ‘unfavourable conditions’. Rawls’ so-called Law of Peoples differs from his principles of domestic justice in two major respects: the subjects are peoples not individuals and the difference principle does not apply.

*The Law of Peoples* was heavily criticised by nearly all of the critics, including some of his disciples. But for the huge respect in which he was held and the fact that he had suffered ill-health, the criticism might well have been harsher. In my view, *The Law of Peoples* is not worthy of the author of *A Theory of Justice* and is best forgotten. From a global perspective, it is bizarre to find a purportedly liberal theory of justice that rejects any principle of distribution, treats an out-dated conception of public international law as satisfactorily representing principles of justice in the global arena, and says almost nothing about radical poverty, the environment, increasing inequalities, American hegemony (and how it might be exercised), let alone about transitional justice or the common heritage of mankind or reparations or other issues that are now high on the global agenda.

Before considering whether any elements of Rawls’ original theory of justice and its modifications as political liberalism can be rescued, it is worth looking briefly at the path of this retreat. The main ideas in *A Theory of Justice* were developed in the 1950s and 1960s, at a time when international ethics had not begun to develop in liberal circles. It was reasonable to assume that the main

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189 Citing Brierley (1963), and Nardin (1983). Rawls could be said to have had an outdated and simplistic view of international law. Even in *The Law of Peoples* (1999c), he continued to rely on the sixth edition of J L Brierley *The Law of Nations* (1963), which had first been published in 1928. This is especially unfortunate in that he claims to derive his Law of Peoples from ‘the history and usages of international law and practice’ (*LP*, pp. 41, 57). He did acknowledge that there had been ‘a dramatic shift in international law since World War II’, but mentions only limits on a state’s right to wage war and limitations on sovereignty (citing a single Harvard doctoral dissertation). One cannot but feel that throughout his career Rawls did little reading about and was poorly advised on international law and relations.

190 See Symposium in 110 Ethics (2000) especially papers by Charles Beitz and Allen Buchanan; Kuper (2000); Téson (1999), Pogge (2001b), and Tasioulas (2002b and c). More than one prominent contemporary has told me that they could not bring themselves to review the book they felt it was so bad. For a restricted defence, see Tasioulas (2005) (supporting a cut-off point for a duty of assistance (foreign aid), but raising it from subsistence to a right to an adequate standard of living). On foreign aid and subsistence see Chapter 11.4 below. Martin and Reidy (eds.) (2006) reached me too late to deal with here. It contains some attempts to defend *The Law of Peoples*, which make points worth considering (especially the chapter by Samuel Freeman), but these do not persuade me to revise the judgement that overall this is a very disappointing work. In mitigation, Tasioulas concludes: ‘[C]ompliance with Rawls’s duty of assistance by wealthier and relatively well-ordered societies would amount to a colossal improvement on the intolerable conditions that prevail in the world today’. (Tasioulas (2005), p. 27).
arena for a theory of justice was a society roughly co-extensive with a nation state. Rawls’ book did, in fact, include a short section on international relations. In the context of considering the justification of civil disobedience, he acknowledged that ‘It is natural to ask how the theory of political duty applies to foreign policy. Now in order to do this it is necessary to extend the theory of justice to the law of nations.’ In what has been widely recognised as one of the weakest sections of the book, he sketched out in a preliminary way some ideas that he later modified and developed in The Law of Peoples: that different principles of justice apply in the international arena, that the basic units of international relations are sovereign states, and that the moral basis of international law is that ‘[I]ndependent peoples organized as states have certain fundamental rights’.

(c) Rawls as a citizen of the world

It could be argued that Rawls was not well placed to adopt a genuinely global perspective. He is distinctively American in a number ways. First, as a person he lived nearly all of his life in the United States. Culturally, he might be said to belong to the progressive wing of the American Puritan tradition. Second, nearly all of the political issues with which he was concerned while developing his ideas were either special local issues, such as race, the draft, and campaign contributions, or else they were directly connected to the United States’ involvement in the wider world, especially in respect of wars: World War II (including Hiroshima), the Cold War and the War in Vietnam. Third, although his theory claims to apply to any liberal democracy, the most influential ideas are based on American constitutional history rather than other experiences of democracy. Fourth, in the period in which the idea of national borders was being eroded, Rawls increasingly emphasised the separateness of territorially defined societies. In A Theory of Justice he talked of the basic structure ‘of society conceived for the time being isolated from other societies’. Rawls is quite explicit about the domain of his domestic theory. It is restricted to a society, which is ‘a self-contained national community’, ‘more or less self-sufficient’, ‘a closed system isolated from other societies’. By emphasising sovereignty and the rights of people to self-determination he maintained this fiction in The Law of Peoples. One cannot but feel that his conception of the world outside the United States was distorted by viewing it through the prism of American culture and foreign policy. Finally, as part of his later retreat he placed increasing emphasis

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191 On recent scepticism about society as a viable analytic concept see p. 93 above and Chapter 15.3(b) on the web.
192 TJ, p. 337.
193 TJ, p. 378. On the issue of pacifism Rawls concludes that conscientious refusal is an affront to the government’s pretensions, and in giving pacifists some leeway, ‘states may even be seen to display a certain magnanimity’ (TJ at p. 382).
195 TJ, p. 457.
196 Ibid., at p. 4.
on the idea that: ‘The aims of political philosophy depend on the society it addresses.’ In his later writings Rawls emphasised that his project is to develop a criterion of justice that would appeal to the common sense of reflective Americans because the ideas are embedded in ‘our history and the traditions of our public life.’

In an interview in 1998 John Rawls was asked what was behind his shift in focus to religion in Political Liberalism, especially the essay on ‘Public Reason Revisited’. His answer was solely in terms of the importance of religion in America:

I think the basic explanation is that I’m concerned with the survival, historically, of constitutional democracy. I live in a country where 95 or 90 percent of the people profess to be religious, and maybe they are religious, though my experience of religion suggests that very few people are actually religious in more than a conventional sense. Still religious faith is an important aspect of American culture and a fact of American political life. So the question is: in a constitutional democracy, how can religious and secular doctrines of all kinds get together and cooperate in running a reasonably just and effective government? What assumptions would you have to make about religious and secular doctrines, and the political sphere, for these to work together?

In respect of concerns, outlook, audience, and even his claims to the significance of his theory, Rawls’ perspective was remarkably parochial.

To emphasise Rawls’ Americanness is not in itself a criticism. Any thinker’s strengths and limitations are almost inevitably associated with a particular context and culture. Rawls’ idea of reflective equilibrium involves appealing to intuitions and particular judgements that are, to a large extent, culturally based. But it is clear that he was not well suited to adopting a genuinely global perspective. His revival of social contract theory is quite abstracted from its European progenitors, Locke, Rousseau, and Kant. He was naïve about international relations and badly advised about international law. A parochial and strikingly naïve picture of the ‘other’ pervades The Law of Peoples, as is illustrated by the paternalistic and offensive division of peoples into ‘reasonable

198 JOC, p. 1. Although this may not have been intended, this self-limitation has given succour to those like Walzer (1983) and Fishkin (1985) who wished to set robust limits to the sphere of justice. Rawls’ limitation may be symptomatic of a more general conservative retreat, on which see Pogge (1989) at pp. 4, 9–11, 254, and passim. Ronald Dworkin makes a similar move, in order to emphasise the point that his kind of theory is concerned with right answers to specific questions of law within a particular system: ‘[I]nterpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong.’ Dworkin (1986), p. 102.

199 KCMT, pp. 518–19, (italics added).

200 Papers (1999b) at p. 616. The interview only makes reference to Christianity. The journal was Commonweal a liberal Catholic magazine. The editor refers to ‘the relation of liberal society to the many religions that flourish within it.’ (ibid). There is no mention of religious revival outside USA (on which see Jenkins (2007)).

201 On parochialism see GLT, pp. 128–9.

202 On Rawls’ view of international law, see n. 189 above.
liberal peoples’, ‘decent peoples’, ‘outlaw states’, ‘societies burdened by unfavourable conditions’, and ‘benevolent absolutisms’.¹²⁰³ He ends up in support of a scheme that, in the words of Thomas Pogge, his former pupil, ‘arbitrarily discriminates in favour of affluent societies and against the global poor’.¹²⁰⁴ One is tempted to dismiss the whole monumental scheme of Rawls’ theory of justice as a culturally biased, parochial project, pandering to American isolationism, ethnocentrism, and self-interest, even among liberals.

This would be a mistake. For supporters and critics alike, Rawls’ theory of domestic justice is still the almost inevitable starting point of any discussion of justice, at least in the West. It has stimulated over 5,000 articles and books and has been translated into over twenty languages. Few philosophical theories have been worked out with such care, patience, and precision. The crucial question is: how much of Rawls’ concepts and arguments can be translated from the domestic context to the transnational arena in a way that meets the objections to The Law of Peoples?

Fortunately, this is essentially what Thomas Pogge, one of Rawls’ own pupils, has done. He has ably defended and refined Rawls’ original theory and has substituted his own quite radical theory of international justice and human rights. Mainly by changing one of Rawls’ key conceptions – the postulate that justice as fairness is only concerned with the internal ordering of societies conceived as self-contained units – he has shown how much of Rawls’ scheme can be converted from a parochial and quite conservative theory into one that could be of real value in providing a moral basis for a substantial critique and re-design of supra-national and international institutions. So rather than dwell on the weaknesses of The Law of Peoples, I shall focus on Thomas Pogge’s attempts to construct a theory of international justice and human rights in a Rawlsian spirit.

(d) Rescuing Rawls: Pogge’s first critique²⁰⁵

Pogge’s writings fall into two distinct phases. First, Realizing Rawls might have been called Rescuing Rawls. It can be read as an attempt to rescue the core of his mentor’s theory from his critics and from himself by responding to misconceived criticisms, by refining some aspects of Rawls’s scheme, and by transferring Rawls’ two principles, somewhat modified, to the supra-national

²⁰³ LP, p. 4. ²⁰⁴ WPHR, p. 108.
²⁰⁵ Bibliographical note: this section draws mainly on the following works by Thomas Pogge: Realizing Rawls (1989) (hereafter RR); (ed.) Global Justice (2001a); World Poverty and Human Rights (2002) (hereafter WPHR) and numerous articles, some of which are discussed below Barry and Pogge (eds.) (2005), especially ‘Rawls and International Justice’ 51 Philosophical Qrtrly 251–53 (2001) at pp. 23–3. ‘Real World Justice’ 9 Journal of Ethics (2005) at pp. 29–53 (a reply to critics of WPHR), ‘Severe Poverty as a Human Rights Violation’ in Pogge (ed.) (2007) Ch.1. A translation from German of a book on Rawls’ life and work (Pogge (2007a), reached me too late to draw on here. In this book Pogge does not discuss Rawls’ treatment of international relations because ‘I could not construct a sufficiently convincing account of it’. (at p. x). This section concentrates on Pogge’s writings about Rawls up to 2005, since when he has moved even further away from his mentor.
arena. Later Rawls developed his position in *The Law of Peoples* and, as we shall see, Pogge has significantly extended his arguments in relation to world poverty and in the process further distanced himself from Rawls.

The first two parts of *Realizing Rawls* defend *A Theory of Justice* against many criticisms, notably Nozick’s extreme libertarianism and communitarian individualism. In this context, Pogge supports Rawls’ core ideas especially the basic structure, the original position, and concern for the least advantaged (the maximin principle). Pogge modifies Rawls’ principles by weakening the priority of liberty, strengthening ‘fair equality of opportunity’, and giving more emphasis to basic social and economic rights. But the first five chapters are essentially a sustained defence of *A Theory of Justice*.

In the third part of *Realizing Rawls*, Pogge is highly critical of Rawls’ rudimentary treatment of international justice in *A Theory of Justice* and proposes a Rawlsian extension of Rawls’ principles of justice to the global arena. Pogge’s argument, which was published before *The Law of Peoples*, could be restated as follows: There are no self-contained national societies in the modern world, nor are there likely to be. The only closed social system is humanity at large. A theory of justice for any other kind of association,

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206 Pogge invokes the original position in several places, but he has been criticised for not attempting a methodological defence of Rawls, in particular against social contract theories in general (Review of *Realizing Rawls* by T.J. Norman (1990) at pp. 465 and 466. Norman, however, adds: ‘Still, one has to welcome Pogge’s predominantly normative discussion given a contemporary debate – encouraged by Rawls’ recent writings – truly obsessed with abstract foundational problems. Surely the idea of modern liberalism and social democracy is based at least as firmly on a concern for the poor and disadvantaged as it is on a commitment to, say, neutrality or anti-perfectionism.’ (Ibid.) Later Pogge abandoned the perspective associated with the original position (*WPHR*, pp. 226–7, n. 99). It is plausible to suggest that many people support Rawls’ two principles (or variants on them) without being unduly concerned about the underlying methodology. On ‘ecumenical arguments’, see further pp. 171–2 below).

207 Some commentators have suggested that Pogge’s modified principles might represent a more plausible reconstruction of what reflective people would choose in the original position than Rawls’ formulation. (e.g. Fuchs (1992)). I do not pursue this point here.

208 *Realizing Rawls* (1989) was written before *The Law of Peoples* (1999c), but Pogge renewed his attack after 1999. One commentator suggested that if were there enough Rawlsians to classify, Pogge could be described alternately as: ‘a left Rawlsian (one whose primary concern is with the plight of the worst-off, and who consequently believes that the USA is far from being a just society); a middle Rawlsian (identifying most with the “radical” of *A Theory of Justice*); and seeing in his recent developments an increasing conservatism and retreat into abstraction; a political Rawlsian (eager to retrieve and defend the moral and political content of the principles of justice, but relatively unconcerned with “issues in moral psychology, metaethics and moral epistemology”, i.e. with “debates that are metaphysical in style if not in substance”…); or a globalized Rawlsian (believing that a theory of justice must be developed in the first instance for a global rather than a national basic structure, and that familiar injustices in our societies, grave as they are, “pale in comparison” to those involved in the prevailing national institutional scheme.’ (Norman at pp. 465–6)

209 Although Pogge talks of ‘the global system’ (about which I have reservations), not much would be changed by substituting some looser term, such as humankind. (On the concept of ‘system’ see Chapter 15.4 on the web). Pogge himself seems to envisage an extension of the Rawlsian model of a hierarchy of associations acting as systems within systems, whereas the picture that I
including the nation state, is dependent on background principles or ‘ground rules’ formulated at the global level.\textsuperscript{210} Rawls’ core ideas for a practical theory aimed at providing a criterion of justice for basic institutions can be applied to the global system with a few adjustments along the following lines: we live in an interdependent world, in which all are involved and from which ‘we cannot just drop out’. This is a world of widespread deprivations and disadvantages, many of which have been promoted by existing transnational institutions; one test of basic institutions is the benefits and burdens they engender. The position of the least advantaged is one important measure of just institutions; it is highly probable that improved global institutions would help to alleviate at least some of the existing deprivations and disadvantages of the worst off. Rawls’ two principles (modified and extended to give more weight to social and economic needs) and some of his basic ideas, such as the search for an overlapping consensus, the individual as the ultimate unit of justice,\textsuperscript{211} and the basic structure are more coherently applicable to ‘the global system’ than to artificially bounded societies or states, not least because ‘all institutional matters, including the ideal extent of national sovereignty, are now systematically addressed within a single framework’.\textsuperscript{212} Pogge concludes, on the basis of this neo-Rawlsian approach, that ‘our current global institutional scheme is unjust, and as advantaged participants in this order we share a collective responsibility for its injustice’.\textsuperscript{213}

have suggested is a much more complex one of overlapping and cross-cutting semi-autonomous social spheres operating in a global context which is itself very complex. However, Pogge’s theory can be interpreted as one which suggests that any theory of justice, including highly localised ones within families, societies, regional groupings, transnational associations and so on, has to be set in a much broader context which prescribes background rules and constraints for more localised spheres of justice. See GLT, pp. 72–5.

\textsuperscript{210} See also Kant: ‘The problem of establishing a perfect civic constitution is dependent upon the problem of a lawful external relation among states, and cannot be solved without a solution to the latter problem.’ Quoted by Pogge from Kant’s Political Writings (ed. H.Reiss (ed.) 1970). Rawls follows Kant (Perpetual Peace (1795)) in rejecting a centralised regime of world government on the grounds that it would either be a global despotism or else an unstable and fragile empire torn by civil strife. LP, pp. 54–5. This is a quite different point from the argument that the justice of any domestic political order needs to be set in a wider, transnational or global context, especially as societies become increasingly interdependent. (See RR, pp. 255–6.)

\textsuperscript{211} Pogge, in RR, Chapter 2, defends Rawls against charges of atomism – (i.e of treating individuals as if they are socially and politically isolated and self-sufficient) but Rawls does treat the individual human being as the ultimate moral unit.

\textsuperscript{212} Ibid., 258.

\textsuperscript{213} Ibid., at 277. Also at p. 36: ‘It is not easy to convince oneself that our global order, assessed from a Rawlsian perspective, is moderately just despite the widespread and extreme deprivations and disadvantages it engenders. Even if we limit our vision to our advanced Western society, it is hardly obvious that the basic institutions we participate in are just or nearly just. In any case, a somewhat unobvious but massive threat to the moral quality of our lives is the danger that we will have lived as advantaged participants in unjust institutions, collaborating in their perpetuation and benefiting from their injustice.’ (RR, p. 36).
Despite the sharpness of Pogge’s criticisms, it is worth emphasising how close his first book was to the early Rawls. Pogge argues that Rawls’ treatment of global justice is inconsistent with two of his own core ideas: the basic structure and his conception of all human beings as free and equal moral persons. The core of Pogge’s argument is that a sharp distinction between domestic and global justice cannot be maintained, especially in an increasingly interdependent world, and that societies can no longer, if they ever could, be treated as self-contained units. Rawls’ two principles, or something very like them, can be applied directly to the critique and design of international and transnational institutions. By a relatively small adjustment of one part of Rawls’ theory (which was undeveloped in *A Theory of Justice*), Pogge transforms a theory of justice that makes a mild critique of the domestic status quo in wealthy ‘well-ordered’ societies into a potentially radical critique of existing institutional arrangements at supra-state levels.

*Realizing Rawls* was published in 1989. During the 1990s Pogge published a stream of articles, most of which focused on global poverty from the point of view of a philosopher who is passionately concerned to make a case for effective action that will have a broad appeal. Pogge’s own position moved away from the Rawls of *A Theory of Justice* and even further from what he, with some justification, sees as a distressingly conservative retreat on Rawls’ part. His criticisms of *The Law of Peoples* are far-reaching and harsh, concluding with the judgement that:

Despite considerable vagueness in his treatment of economic institutions, it seems clear, then, that Rawls endorses double standards on three different levels: in regard to national economic regimes, the difference principle is part of Rawls’ highest aspiration for justice; in regard to the global economic order, however, Rawls disavows this aspiration and even rejects the difference principle as inapplicable. Rawls suggest a weaker minimal criterion of liberal economic justice on the national level, but he holds that the global order can fully accord with liberal conceptions of justice without satisfying this criterion. And Rawls suggests an even weaker criterion of decency on the national level: but he holds that the global order can not be merely decent, but even just, without satisfying this criterion. Insofar as he offers no plausible rationales for these three double standards, Rawls runs afoul of moral universalism. He fails to meet the burden of showing that his applying different moral principles to national and global

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214 Pogge studied under Rawls and has an intimate knowledge of his mentor’s texts. This has served him well in clearing away misunderstandings and unfair criticisms. Although he is consistently critical of some details, Pogge defends and uses what he considers to be core Rawlsian ideas: the original position (which he later abandoned *WPHR*, n. 99); the conception of a theory of justice as political and practical rather than metaphysical; the focus on the basic structure and institutional design; the maximin principle, a consistent concern for the plight of the worst off; and the embodiment of these ideas in a relatively thin theory of human rights. Even more than Rawls, Pogge, while doing philosophy, is strongly committed to confronting real practical problems.

215 *RR*, p. 240. 216 Ibid., at p. 277. Also at p. 36 (quoted at n. 213 above).
institutional schemes does not amount to arbitrary discrimination in favor of affluent societies and against the global poor.\textsuperscript{217}

\textbf{(e) Pogge on radical poverty}

The poorest 46 per cent of humankind have 1.2 per cent of global income. Their purchasing power per person per day [was] less than that of $2.15 in the US in 1993. 826 million of them do not have enough to eat. One third of all human deaths are from poverty-related causes: 18 million annually, including 12 million children under five.

At the other end, the 15 per cent of humankind in the ‘high income economies’ have eighty per cent of global income. Shifting 1 or 2 percent of our share toward poverty eradication seems morally compelling. Yet the prosperous 1990s have in fact brought a large shift toward global inequality, as most of the affluent societies believe that they have no such responsibility.\textsuperscript{218}

We are all familiar with such statements. Often the statistics are concretised by particular stories or images. Few will disagree that something is badly wrong. But people differ as to precisely what is wrong about the situation. Why is this wrong? Surely, the facts speak for themselves – perhaps more eloquently than any articulated philosophy. If we focus on the situation of the poorest: there is widespread agreement that a situation of large-scale radical poverty is bad. But people may express their view of why it is bad in terms of utility (pain or unhappiness), basic needs, human rights, just deserts, equality, justice as fairness, humanitarian concern, or compassion, or a combination of these. They may also differ on what counts as ‘poverty’, on what are the main causes, where the responsibility lies, and what can be done to change it for the better or, more boldly, ‘make poverty history’.

Such differences are at the root of debates within development theory.\textsuperscript{219} They all have a moral dimension, but they also involve economic, political, psychological and cultural judgements about practicalities. What the potential contribution of moral philosophy is, is itself a matter of disagreement.\textsuperscript{220} Most agree that it is an important, perhaps a necessary ingredient in such considerations, but few would claim that on its own it is a sufficient one.

In the West, nearly all theories of justice in the twentieth century focused on domestic justice, that is to say questions internal to a society treated as a more or less closed unit. Concern with supranational ethics has a long history, but in

\begin{thebibliography}{99}
\bibitem{217} WPHR, p. 108. \bibitem{218} Jacket cover of Pogge (2002). \bibitem{219} See Chapter 11 below. \bibitem{220} Griffin, ‘Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’ (2001a), criticised by Tasioulas, (2002a). See Richard Rorty, who considers that a philosophical justification of the international human rights regime is neither necessary nor desirable (Rorty, (1989); (1993)). In interpreting Pogge, Singer, An Na’im or even Rawls it is often difficult to sort out the abstract philosophical aspects from more pragmatic concerns of political persuasion, feasibility, and effectiveness in implementation. See n. 206 above and pp. 171–2 below.
\end{thebibliography}
recent times it was slow to develop in a sustained way until about 1980. In the liberal tradition Brian Barry, Charles Beitz, Onora O’Neill, Thomas Pogge, Thomas Scanlon, Henry Shue, and Peter Singer are among those who have focused on important transnational ethical issues within the broad liberal tradition. I have chosen to focus on Thomas Pogge because he is at once the best interpreter and the most persistent critic of Rawls in this respect. In some ways Pogge stands to Rawls as Tamanaha relates to Hart and Singer to Bentham: all three have built on and modified the ideas of their predecessors in translating them into a global context.

Since 1991, in many essays and several books Pogge has developed his argument in favour of effective radical reform of transnational institutions in order to implement the maximin principle. It is worth considering Pogge’s developed thesis briefly, because it represents one of the most sustained efforts by a contemporary philosopher to confront problems of distributive justice from a global perspective.

Building on his earlier critique of Rawls, Pogge rejects the idea that there should be a fundamental distinction between principles of domestic and transnational justice. If we use the device of the original position, then it should be individuals rather than representatives of peoples who should participate and they would need to make judgements as good Kantian cosmopolitan citizens, with the veil of ignorance hiding from them what kind of society they might find themselves in.

Pogge’s main argument is directed against two moral prejudices, that he considers to be widespread among ‘nearly all our politicians, academics, and the mass media’: [t]hat the persistence of severe poverty abroad does not require our moral attention, and that there is nothing seriously wrong with our conduct, policies, and the global economic institutions we forge in regard to world poverty.

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221 Significant early works in the revival include Barry (1972), Beitz (1979), Beitz et al. (eds.) (1985), O’Neill (1986), and Shue (1980). Neglected classics relevant to this revival include Kant’s Perpetual Peace (1795) and Bentham’s writings on international law.

222 The term ‘international ethics’ is too narrow, because if used precisely it is restricted to the morality of relations between nations or states; on the problems surrounding ‘global’, ‘cosmopolitan’, supra-national’ etc. See above pp. 69–72.

223 See bibliography. This passage is based mainly on WPHR (2002). Pogge has continued to write and campaign in this area and in the process has modified some of his earlier positions.

224 Of course, since the device of the original position is intended to provide a way to settle on principles that constitute the basic structure, the distinctions between democratic/hierarchical, decent/ non-decent societies that so concerned Rawls are part of what is in issue in constitutional design. Pogge tellingly mocks Rawls’ argument that liberal societies should offer reciprocal recognition to ‘decent’ non-liberal societies: ‘This is a strange suggestion because, in our world, nonliberal societies and their populations tend to be poor and quite willing to cooperate in reforms that would bring the global economic order closer to meeting a liberal standard of economic justice. The much more affluent liberal societies are the one blocking such reforms’ (WPHR, p. 107).

225 WPHR, p. 5.

226 WPHR, p. 4. It is unclear whether ‘our’ in this context refers to Americans or cosmopolitan citizens or world leaders.
He argues that these prejudices are sustained by four ‘easy assumptions’: First, a belief that poverty prevents over-population and that efforts to reduce severe poverty will increase suffering and deaths in the long run. This is refuted by evidence, which suggests that reducing poverty and enhancing women’s opportunities leads to falling birth-rates.

Second, that the problem of world poverty is so great that its eradication in a short period would involve such huge costs to the better off that it would meet with strong political resistance. Pogge’s response that this greatly overstates the costs (Pogge’s figure is 1.25 per cent reduction of aggregate gross national incomes).227 Even if the point were true this would not justify neglect of the problem.

The third prejudice suggests that historical experience shows that ‘throwing money at the problem’ does not work and that most efforts at development assistance have failed. Here the response is more complex. Given the generally uneven record of development assistance, there is some truth in this belief. Pogge’s response is that not all poverty eradication projects have failed, especially those that are used to increase the income of the poor. However, his main solution is not about spending and transfers. Rather it is to ‘restructure the global order to make it more hospitable to democratic government, economic justice and growth in the developing countries’, coupled with a willingness on the part of more affluent states to drive less of a hard bargain in international trade, investment and taxation.228

‘A fourth easy assumption is that world poverty is disappearing anyway.’229 This comforting idea is sustained by the desire to believe in it and by figures presented in such a way as to suggest that things are improving.

Pogge concentrates his fire on ‘skilful defense(s)’ built around the second assumption: a factual claim that existing institutional arrangements are not harming the global poor (the factual claim) and while causing severe poverty would be morally wrong, it is not seriously wrong to fail to benefit them by not doing all that we might.230 Pogge’s strategy is to challenge the factual claim by showing ways in which the existing structure maintains and contributes to severe poverty. This argument is developed at length in World Poverty and Human Rights (2002) and is continued in later writings.

227 See also estimates cited by Sachs (2005), Singer (2004), Sen 1999) suggesting that the moral heroism argument is not a major threat as a great deal can be achieved within existing UN targets and by the Millennium Development Goals. Pogge devotes space to countering the argument that elimination of poverty is unaffordable, but places more emphasis on reforming supranational structures.

228 WPHR at p. 9. This argument is developed at length in Chapters 4–7 of that book.

229 WPHR, at p. 9. Complacency of this kind is associated with free market ‘trickle down’ arguments on the right and with optimistic belief in public initiatives such as the Millennium Development Project and the efforts of IFIs. See further Chapter 11 below.

230 ‘This defense combines two claims. Its factual claim asserts that we are not harming the global poor by causing severe poverty, but merely failing to benefit them by not eradicating as much severe poverty as we might. Its moral claim asserts that, while it is seriously wrong to harm the global poor by causing severe poverty, it is not seriously wrong to fail to benefit them by eradicating as much severe poverty as we might.’ (WPHR, p. 12)
Many people, including Rawls, reject a sharp distinction between causing poverty and failing to reduce it – one version of the problematic distinction between acts and omissions. Utilitarians, including Singer, argue that if reducing poverty will increase aggregate happiness, that in itself is sufficient to ground duties to pursue this goal. There may be room for differences about allocation of responsibility (whose duties?) and about the most effective strategies for achieving the goal. And, as we have seen, a pure utilitarian might make the duty an onerous one by insisting on a principle that ‘if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought morally to do it’. This is a pure consequentialist argument. It has been criticised as involving ‘moral heroism’ or an ‘overload of obligations’ and in response to such resistance Singer himself has pragmatically been prepared to lower the ceiling of obligation; others have developed the further pragmatic argument that the costs of significantly reducing severe poverty involve only small sacrifices, but of course, this does not deal with eliminating all poverty and difficult questions about egalitarian considerations above some artificially prescribed poverty line. In Benthamic terms, it is easier to reach consensus about distribution in relation to subsistence than in relation to abundance.

Interestingly, in *The Law of Peoples*, Rawls rejects both the distinction between causing poverty and allowing it to happen and the idea that foreign aid is a matter of charity. Liberal and Decent Peoples have a duty to assist ‘heavily burdened societies’, whether or not they have contributed to their situation. But this duty is limited to enabling them to establish reasonably just or decent institutions.

By choosing to rely on the causal argument that the basic structure of ‘the global order’ is contributing to poverty, Pogge has made a factual claim that invites controversy. For the causes of underdevelopment and severe poverty

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231 Singer *et al.* in Beitz (ed.) (1985) Part V.
233 One of the attractions of the difference principle for some is that it does not put a ceiling on improving the lot of the worst off. Indeed, its operation does not depend on a definition of poverty. This is one reason why Rawls tried to set a limit on the duty of assistance (n.190 above).
234 See p. 138 above.
235 Rawls elaborates on this in *LP*, p. 55, 43n, pp. 106–19. He differentiates this from a global distribution principle, which he rejects. In this instance, he goes somewhat further than American foreign policy (but a liberal interpretation of the duty to assist can be used to support initiatives like the MDGs).
236 For an interesting critique, the thrust of which is that Pogge overstates his case (international institutions have contributed to some amelioration but are open to improvement) see Risse (2005). Pogge responds in ‘Real world Justice’ Cf. Singer, *One World* (2004), judiciously advises caution on interpreting statistics about poverty and inequality and concludes that ‘No evidence that I have found enables me to form a clear view about the overall impact of economic globalisation on the poor’ (at p. 89). He insists that the crucial question is how to promote the welfare of the poorest rather than the size of the gap between rich and poor (p. 84).
are a continuing matter of debate and disagreement among economists and development theorists. I do not propose to enter this controversy here.

Pogge has also devoted a lot of effort to advocating a particular strategy for attacking global poverty, what he calls ‘A Global Resources Dividend’. This is presented as a moderate or modest proposal, based on the idea that ‘those who make more extensive use of our planet’s resources should compensate those, who involuntarily, use very little’. It is not necessary to go into detail about the desirability, feasibility, and political prospects of this proposal for it is one of a number of strategies that are on the table aimed at reducing or eliminating global poverty.

For present purposes it is sufficient to make some points about the significance of Pogge’s contribution: First, as a disciple of Rawls he has modified and refined the ideas in ways that many may agree represent a Rawlsian improvement on *A Theory of Justice*. Second, as an increasingly sharp critic of Rawls he has substituted a theory of international justice that is radically different from Rawls’ own disappointing effort, but which is still Rawlsian in spirit. Third, by confronting in detail the facts of global poverty and some of the political practicalities it involves he has engaged with one of the major issues of our age from the point of view of a philosopher, who believes that abstract ideas are important in addressing practical problems. Whether or not one agrees with all of his arguments, the message is clear: if you are concerned about justice in relation to world poverty, read *World Poverty and Human Rights* rather than *The Law of Peoples*.

However, for our purposes Pogge’s work has three limitations: first, it is highly focused on only one aspect of global justice, albeit a very important one. Pogge says little about environmental justice or transitional justice. He adopts a thin interpretation of human rights for his specific purpose. We need to consider more expansive versions. Second, Pogge is constructing an argument that is intended to have a broad appeal that transcends a range of positions. In particular, he does not rely on arguments that we owe a positive duty to help the worst off, as Singer does, but restricts his argument to a negative duty not to

237. See especially *WPHR*, Chapter 8.
238. *Ibid.* at p. 204. Pogge’s proposal does not involve commitment to the idea that global resources are common property of humankind nor the more modest idea of *ius humanitatis* applying to hitherto unappropriated territories on this and other planets (discussed *GLT*, p. 240). Although the issues are mired in the realpolitik of international relations, especially in connection with the Law of the Sea and, more recently, the Arctic, it is a pity that so far philosophers, such as Rawls and Pogge, have not constructed the strongest theoretical foundation for this doctrine. The best work to date is Baslar (1998), which also has a quite comprehensive bibliography up to 1998 at pp. 383–417.
239. Examples listed by Risse (2005) at p. 371 include the Millennium Development Project, discussed in Chapter 12 below; fulfillment of the UN target of 0.7 per cent of GNP devoted to state development aid; George Soros’ proposal for ‘special drawing rights’ as development aid (Soros (2002)); various forms of tax on (e.g. carbon use, weapons trading) or a general tax on financial markets. To these I would add the development of a more robust conception of *ius humanitatis* in international law (see n. 238).
support institutions that maintain or contribute to radical poverty. As Singer has modified his pure utilitarianism in order to broaden the appeal of his argument, Pogge appears to be have trimmed his philosophical views in order to persuade a broader political constituency, using in his own words an ‘ecumenical approach’. Thirdly, Pogge has devoted a great deal of effort to promoting one particular strategy for poverty alleviation; this is just one among many such proposals, some of which we will consider in Chapter 11. Before that we need to turn to some broader aspects of human rights theory.