

# Property Rights vs. Utilitarianism: Two Views of Ethics

Robert McGee  
Barry University

## Introduction

Most discussions of political philosophy revolve around the relationship between the individual and the state or the individual and the masses. But before we can begin such discussions, a few preliminary points need to be addressed. Let's start with property rights. The underlying premises upon which property rights are based include the nonaggression axiom and natural rights, which flows from the nonaggression axiom. The nonaggression axiom states that the initiation of force is never justified. Rothbard states it thus: "that no man or group of men may aggress against the person or property of anyone else."<sup>1</sup> That is not to say that self-defense is never justified,<sup>2</sup> because it is, if one believes that one has the right to protect one's property (the body, the nose or whatever other body part is being aggressed against) from aggression. It is an objective fact, one that all reasonable men can agree on.

At least one well-known rabbi of a few thousand years ago would (perhaps) disagree with this last statement. He, and some of his followers, argued that we should turn the other cheek rather than resist aggression.<sup>3</sup> This pacifist

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<sup>1</sup> Murray N. Rothbard, *For a New Liberty* 23 (New York: Libertarian Review Foundation, 1978). Tibor Machan makes the following point in this regard:

Intuitionism holds what is morally right and wrong is not known by way of elaborate theories or arguments. Rather we have a sense of right and wrong and relying on this sense is the best means to obtain moral and political understanding. For example, we all "know" -- in our bones or guts, as it were -- that depriving someone of his or her personal liberty is evil. To assault another, to rob him of what is his, is wrong. We don't need a philosophical theory to discover this -- we know it intuitively. Tibor R. Machan, *Government Regulation of Business*, in Tibor R. Machan, editor, *Commerce and Morality* 161-179 (Totowa, NJ: Rowman & Littlefield, 1988), at 167.

<sup>2</sup> For a philosophical justification of the use of force in self-defense, see Tibor Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Company, 1989), at 169-171.

<sup>3</sup> Many, including Gandhi, have interpreted this statement [Matthew 5:38-41] to mean that we should not even defend ourselves against the Hitlers of the world (He actually said so in a 1946 interview). However, recent biblical scholarship has cast doubt upon this interpretation. In two of his books, *Engaging the Powers* and *The Powers that Be*, Walter Wink points out that in order to be struck on the right cheek, which is the cheek

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approach to resist force might work in some instances, but such an approach would likely prove unsuccessful against the Hitlers and Pol Pots of the world. Gandhi and Martin Luther King both used this turn the other cheek approach with some degree of success (for their survivors, not for themselves). The Jews in the Warsaw ghetto did not. If one were to limit oneself to success in this world (Christians would not), then it seems reasonable to conclude that a case can be made for resisting aggression, since not resisting aggression is often rewarded only in the next world.

The nonaggression axiom does not hold that one must not use force if one's body or other property are aggressed upon, although one has that option. It merely asserts that the initiation of force is never justified. The use of force is permitted under the nonaggression axiom, as is coming to the defense of someone else who has been aggressed against. If someone is being beaten or robbed, there is nothing wrong with coming to that person's defense. The rescuer is not guilty of initiating force. The masher is guilty, however, and may ethically be prevented from continuing such behavior. Those who aggress against others forfeit their right not to be aggressed against.

Although the pacifist approach is an option, it could be argued that deciding not to resist aggression constitutes an immoral act. If the ultimate human value is life and its preservation, then failing to protect this right serves to protect and encourage its opposite. "All the reasons which make the initiation of physical force an evil, make the retaliatory use of physical force a moral imperative."<sup>4</sup>

The theory of self-ownership derives from the nonaggression axiom. We own our own bodies. No one else has a superior claim. Thus, whatever we do with our own body is our own business as long as we do not use our bodies to aggress against others. We can rent our bodies to an employer eight hours a day in exchange for some agreed-upon wage. We can rent our bodies to others for sex or for surrogacy or for medical experimentation. If we are a dwarf, we can

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mentioned in the biblical passage, it would be necessary to backhand the person with the right hand, since the left hand was not used for such purposes. Backhanding someone was used by someone in a higher position of authority (a master) to hit someone in an inferior position (a servant). People in first century Palestine did not hit with their left hand, since that hand was used for less savory activities. To use a closed fist -- to punch someone -- would only occur in a fight between equals. It might also be pointed out that Jesus resorted to violence when he overturned the tables of the money changers in the temple. So it could be argued that Jesus was not a complete pacifist, because he did use force on at least one occasion.

<sup>4</sup> Ayn Rand, *The Virtue of Selfishness* (New York: New American Library, 1964), 108, cited in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), at 442.

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allow others to toss us into a mattress for sport (dwarf tossing).<sup>5</sup>

Where there are rights, there are also duties. If one has the right to one's own body, then all others have a duty to refrain from aggressing against the bodies of others. These rights and duties are reciprocal. Of course, one may give up this right. For example, if John punches Bob in the nose, John gives up his right not to be punched in return or not to be physically restrained by anyone else to prevent further aggression.

If one begins with the nonaggression axiom as the premise, a number of policies and positions flow therefrom. The theory of property rights is one of the most important ideas to flow from this axiom. John Locke<sup>6</sup> was one of the early proponents of this view in its modern form, although Aristotle and other ancient Greek and Roman philosophers also discussed property rights. Locke's position was that if you mix your labor with unowned property, that property becomes yours. No one has a right to use force to take it from you. Robert Nozick<sup>7</sup> labels this view the entitlement theory of rights. In fact, no unowned property need be mixed with labor to claim ownership. One may enter into a contract to work for an employer in exchange for wages without any unowned property coming into the picture. Once the work is performed, the worker is entitled to the fruits of his labor -- usually cash -- which were earned either by the use of his muscles or brains, both of which are body parts. No other individual or group of individuals has a superior claim to the fruits of that labor, not even the tax collector.<sup>8</sup> This conclusion does not change whether the amount received through voluntary exchange is \$4 or \$40 billion.

The right of free speech also derives from the body as property doctrine.<sup>9</sup> One has the right to use one's vocal cords to communicate the thoughts that are in the brain. Both the vocal cords and brain are body parts. Of course, one may not shout fire in a movie theater, because doing so would violate the

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<sup>5</sup> For more on this point, see Robert W. McGee, *If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?* 38 *American Journal of Jurisprudence* 335-358 (1993).

<sup>6</sup> John Locke, *The Second Treatise on Civil Government* (1690; 1986).

<sup>7</sup> Robert Nozick, *Anarchy, State & Utopia* (New York: Basic Books, 1974).

<sup>8</sup> Nozick points out that the income tax is a form of slave labor, since the fruits of one's labor are being taken by force. If one works 8 hours a day and must pay 50 percent of what one makes to the state, how does that differ, in essence, from being forced to work for the state for four hours a day? Nozick makes a good point, but exploring this view would take us far afield from the main discussion of this thesis. For more than 20 discussions on the ethics of tax evasion, see Robert W. McGee, editor, *The Ethics of Tax Evasion* (Dumont, NJ: The Dumont Institute for Public Policy Research, 1998).

<sup>9</sup> For a full discussion of the body as property doctrine, see Russell Scott, *The Body as Property* (New York: The Viking Press, 1981).

property rights of the theater owner and the contract rights of those attending the performance. Individuals have the right to speak freely when they are on their own property or when they have permission to speak on someone else's property. There is no right to speak freely on someone else's property because there is no right to be on someone else's property without the owner's consent. This basic, commonsense position gets a bit murky when one tries to assert a free speech right on property that is government owned but that does not detract from the basic argument.

The right to liberty -- to not be confined against one's will -- is also a property right, since it is the physical location and control of the body that are at issue. Contract rights also derive from property rights, since contract rights merely involve trading the property one has for the property one wants. Thus, property rights are the fountain from which other rights flow.<sup>10</sup>

Application of the entitlement theory of property rights leads to other conclusions as well. If one is entitled to the fruits of one's labor, then one should be free to enter into contracts and trade labor for cash or other property. One may also trade the property one has justly acquired for other property or one may give away justly acquired property as a gift. Any government that imposes a gift tax or an inheritance tax thus violates rights, since those who have earned or acquired property through voluntary exchange always have a superior claim to it than do those, whether individuals or governments, who have not thus acquired title.<sup>11</sup>

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<sup>10</sup> Ayn Rand puts it somewhat differently. "The right to life is the source of all rights -- and the right to property is their only implementation. Without property rights, no other rights are possible." Ayn Rand, *The Virtue of Selfishness* (New American Library, 1964), 94, cited in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), at 388.

<sup>11</sup> For more on the ethics of evading the estate tax, see Robert W. McGee, *Is It Unethical to Evade the Estate Tax?* 2 *Journal of Accounting, Ethics & Public Policy* 266-285 (Spring 1999). A discussion of when, and under what circumstances, governments may use force to take property from citizens to pay for government services (whether wanted by the citizens or not) would take us far beyond the scope of this thesis. This question has been addressed in Robert W. McGee, *Is Tax Evasion Unethical?* 42 *University of Kansas Law Review* 411-435 (Winter 1994). Some authors have taken the position that tax evasion is always unethical. For examples, see Gordon Cohn, *The Jewish View on Paying Taxes*, 1 *Journal of Accounting, Ethics & Public Policy* 109-120 (Spring 1998); Meir Tamari, *Ethical Issues in Tax Evasion: A Jewish Perspective*, 1 *Journal of Accounting, Ethics & Public Policy* 121-132 (Spring 1998); Sheldon R. Smith and Kevin C. Kimball, *Tax Evasion and Ethics: A Perspective from Members of The Church of Jesus Christ of Latter-day Saints*, 1 *Journal of Accounting, Ethics & Public Policy* 337-348 (Summer 1998); Wig DeMerville, *The Ethics of Tax Evasion: A Baha'i Perspective*, 1 *Journal of Accounting, Ethics & Public Policy* 356-368 (Summer 1998). For a critique of these positions, see Robert W. McGee, *Is It Unethical to Evade Taxes in an Evil or Corrupt*

## Two Approaches to Ethics

There are basically just two ways to look at ethics. Ethical systems are either utilitarian based or rights based. Other ethical systems that claim to be a third way usually break down, upon closer analysis, into some variation of utilitarianism. Thus, we need to take a look at the two ethical alternatives to determine which would better result in human flourishing.

### Utilitarian Ethics

Jeremy Bentham coined the term utilitarian and is perhaps the first systematic exponent of the utilitarian philosophy,<sup>12</sup> although the concept of utilitarianism goes back to the time of Plato and Aristotle. Bentham's view was as follows:

... it is the greatest happiness of the greatest number that is the measure of right and wrong.<sup>13</sup>

For Bentham, one must take into account the effect an action has on everyone affected by the action when determining the rightness or wrongness of the action.<sup>14</sup> John Stuart Mill, another early exponent of utilitarianism, said:

The creed which accepts as the foundation of morals "utility" or the "greatest happiness principle" holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.<sup>15</sup>

Henry Sidgwick, another English utilitarian, gives a more precise definition:

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*State? A Look at Jewish, Christian, Muslim, Mormon and Baha'i Perspectives*, 2 Journal of Accounting, Ethics & Public Policy 149-181 (Winter 1999).

<sup>12</sup> William H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism 7* (Malden, MA and Oxford: Blackwell Publishers, 1999).

<sup>13</sup> Jeremy Bentham, *A Fragment on Government*, in *The Works of Jeremy Bentham*, Vol. 1, J. Bowring, editor, (New York: Russell & Russell, 1962), at 227, as cited in W. Shaw, *supra*, at 8.

<sup>14</sup> W. Shaw, *supra*, at 8.

<sup>15</sup> John Stuart Mill, *Utilitarianism 7*, G. Sher, ed. (Indianapolis: Hackett, 1979), as cited in W. Shaw, *supra*, at 9. For other editions, see John Stuart Mill, *Utilitarianism and Other Writings* (New York: New American Library, 1962); John Stuart Mill, *On Liberty and Utilitarianism* (New York: Bantam Books, 1993).

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By utilitarianism is here meant the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole; that is, taking into account all whose happiness is affected by the conduct.<sup>16</sup>

In other words, "an action is right if and only if it brings about at least as much net happiness as any other action the agent could have performed; otherwise it is wrong."<sup>17</sup>

Richard A. Posner, an American jurist and prolific author on law and economics, takes the position that morality and efficiency are consistent.<sup>18</sup> He states that "the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society."<sup>19</sup>

If these views are to be reconciled, one might say that an act or policy or institution is ethical if it is more efficient than any other alternative. Otherwise, it is unethical. Thus, if the act or policy results in the misallocation of resources, it is unethical because it reduces efficiency.

There are several problems with taking a utilitarian approach to ethical issues. The fatal flaw is that the utilitarian approach ignores property and contract rights. But there are other weaknesses as well.

One weakness with the utilitarian approach is that it is not possible to accurately measure gains and losses.<sup>20</sup> So if the goal is to achieve the greatest good for the greatest number, one must work with estimates. Economics textbooks present their examples of the application of marginal utility theory in terms of units, which they call utils. Each util is assigned a numerical value. And with each additional purchase, the marginal utility declines.

For example, let's say that Jane is very hungry. She goes into a fast-food restaurant and orders a hamburger for \$1. Since she is very hungry, the value of the hamburger, to her, is 10 utils. And since \$1 is worth only 3 utils to her,<sup>21</sup> her

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<sup>16</sup> Henry Sidgwick, *The Methods of Ethics* 411 (New York: Dover, 1966), as cited in W. Shaw, *supra*, at 9-10.

<sup>17</sup> W. Shaw, *supra*, at 10.

<sup>18</sup> Richard A. Posner, *Economic Analysis of Law*, 5th edition 284-285 (New York: Aspen Law & Business, 1998).

<sup>19</sup> Richard A. Posner, *The Economics of Justice*, revised edition 115 (Cambridge, MA: Harvard University Press, 1983).

<sup>20</sup> For a detailed critique of this point, see Murray N. Rothbard, *Man, Economy, and State* 260-68 (Los Angeles: Nash Publishers, 1970).

<sup>21</sup> She places a value of 3 utils on one dollar, but other consumers may place different values on one dollar. A high-income person may place a value of 0.005 utils on one dollar, whereas a low-income person may assign a value of 20 utils to one dollar. And the number of utils' value for a dollar may change with the same individual. As the individual

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satisfaction is increased by surrendering the \$1, worth 3 utils, for a hamburger that is worth 10 utils.<sup>22</sup> She has gained to the extent of 7 utils. After finishing the first hamburger, she must decide whether consuming a second hamburger would increase her happiness. If she values the second hamburger at 6 utils and the next dollar in her purse at 3 utils, she will decide to purchase a second hamburger because doing so will increase her satisfaction. So she exchanges a dollar, worth 3 utils, for the second hamburger, worth 6 utils. After consuming the second hamburger, she must decide whether to buy a third hamburger. If the value of a third hamburger to her is only 2 utils, she will decide not to buy, since she is better off keeping her dollar, which is valued at 3 utils, rather than exchanging it for something that has a value to her of only 2 utils.

The problem inherent in using this approach is that utils are defined in terms of definite, measurable units, whereas choices are actually ranks. We can say that she prefers two hamburgers to \$2, but we cannot say that she gains 6 utils by making an exchange. Economics textbook writers use utils to illustrate how the marginal utility theory works. But utils actually do not exist.

Attempting to apply the marginal utility theory presents some problems. For example, if a certain protectionist measure is applied to a particular product, we cannot determine by precise measurement whether the gains received by the domestic producers exceed the losses incurred by domestic consumers. And it should also be pointed out that domestic producers and consumers are not the only ones affected by protectionist policies. Foreign producers, their employees, the companies that would otherwise transport the foreign product to the domestic market, the domestic import companies and their employees, and the businesses that would otherwise receive a portion of the import companies' employee salaries are also affected.

Let's say that a particular protectionist measure such as a tariff or quota causes the price of the average shirt to be \$5 higher than would be the case under

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spends more dollars, thereby reducing the supply of dollars, the value of the next dollar -- the marginal dollar -- may change. So the value of a dollar to a particular individual can change. It is not necessarily constant. It should also be pointed out that a high-income person does not necessarily derive fewer utils of benefit from a dollar than does a low-income person. This relationship is often assumed by economists (the graduated income tax is based on the validity of this assumption), but this assumption may be invalid.

<sup>22</sup> It should be pointed out that these values are subjective. If the seller of hamburgers also valued \$1 at 3 utils and one hamburger at 10 utils, there would be no trade because the seller of hamburgers would be worse off if a trade transpired. The reason any trade takes place is because the buyer and seller place different values on the products or services they buy and sell. Both parties to a trade gain, in their own subjective judgment. The seller of hamburgers would rather have the \$1 than the hamburger and Jane would rather have the hamburger than the \$1.

free trade. So millions of consumers have to pay an extra \$5 for a shirt, and domestic producers of shirts gain as a result. But they do not necessarily gain the same total amount as the loss that domestic consumers incur because some of the shirts consumers buy will be manufactured by foreign producers. So an induced cost increase also might benefit foreign producers (especially if the induced cost increase is the result of a quota rather than a tariff). The presence of a quota will reduce the number of shirts that a foreign producer can sell in the domestic market, but it will increase the unit price the foreign producer can charge, this increasing foreign producer profit margins.

Fewer foreign shirts will be purchased as a result. Which means that the domestic import companies that would otherwise bring the shirts into the United States will lose business. So they will need fewer employees. And the money that these employees would otherwise earn cannot flow into the purchase of autos, clothing, and so forth because these employees do not have jobs as a result of the protectionist measure.

There is really no way to accurately measure the total gains and total losses that result from a particular protectionist measure because it is impossible to predict where the money will flow in the absence of protectionism. But it can be concluded, a priori, that total satisfaction will decrease if consumers have to settle for their second or third choice because some protectionist measure prevents them from buying their first choice.

Another way to look at the effect of a protectionist measure, in an attempt to determine whether the measure is good or bad, is to predict who would gain and who would lose if the particular policy were implemented. In the case of a protectionist measure on textiles, for example, millions of consumers stand to lose because they would have to pay higher prices.<sup>23</sup> But a few domestic textile companies stand to gain by the passage of the measure. Based on this approach, it might be concluded that the protectionist measure is bad because many

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<sup>23</sup> Numerous studies have been made that attempt to measure the extent of consumer losses that result from protectionism in various industries. In textiles and apparel, some results have been as follows: Gary Clyde Hufbauer, Diane T. Berliner and Kimberly Ann Elliott, *Trade Protectionism in the United States: 31 Case Studies* 146 (Washington, DC: Institute for International Economics, 1986) (the induced price increase in textiles was 21%); William R. Cline, *The Future of World Trade in Textiles and Apparel*, revised edition 15 (Washington, DC: Institute for International Economics, 1990) (the estimated price increase for textiles was 28%); Hufbauer, Berliner and Elliott 146 (1986) (39% price increase in apparel); Carl Hamilton, *An Assessment of Voluntary Restraints on Hong Kong Exports to Europe and the U.S.A.*, 53 *Economica* 339-50 (1986) (50% increase in apparel prices); Susan Hickok, *The Consumer Cost of Trade Restraints*, Quarterly Review (Federal Reserve Bank of New York), Summer, 1985, 1-12 (46% to 76% increase in apparel prices); Cline 15 (1990) (53% increase in apparel prices).

individuals (consumers) stand to lose something, whereas only a few stand to gain (domestic textile manufacturers). But this analysis is superficial because the unit gains and unit losses are not equal. The domestic textile producers stand to gain much if the measure becomes law, whereas the millions of consumers who lose something would only lose a little bit, perhaps \$5 per shirt.

Another fact to consider is that the textile manufacturers are highly organized special interests, whereas the majority, the consumers, are unorganized. It is in the textile manufacturers' best interest to expend large sums of money to lobby Congress to pass the piece of protectionist legislation. But it is rational behavior for the millions of unorganized consumers not to organize to petition Congress not to pass the bill. The cost of organizing, in terms of time, effort and money expended, is just not worth it. It is better to pay an extra \$5 a shirt than to try to counterbalance the special interest that has the ear of the legislature.

This phenomenon is present regardless of which industry is involved. The steel industry, auto industry, farm lobby and every other producer of domestic goods stand to gain, in the short-run at least, if they can convince Congress to protect them from foreign competition. So it pays them to organize. And it is rational behavior for the consumers of these items not to organize because the cost of doing so exceeds the benefits to be gained by organizing.<sup>24</sup> Thus, the special interests have a built-in advantage over consumers.

The Public Choice School of Economics has been discussing this point for several decades. Wherever the costs of lobbying are low and the potential benefits are high, special interests will run to government for protection or special favors. Public Choice economists call this phenomenon rent-seeking -- the seeking of special privileges or protection from government or getting others to pay for your benefits.<sup>25</sup> But a better, more descriptive term would be booty

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<sup>24</sup> There are some exceptions, of course. In some cases, one organized special interest lobbies Congress to pass a piece of protectionist legislation while another, opposing special interest lobbies Congress not to pass it. For example, in some instances, the steel industry's attempt to lobby Congress has been opposed by industry groups that use steel. And domestic auto producers that try to restrict foreign imports have been opposed by foreign car dealerships. So there is sometimes organized opposition, a countervailing power where special interests do battle with each other. For some case studies detailing specific instances where special interest groups have engaged in this kind of activity, see I.M. Destler and John S. Odell, *Anti-Protection: Changing Forces in United States Trade Politics* (Washington, DC: Institute for International Economics, 1987).

<sup>25</sup> For more on the concept of rent-seeking, see James M. Buchanan, Robert Tollison and Gordon Tullock editors, *Towards a Theory of a Rent-Seeking Society* (College Station, TX: Texas A&M University Press, 1980); Charles K. Rowley, Robert D. Tollison and Gordon Tullock editors, *The Political Economy of Rent-Seeking* (Boston: Kluwer Academic Publishers, 1988) (Pages 217-37 apply the theory of rent-seeking to trade regulation); Gordon Tullock, *The Economics of Special Privilege and Rent Seeking*

seeking.<sup>26</sup>

### **The Public Interest Argument**

Another basically utilitarian argument is the public policy or common good argument. Those who would ban sex acts between (or among) consenting adults -- prostitution, anal, oral or homosexual sex -- using drugs such as cocaine, hashish, coffee, crack, or marijuana, smoking in public, selling body parts, charging to rent your womb, ticket scalping, advertising tobacco or alcohol or whatever, often argue that such things are against public policy. Permitting such activity would tear at the social fabric. These things are not in the public interest. If a policy of free trade is good, it is good because it is in the public interest or it is for the common good.

The fatal flaw in this line of reasoning is that there is no such thing as "the public." The public is just a collective term to describe the general citizenry. The public does not eat, sleep and breathe. Only individuals do these things. Only individuals have interests. And in a pluralist society, these interests conflict.<sup>27</sup> Different individuals have different interests.

It is in the interest of nonsmokers to have smokefree restaurants and work places. But it is in the interest of smokers to be able to smoke in restaurants and work places. It is in the interest of prostitutes and ticket scalpers to be able to earn a living and it is in the interest of their clients to be able to use their services. But moralists would ban prostitution if they could, and other segments of the entertainment industry would like to see bans against ticket scalping stringently enforced.

Auto manufacturers (their stockholders and employees, actually) have an interest in seeing protectionist legislation passed to protect them from foreign competition. And the millions of individuals who purchase autos have an interest in having low prices and a wide variety of choices. Foreign auto producers also have an interest in selling their products on the domestic market. While it might be concluded that the public interest is in free trade, this conclusion is reached on utilitarian grounds -- the consumers who stand to gain by free trade outnumber

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(Boston: Kluwer Academic Publishers, 1989); Gordon Tullock, *Private Wants, Public Means: An Economic Analysis Of The Desirable Scope Of Government* (New York: Basic Books, 1970; Lanham, MD and London: University Press of America, 1987); Gordon Tullock, *Rent Seeking* (Brookfield, VT and Hants, UK: Edward Elgar Publishing Company, 1993).

<sup>26</sup> I would like to thank Walter Block for this philosophical insight.

<sup>27</sup> Michael Novak points this out in *Free Persons and the Common Good* 19-22 (1989).

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the auto company stockholders and employees who stand to gain by protectionism (the interests of the foreign auto producers, their stockholders and employees are usually ignored in arriving at this determination).

There is no way to reconcile the interests of different, divergent groups without violating someone's rights. If prostitution is banned, prostitutes have their property and contract rights violated. Women who cannot rent their wombs as surrogates have their property and contract rights violated, too. Restaurant owners who are forced to admit anyone who walks through the door have their property, contract and association rights violated.<sup>28</sup> There is no way to prohibit activity between consenting adults without violating someone's property, contract or association rights. Yet this fact is almost always overlooked by those who advocate banning or restricting some kind of activity on public policy grounds.

Ayn Rand has the following point to make about the concept of the public interest:

Since there is no such entity as "the public," since the public is merely a number of individuals, any claimed or implied conflict of "the public interest" with private interests means that the interests of some men are to be sacrificed to the interests and wishes of others. Since the concept is so conveniently undefinable, its use rests only on any given gang's ability to proclaim that "The public, *c'est moi*" -- and to maintain the claim at the point of a gun.<sup>29</sup>

In another place, Rand states:

All "public interest" legislation (and any distribution of money taken by force from some men for the unearned benefit of others) comes down ultimately to the grant of an undefined undefinable, non-objective, arbitrary power to some government officials. The worst aspect of it is not that such a power can be used dishonestly, but that it *cannot be used honestly*. The wisest man in the world, with the purest integrity, cannot find a criterion for the just, equitable, rational application of an unjust,

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<sup>28</sup> "The Civil Rights Act is inconsistent with the capitalist ideal to the extent that it limits the free choice of employers and -- in the case of personal services -- consumers." Joseph A. Pichler, *Capitalism in America: Moral Issues and Public Policy*, in Richard T. DeGeorge and Joseph A. Pichler, editors, *Ethics, Free Enterprise, and Public Policy* 19-39 (New York: Oxford University Press, 1978), at 31.

<sup>29</sup> Ayn Rand, *The Virtue of Selfishness* 116 (New York: New American Library, 1964); see also Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism From A To Z* 396 (New York: New American Library, 1986).

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inequitable, irrational principle.<sup>30</sup>

There are other problems with the public interest argument. For example, which individuals should we consider, only those in some local community or those in the next country, state or country? Should we consider only those who might be directly affected or also those who might be indirectly affected? Should we consider only individuals over the age of 18 or all living individuals? Should the unborn also be considered, since they might some day be affected by any decision that is made? Should foreigners receive the same weight as native born citizens in the decision-making process? Should women receive the same consideration as men (they are not in some societies, either because of culture or religious beliefs)? Should members of the preferred religion have louder voices in the outcome than those of other religions?<sup>31</sup>

In a pluralist society, the only values we can hope to have in common are the protection of life, liberty (in the negative sense of the term) and property.<sup>32</sup> Every other value is optional, since individuals have different values. We cannot determine the common good or the public interest by adding up all the values of all members of society, since they have different, conflicting values. And some individuals feel stronger about their values than others, yet we cannot assign a weight to such values to compute some weighted value. For example, 57 percent of a certain community might favor the "right" to abortion while 43 percent oppose this "right." Does that mean that the public policy should be to make abortion legal? What if the 43 percent who oppose legalized abortion are strongly opposed, whereas the 57 percent who approve are only mildly supportive? What if the percentage changes next week, after a visit to the town by the Pope, so that only 49 percent favor legalized abortion? Public policy in such a case should have nothing to do with majority rule or sentiment. Either the

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<sup>30</sup> Ayn Rand, *Capitalism: The Unknown Ideal* 170 (New York: New American Library, 1966). Also in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* 396 (New York: New American Library, 1986).

<sup>31</sup> In Israel, people who drive on Saturday (the Jewish Sabbath) might have their cars stoned, since the orthodox segment of the Jewish religion thinks that such activity violates Jewish law. Gentiles (and non-orthodox Jews) stand to have their property rights impinged with impunity for violating other people's moral code.

<sup>32</sup> Even property rights are not safe from the mob. Orthodox Jews in Israel can safely throw stones at moving vehicles on the Sabbath without fear of reprisal. Black community "leaders" in Harlem can paint over billboards that contain cigarette or alcoholic beverage advertising and the police not only do not arrest them but actually stand by to keep order. Asset forfeiture laws in the United States allow the confiscation of assets if someone is merely thought to be engaged in the drug trade. These assets are often not recoverable even if the owner of the asset is found innocent. Indeed, the owners of 80 percent of the assets seized by federal drug officials are never even charged with a crime.

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potential mother has rights or the unborn child has rights. Any decision regarding this issue must be based on rights, not public interest, since public interest is just a question of majority rule, at best, and at worst, the rule of a concentrated, highly vocal minority.<sup>33</sup>

John Hospers makes the following point regarding the public interest argument:

People speak of "the public interest." But what is the public interest? Strictly speaking, there is no such thing. There is only the interest of each individual human being. There are interests that many or all people share, but these are still the interests of individuals. When politicians say that something is "to the public interest," they usually mean it serves the interests of some people but goes against the interests of others -- and usually the interests of the people with the most political pull win out. Is it to the public interest for some to be forced to die so that others may be saved? Is it to the public interest for a hundred crazed men to lynch one man in the public square? Is it to the public interest for all the citizens of the nation to be taxed to pay for a federal dam in one section of it? In Sweden it takes a couple eight years on the average before they can obtain an apartment of their own (owned by the government, rented by them); but they are not supposed to complain, because "it's in the public interest." Just as there are only individual rights, so there are only individual interests.<sup>34</sup>

In the area of freedom of association, the public policy argument is used to violate the rights of property owners who do not want to serve or hire members of certain groups. While it would be nice if everyone could go into a restaurant and be served, there is no right to do so. The public policy argument, in effect, says that it is in the "public" interest that the property rights of some be sacrificed for the convenience of others. This position views rights as positive, since there is a winner and a loser. However, any argument based on positive rights theory is *prima facie* invalid.

The public policy argument is also used to support the view that women and minorities should be allowed to be admitted to private clubs even if the owners of the clubs want to exclude them. The property and association rights of

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<sup>33</sup> Political scientists would call these minorities who gain control of an issue a "political elite." Actually, majorities do not rule even in a democracy. Rule is always by some political elite. In a democracy, that political elite consists of elected representatives and the special interest groups who influence them. In a dictatorship of the proletariat, it is the *nomenklatura*.

<sup>34</sup> John Hospers, *Libertarianism: A Political Philosophy for Tomorrow* 84 (1971).

some must be sacrificed because some individuals think that the public would benefit by forcing unwanted members down their throats. But "the public" cannot benefit from any action, since "the public" is just a collective term for a group of individuals. As Bastiat pointed out in the 1840s, if a law has the effect of helping someone at the expense of someone else, it is legal plunder, an illegitimate object of government.

Aside from the inherent weaknesses in the public interest argument is the fact that the argument is sometimes used to protect special interests at the expense of the general public. It has been argued that the passage of antimerger legislation is in the public interest, when in fact such legislation often serves to protect entrenched, inefficient management at the expense of shareholders, consumers and the general public.<sup>35</sup> The farm lobby argues that it is in the public interest to have a strong farm sector, so Congress passes legislation to subsidize the farm industry and protect it from foreign competition at the expense of the general public.<sup>36</sup> Industry leaders whose companies are losing market share from foreign or domestic competition petition Congress to regulate their industry to prevent cutthroat competition, in the public interest.<sup>37</sup> But the effect of such legislation is to keep prices abnormally high, compared to what they would be in a free market. Most antitrust actions are initiated not by government, but by

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<sup>35</sup> For a discussion of this point, see Robert W. McGee, *Mergers and Acquisitions: An Economic and Legal Analysis*, 22 Creighton Law Review 665-93 (1988/89).

<sup>36</sup> For more on this point, see James Bovard, *The Farm Fiasco* (San Francisco: ICS Press, 1989). It should be pointed out that the United States government is not the only government that caves in to such pressure from the farm lobby. France was able to convince the World Trade Organization to cut out a special deal for French farmers. England faced a similar problem in the nineteenth century from its agricultural special interests. For more on this point, see Norman Longmate, *The Breadstealers: The Fight against the Corn Laws, 1838-1846* (New York: St. Martin's Press and London: Temple Smith, 1984).

<sup>37</sup> The Interstate Commerce Commission and numerous other government agencies were created to protect industry leaders from loss of market share to smaller, more competitive companies. For documentation of this point, see Gabriel Kolko, *Railroads and Regulation 1877-1916* (New York: W.W. Norton & Co., 1965); Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1963). A more recent example of using the antitrust laws to destroy the competition is the Microsoft case. For more on this case, see Stan J. Liebowitz and Stephen E. Margolis, *Winners, Losers & Microsoft: Competition and Antitrust in High Technology* (Oakland, CA: The Independent Institute, 1999); Jeffrey A. Eisenach and Thomas M. Lenard, editors, *Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace* (Boston: Kluwer Academic Publishers, 1999); Richard B. McKenzie and William F. Shughart, II. *Is Microsoft a Monopolist?* 3 The Independent Review 165-197 (Fall 1998).

competitors who see their market share eroded by more efficient competitors.<sup>38</sup> Members of various professions and occupations such as doctors, lawyers, accountants, hair dressers, electricians, opticians, pharmacists, morticians, auto mechanics, speech therapists, tattoo artists, and so forth petition the legislature to pass licensure laws to protect the general public from quacks, when research shows that the loosening or repeal of such laws results in higher quality service at lower cost.<sup>39</sup> Moralists try to have victimless crimes like prostitution, gambling, ticket scalping and dwarf tossing outlawed even though they have no right to interfere with acts between or among consenting adults.

The problem with the public interest argument is that it is conveniently undefinable.<sup>40</sup> No one can be against the public interest, so anyone or any group that takes the position that the policy they advocate is in the public interest is on the high ground as far as defending their position is concerned. The problem is that the public interest argument has been used to lobby government to support

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<sup>38</sup> Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure*, second edition (New York and London: Holmes & Meier, 1990); D.T. Armentano, *Antitrust Policy: The Case for Repeal* (Washington, DC: The Cato Institute, 1986). For an in-depth discussion of how the antitrust laws have been used by rent-seekers to feather their own nests at the expense of the general public, see William F. Shughart II, *Antitrust Policy and Interest-Group Politics* (New York and Westport, CT: Quorum Books, 1990).

<sup>39</sup> Milton Friedman, *Capitalism & Freedom* 137-60 (Chicago: University of Chicago Press, 1962); Simon Rottenberg, editor, *Occupational Licensure and Regulation* (Washington, DC: American Enterprise Institute, 1980); S. David Young, *The Rule of Experts: Occupational Licensing in America* (Washington, DC: The Cato Institute, 1987); Robert Albon and Greg Lindsay, editors, *Occupational Regulation and the Public Interest* (Australia: The Centre for Independent Studies, 1984); S. Gross, *Of Foxes and Henhouses: Licensing and the Health Professions* (1984).

<sup>40</sup> Donna J. Wood makes the following point in *Strategic Uses of Public Policy*, in S. Prakash Sethi and Cecilia M. Falbe, editors, *Business and Society: Dimensions of Conflict and Cooperation* (Lexington, MA: D.C. Heath and Company, 1987), at 83-85:

... in political terms, the public interest is a very useful concept for defending and justifying almost any action or decision; it expresses a deeply held if poorly defined value in American culture. It can be an almost irrefutable justification; no one can be against the public interest.

However, no one has been able to precisely define *public interest*... therefore, it must be used with great caution by analysts and scholars...the public interest is little more than a bad faith concept, both analytically and in practice...

The public interest...is not useful as an analytical or theoretical concept. But as a condensation symbol...it has been extremely useful to various interest groups and policy-making bodies precisely because of its broad appeal and its intransigence to specific definition.

Special-interest groups...allegedly representing the public interest, are often accused...of acting against the public interest.

numerous programs that are really in the interest of some small group, usually or always to the detriment of the majority. It cannot be in the public interest to have government provide funding to cure rare children's diseases, for example, since such a small segment of the total population is affected. Yet it is difficult to argue against providing funding for diseases that kill small children, even if the disease in question only kills five or ten of them in any particular year or decade.

If the public interest argument can legitimately be used at all, the only place where it might be used without distorting reality is when it is used to defend negative rights such as the right not to be killed or robbed, since 100 percent of the population would find such prohibitions to be in their interest. Once one falls below unanimity, the public interest argument quickly loses credibility because, at that point, the interests of some individuals conflict with the interests of other individuals, which results in a regress into utilitarianism.

### **The Balancing of Interests Argument**

Another, related argument is the balancing of interests argument, or the balancing of rights argument. This argument takes the position that the interests or rights of some individuals or groups must be balanced against the interests or rights of other individuals or groups. But this argument is just another variation of the basic utilitarian argument. It is grounded in positive rights theory, which we have already seen is fatally flawed.<sup>41</sup>

The balancing of rights argument, when applied to trade theory, argues that the rights of foreign producers to sell their products on the domestic market must be balanced against the rights of domestic producers to be protected from dumping or unfair competition. There are several weaknesses with this line of reasoning. For one thing, the rights of consumers to buy the products of their choice from the sellers of their choice is often ignored. But more importantly, this argument assumes that domestic producers have some inherent right to sell their products even though consumers do not want to do business with them. Domestic producers do not have their rights violated when a foreign producer "dumps" products on the domestic market.<sup>42</sup> Although they may be harmed by

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<sup>41</sup> The balancing of rights theory is often discussed in connection with the First Amendment. For a discussion on this point, see Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. Law Review 1405 (1987).

<sup>42</sup> Many foreign producers that are accused of dumping their products on the market are not really dumping, in the sense that they are not selling for less than the cost of production. And even if they are, so what? Consumers benefit by the practice. Foreign producers can also be found guilty of dumping if they sell their products for less than "fair value." But aside from the fact that "fair value" is a completely arbitrary concept, this practice also does not harm consumers. And it does not violate anyone's rights.

foreign dumping, their rights are not violated because they have no property rights in transactions that consumers do not want to enter into with them.

If a supermarket opens up across the street from a mom and pop grocery store, there is no doubt that the mom and pop store will be harmed by the competition. It may even be driven out of business. But it cannot be said that their rights are violated by having the supermarket set up shop across the street. The supermarket has every right to open a store across the street (not to mention the fact that consumers will benefit by lower prices and a larger selection) and mom and pop have no right to prevent consumers from taking their business across the street if they want to.

Government has no right to prevent the supermarket from opening because there are no rights to "balance." Although the interests of mom and pop are diametrically opposed to the interests of the supermarket, government has no business balancing these interests in one direction or the other. The real issue is rights, not interests. When people speak about balancing "interests," what they really mean is balancing "rights." But in a negative rights regime,<sup>43</sup> rights can never conflict.<sup>44</sup> You have the right to property and so do I. You have the right not to be killed or confined and so do I. It is only in a positive rights regime that rights can conflict because the right of one individual or group must be sacrificed so that another individual or group can gain something. Thus, the balancing of interests argument suffers from several structural weaknesses.

Perhaps one of the best points that has been made against the balancing of interests doctrine was made by Justice Douglas in his dissenting opinion in *Scales v. United States*:<sup>45</sup>

In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been "balancing" the right of speech and association against other values in

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<sup>43</sup> Negative and positive rights are discussed below.

<sup>44</sup> Some political theorists would disagree with the view that rights cannot conflict. For example, Bowie and Simon state:

...rights may clash. My right to ten dollars from Jones and your right to ten dollars from Jones cannot both be honored if Jones has only ten dollars. Moreover, if Jones has only ten dollars, perhaps none of us is justified in claiming it in the first place, all things considered. Norman E. Bowie, and Robert L. Simon. *The Individual and the Political Order*, 2nd edition 50 (Englewood Cliffs, NJ: Prentice Hall, 1986).

The problem with this argument is that the authors confuse rights with remedies. While both parties have a right to the ten dollars, only one of them, at most, will be able to actually get it because there is not enough to go around. But this fact does not mean that their rights conflict. There is simply no equitable remedy.

<sup>45</sup> *Scales v. United States*, 367 U.S. 203, 270-272 (1961).

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society to see if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights<sup>46</sup> ... This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation" (see Hand, *The Spirit of Liberty* (1960 ed.), p. 278), runs counter to our prior decisions.

It also runs counter to Madison's views of the First Amendment as we are advised by his eminent biographer, Irving Brant:

When Madison wrote, 'Congress shall make no law' infringing these rights, he did not expect the Supreme Court to decide, on balance, whether Congress could or could not make a law infringing them...If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>47</sup>

Once it is seen that the balancing argument is just another positive rights argument,<sup>48</sup> it quickly falls apart. I have the right to life and so do you. I have the right to property and so do you. If you violate my right to property, you are acting unjustly. It cannot be said that an unjust act, such as violating my property rights, can be balanced against your right to take my property, because you have no right to take my property. The public accommodation argument, that you have a right to trespass on my property, is invalid because you have no right to set foot on my property without my permission. The fact that you might have to eat somewhere else or might have your career advancement short-circuited is not an issue, since you have no right to force me to serve you or advance your career at my

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<sup>46</sup> The specific cases Justice Douglas referred to were *Dennis v. United States*, 341 U.S. 494, 508-509; *Communications Assn. v. Douds*, 339 U.S. 382, 399-400; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463-466; *Uphaus v. Wyman*, 360 U.S. 72, 78-79; *Barenblatt v. United States*, 360 U.S. 109, 126-134; *Bates v. Little Rock*, 361 U.S. 516, 524; *Shelton v. Tucker*, 364 U.S. 479; *Wilkinson v. United States*, 365 U.S. 399; *Braden v. United States*, 365 U.S. 431; *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82. Douglas also discusses the right of association and the balancing test in *W. Douglas, The Right of Association*, 63 COLUMBIA LAW REVIEW 1361-83 (1963).

<sup>47</sup> *Scales v. United States*, 367 U.S. 203, 270-272 (1961).

<sup>48</sup> For a discussion of this point, see R. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. Law Review 1405-91 (1987).

expense.<sup>49</sup> The argument that my right not to associate with you must be balanced with your right to associate with me is ludicrous because you have no right to associate with me unless I agree to the association.

### **The Rights Approach**

A major problem with any utilitarian argument is that it is impossible to precisely measure the total gains and the total losses. So it is not possible to determine in many cases whether a particular policy results in the greatest good for the greatest number. But the fatal flaw in any utilitarian approach is that utilitarian approaches ignore individual rights. If the good outweighs the bad, a utilitarian would not be concerned that someone's rights have to be violated to implement the policy.

To illustrate this point, let's take an example. Let's say that John is, and always has been, a sex-craved maniac. He has just been released from prison after ten years of incarceration. During that time he has not had sex. And he is prowling the streets with the goal of making up for lost time. He comes upon a prostitute who is lying on the sidewalk in a drunken stupor. He drags her into an alley and rapes her. While he is ripping off her clothes, she protests by mumbling that he should stop. But she does not put up any resistance and actually falls asleep while he is committing the crime.

She has experienced almost no discomfort or disutility as a result of John's act. But John has experienced a great deal of pleasure. Has society benefited by the act? A utilitarian would conclude that it had. One person gained and one person lost as a result of the rape. So it appears to be a zero-sum game. But the person who gained, gained a great deal, whereas the person who lost, lost only a little. So the gains exceed the losses, even if John's utility gain and the prostitute's utility loss cannot be measured precisely, and the act can be declared to be good on that account. Legislators who base their legal philosophy on utilitarianism could easily conclude that governments should pass laws allowing people to rape drunken prostitutes because society stands to gain by the passage of such laws.

The example is outrageous, but the thought process a utilitarian uses to arrive at a conclusion cannot be faulted on utilitarian grounds. The reader may be quick to point out that the prostitute's rights were violated in a very personal way

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<sup>49</sup> It should also be mentioned that employers might recognize this drawback to their employees' career advancement and make it a corporate policy not to support organizations that do not admit women or minorities. But that is a matter of individual choice.

by John's action. But rights violations are of no concern to a pure utilitarian theorist. All that matters to a utilitarian is whether the gains exceed the losses. The idea that someone's rights might have to be violated to achieve the goal is not worthy of consideration.

But violating someone's rights is never necessary to achieve a worthy goal. If someone's rights must be violated to achieve a goal, the goal is not a worthy one in the first place. Utilitarian approaches all begin with the premise that the end justifies the means. Rights approaches begin with the premise that it is the process that is important, not the destination. A trade policy based on utilitarianism can have protectionist elements if it is determined that the gainers from the policy exceed the losers, or if it is determined that "society" benefits as a whole. Under a rights approach to trade policy, for example, "society" is not even at issue. The issue is whether someone's rights, properly defined, are violated by the policy. If rights are violated, then the policy is a bad one. If no one's rights are violated, then the policy is not a bad one.

Which brings us to another important question: What exactly are rights, anyway? Philosophers over the centuries have viewed rights from two different and diametrically opposed perspectives. Negative rights include the rights to life, liberty and property, among others.<sup>50</sup> Stated in negative terms, they would be the right not to be killed, the right not to be involuntarily confined, and the right not to have your property taken from you without your consent. Negative rights are inherent. They are not rights that are granted by government. They are rights that come before government. Governments are instituted to protect these rights. It might even be said that governments that disparage these rights lose their legitimacy.<sup>51</sup>

Positive rights advocates view rights from a different perspective. Examples of positive rights include the right to medical care, the right to subsidized rent, and so forth. Positive rights are rights that are granted by government. They are not inherent. And they are rights that are gained at someone else's expense.

Under a positive rights regime, the rights of some must be sacrificed so that others may have rights.<sup>52</sup> In the case of medical care, for example, those who

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<sup>50</sup> It is not my intent to attempt to make an exhaustive list of all the negative rights. Suffice it to say that all negative rights are derived from property rights. This point is discussed below.

<sup>51</sup> Bowie and Simon state the following viewpoint: "The state calls its own reason for being into question when it violates the fundamental rights of its citizens." Norman E. Bowie and Robert L. Simon. *The Individual and the Political Order*, 2nd edition 73 (Englewood Cliffs, NJ: Prentice Hall, 1986).

<sup>52</sup> A number of writers have made this point. For example, see Henry B. Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), at 179.

claim a right to medical care gain this right at the expense of others, who must provide it. Free medical care does not mean that medical care is costless. Someone (the taxpayer) has to pay. But it is free to the recipient because the recipient incurs no out of pocket costs.

Forcing some to pay cash for the medical benefits others receive is only one way that medical care might be provided. Under a positive rights regime, one might argue that, since some people have two kidneys and since they need only one kidney to live, that some individuals must be made to give up a kidney lest some other individual die for the lack of having at least one functioning kidney.<sup>53</sup>

The individuals who must relinquish a kidney may be chosen by lottery to make the theft of property "fair" or they may be chosen from among the prison population. In a Nazi-like regime, perhaps Jews could be used for body parts. Under a Stalinist regime, perhaps capitalists could be chosen as donors. Under the Turkish regime of the early twentieth century, perhaps Armenians could be chosen. In ancient Greece or Rome, perhaps they could have used captured soldiers if they had had the relevant technology.<sup>54</sup>

Under a positive rights regime, the premise is that some individuals have a claim on the property of others. What property is to be transferred or how it is to be transferred is just a matter of need and administrative detail.

Rent control laws are another example of applying positive rights theory to transfer property from those who are entitled to it to those who are not. If the law prevents a landlord from charging \$800 a month (the market rate) for an apartment, the difference between the actual rent and the market price for the apartment is, in effect, a forcible transfer of property from the landlord to the tenant. If the maximum rent that can legally be charged is \$500 and the rent that could be charged in a free market is \$800, then the landlord is, in effect, having \$300 of his property confiscated each month and having it transferred to the tenant. The tenant's "right" to affordable housing comes at the expense of the landlord. If the tenant lives in a government subsidized housing project, the result is the same, except that it is the taxpayer rather than the landlord who has to pay for the tenant's right to affordable housing.

Losses always exceed gains under a positive rights regime if for no other

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<sup>53</sup> For another discussion of kidney transfers as part of a positive rights regime, see Fred D. Miller, Jr., *The Natural Right to Private Property*, in Tibor R. Machan, editor, *The Libertarian Reader* 275-285 (Totowa, NJ: Rowman & Littlefield, 1982).

<sup>54</sup> One might be more "humane" in the kidney harvesting by giving people options. For example, in the case of prisoners, the State might give them the option of a reduced prison sentence in exchange for a kidney. Thus, prisoners would have the option of buying their freedom through the use of a noncash transfer (a kidney). But if such transactions were permitted, there would be no reason why other prisoners, those who could afford to buy their way out of prison with cash (like wealthy drug dealers), should not be able to do so. So the State would be faced with a dilemma and no logical solution.

reason than the fact that there are transaction costs. The landlord will not voluntarily write out a \$300 check to the tenant each month. There has to be an enforcement authority around the corner that is ready to enforce the law if the landlord does not want to comply. And an army of bureaucrats has to be retained to see that the various redistributive laws are properly administered and enforced. So it cannot be said that a positive rights regime is a zero-sum game, because the losses do not exactly offset the gains. The landlord loses \$300 a month and the tenant gains \$300 a month, but the cost of maintaining the enforcement authority must also be counted, which leads to a negative-sum result. Economists call this net loss a deadweight loss.

But whether this policy or that is a zero-sum game, a negative-sum game or a positive-sum game is really beside the point. Discussions about whether a policy is a negative-sum or positive-sum game are utilitarian because the object is to determine whether the gains exceed the losses. In a rights regime, gains and losses are irrelevant. All that matters is whether rights are violated -- in the negative sense of the term. There is no way to morally justify depriving some individuals of justly acquired property and transferring it to other individuals who are not entitled to receive it.

### **Are Natural Rights Nonsense on Stilts?**

Right is the child of law; from real laws come real rights, but from imaginary law, from "laws of nature", come imaginary rights. Natural rights is simple nonsense, natural and imprescriptible rights rhetorical nonsense, nonsense upon stilts.<sup>55</sup>

Are natural rights nonsense on stilts? Jeremy Bentham asserted that they were. Of course, if one wanted to refute Bentham's claim without going into further detail, one might just as easily assert that utilitarianism is nonsense on stilts.<sup>56</sup> But this approach at refutation might not satisfy some utilitarians, so

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<sup>55</sup> Jeremy Bentham, in *Anarchical Fallacies*, reprinted in J. Bowring (ed.), *The Collected Works of Jeremy Bentham* (London 1843), at 2: 501, as quoted in Antony Flew, *Could There Be Universal Natural Rights?* 6 *Journal of Libertarian Studies* 277-288 (Summer/Fall 1982), at 277.

<sup>56</sup> Actually, Ayn Rand begins her attack on utilitarianism in a similar manner with her statement that " 'The greatest good for the greatest number' is one of the most vicious slogans ever foisted upon humanity." Ayn Rand, *Textbook of Americanism*, pamphlet 10, cited in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), at 518. She elaborated by stating that the slogan has no concrete, specific meaning. The good is not determined by majorities and "is not achieved by the sacrifice of anyone to anyone." Utilitarianism is a bankrupt moral philosophy because it can entail the sacrifice of some individuals to others.

further analysis of this claim is called for.

For a utilitarian, people have rights because having rights results in the greatest good for the greatest number. Humanity tends to flourish more if murder is outlawed than if it isn't. There is more human flourishing when theft is punished than when it is not. End of argument.

There is a problem with this view, although the problem may not be readily apparent. If individuals have a right to life -- a right not to be killed without their consent -- a utilitarian would argue that it is because "society" deems that individuals should be "allowed" to live free from the fear of being killed against their will. The individual right not to be killed is based on the majority view. Thus, if some majority thinks that a certain individual (Robespierre) or a certain group of individuals -- Royalists, Jews, Gypsies, Poles, Kulaks, communists, capitalists, blacks, etc. -- should not live, then these individuals and groups no longer have the right not to be killed against their will.

In a negative rights regime, majorities are irrelevant. Under a negative rights regime, the individual has rights that no majority can disparage.<sup>57</sup> Even if the entire population, save one (the proposed victim) decided that some individual should be killed, the individual could not be killed.<sup>58</sup>

Let's say that some society decides that it would be best to take all individuals who reach a certain age to some place where they will be humanely killed and their bodies harvested for useful chemicals (or perhaps their body parts could be harvested for use by other human beings). The utilitarian benefits would be immense in terms of reduced health care costs, since health care costs increase as people get older.<sup>59</sup> The harvested chemicals or body parts would also provide

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<sup>57</sup> This point reminds me of an illustration attributed to Benjamin Franklin. Democracy is when two wolves and a sheep vote on what's for dinner. Justice is when a well-armed sheep protests the vote.

<sup>58</sup> There are exceptions, of course. For example, if the individual in question has unjustly killed someone else, he has given up his right to life.

<sup>59</sup> Killing individuals once they reach a certain age would reduce health care costs but it would also have negative effects from a utilitarian perspective. Some of the individuals who would be killed would still have some good years left in them. They would still be able to produce goods or services. Even if retired, they would be able to baby sit their grandchildren, leaving their children free to go out and work. Thus, a utilitarian would have to determine at what point it would be better to kill certain individuals rather than to permit them to continue living.

Other, secondary effects would also occur if people knew that the State would kill them at a certain age. For example, if someone knew he was going to be exterminated in five years and if he had saved enough money to live off of his savings for five years, he might decide to quit working five years before his extermination date, thus depriving others of the products and services he might produce. A smart utilitarian legislator might foresee of this possibility and pass some law limiting the amount of savings people could

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benefits to society (or rather to individuals). This example perhaps best highlights the result that can occur when utilitarianism is followed to its logical conclusion. Of course, if the victims are willing, if they voluntarily give up their right to life because of some belief that it is the right thing to do, then their rights are not violated. But if even one person objects to being killed and having his body made into useful chemicals or distributed piecemeal to others, the utilitarian regime collapses.

For an Aristotelian, the ultimate question might be: Which regime results in greater human flourishing, a utilitarian regime or a negative rights regime? This question can be answered by looking at a few historical examples. Under the Nazi regime, Gypsies, Jews and Poles were systematically exterminated because of the belief that the world would be a better place to live if these groups were eliminated. Under the communist regime in the former Soviet Union, Kulaks were systematically killed because Stalin believed that small capitalists should be killed so that greater goals could be achieved. Pol Pot killed perhaps one-fourth of Cambodia's population to achieve his version of utopia. China's Mao, the greatest killer of the twentieth century, killed untold millions, both through outright murder and by economic policies that resulted in starvation, to achieve a communist society.

Of course, none of these regimes made their decisions to kill millions of people by popular vote, although the individuals who made these decisions were quite popular, at least within a certain segment of the societies in which they lived. Hitler gained power through the democratic process. After the collapse of the Soviet Union, many people were hoping to find a leader who could restore order and stability like Stalin did in the 1930s and 1940s. Stalin was popular (and feared) while he was still alive, both in his own country and in the United States (F.D.R. was one of his biggest fans). Mao is still highly regarded in China in spite of all the atrocities he committed. All of these monsters had popular support. An argument might even be made that their actions, at the time at least, were in accordance with the utilitarian concept of the greatest good for the greatest number, as these leaders perceived the greatest good. Perhaps Stalin said it best when he stated that you can't make an omelet without breaking a few eggs. Yet it would be difficult to argue that their actions resulted in or enhanced human flourishing.

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accumulate. But if such a law were passed, economic growth would necessarily slow down or even stop completely, which would not result in the greatest good for the greatest number. The State could overcome this lack of capital accumulation by forcing people to save a certain portion of their income, which is exactly what the government of Singapore does.

The problem with any utilitarian solutions is that it would involve the passing of additional laws, which have the effect of limiting individual choice. If the goal were to maximize individual choice, the solution would be to repeal laws, not to multiply them.

If one looks at regimes that are based on negative rights, one is more likely to find human flourishing. The United States, for example, was founded on negative rights principles, which were clearly stated in its Declaration of Independence (1776). Now, more than 200 years later, this once underdeveloped country has one of the highest per capita gross domestic products in the world and a population that is many times larger than at the time of its founding. The average American or Western European today lives much better than the French kings lived a few hundred years ago.<sup>60</sup> For generations, people have been "voting with their feet" to move to the United States, whereas in the former Soviet Union and its satellites in Eastern Europe, people were prevented, under threat of death, from voting with their feet to leave. Thus, it seems clear that a negative rights regime results in more human flourishing than does a utilitarian based regime.<sup>61</sup>

### **The Legal System**

In order to secure individual rights, the legal system must be based on the protection of rights rather than the greatest good for the greatest number principle. Of course, in many cases, a utilitarian-based system and a rights-based system will have the same result. In the area of trade, for example, a utilitarian-based system would allow free trade because the wealth of society would be more enhanced with free trade than with protectionism. Under a negative rights regime, government would have a policy of free trade because that is the only policy that does not violate the rights to property and contract.<sup>62</sup> However, in some instances,

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<sup>60</sup> The food is better. Medical care is better. People live much longer. Anyone with a few thousand dollars can travel anywhere in the world, unless prevented from doing so by some government. Louis XIV was unable to get the lice out of his hair at Versailles. Practically no one has lice problems these days, at least in the West, and it is easy to get rid of lice. Louis XIV at times had to break a thin layer of ice off the surface of his wine glass before being able to drink because there was insufficient heat at Versailles. Practically no one in the West has such problems today.

<sup>61</sup> Gilbert Harman makes the following argument for rights based on the concept of flourishing: "I ought to develop my own potential for flourishing. So, others ought not to prevent me from developing my potential. So, I have a right not to be prevented from developing my potential. So, by the principal of universalizability everyone has such a right." Gilbert Harman, *Human Flourishing, Ethics, and Liberty*, 12 Philosophy and Public Affairs 307-312 (Fall 1983), as quoted in Henry B. Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), at 165, n. 26.

<sup>62</sup> It might be pointed out that, in the area of trade at least, very few governments have either a utilitarian or rights based policy. The majority of the world's governments are protectionist when it comes to trade. Neither the North American Free Trade Agreement (NAFTA) nor the World Trade Organization (WTO) agreements are about free trade. They consist of thousands of pages that do little more than protect existing markets and prolong the day when tariffs and quotas will cease to exist. There are even escape clauses

the results under a utilitarian regime would be different than the results under a rights regime. Where results would differ, the rights regime is superior.

There is no place for positive rights in a (negative) rights regime because granting positive rights to one group must necessarily result in the disparagement of someone else's negative rights. When government goes beyond these basic functions of protecting life, liberty and property, it becomes a redistributive state.<sup>63</sup> In order to give something to some individuals or groups, it must first take something from others. That is because governments have no resources of their own. Whatever resources they have they must first take from someone.

It is perhaps Frederic Bastiat, the nineteenth century French philosopher, who summed it up best when he elaborated on the kind of law that governments should not adopt.

See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish this law without delay, for it is not only an evil itself, but also it is a fertile source for further evils because it invites reprisals. If such a law -- which may be an isolated case -- is not abolished immediately, it will spread, multiply, and develop into a system.<sup>64</sup>

Such laws constitute legal plunder for Bastiat because they allow some individuals to use the force of government to rob others.<sup>65</sup> Modern welfare states abound with examples of such redistribution. People who live in subsidized housing do so at the expense of the landlord. Domestic producers who convince

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that permit governments to prolong protectionist measures beyond the scheduled date of expiration. For detailed documentation on this point, see Bryan T. Johnson, Kim R. Holmes and Melanie Kirkpatrick, *1999 Index of Economic Freedom* (The Heritage Foundation and The Wall Street Journal, 1999); James Gwartney and Robert Lawson, *Economic Freedom of the World: 2000 Annual Report* (Vancouver: The Fraser Institute, 2000); United States Trade Representative, *Foreign Trade Barriers: 1999 National Trade Estimate* (Washington, DC: U.S. Trade Representative, 1999).

<sup>63</sup> For a detailed philosophical critique of the redistributive state, see Bertrand de Jouvenel, *The Ethics of Redistribution* (1952).

<sup>64</sup> Frederic Bastiat, *The Law* 21 (1968). This book was originally published in 1850 as a pamphlet, *La Loi*, reprinted in *Sophismes Économiques*, Vol. I of *Oeuvres Complètes de Frédéric Bastiat*, 4th ed. (Paris: Guillaumin et C<sup>ie</sup> 1878), at 343-94.

<sup>65</sup> For some modern examples of such laws, see Dean Russell, *Government and Legal Plunder: Bastiat Brought Up to Date* (1985); Doug Bandow, *The Politics of Plunder: Misgovernment in Washington* (1990).

the legislature to protect them through quotas or tariffs gain at the expense of consumers, who must pay higher prices than would be the case under a free trade regime. People who receive "free" medical care are able to do so only because others are forced to pay for their care through taxation. People whose children are educated for free in government schools enjoy this benefit at the expense of those who are taxed to support education. Asserting that there is a right to education merely means that some individuals have the right to ask government to take the property of others to educate their children. When stated in this manner the unfairness of a positive rights regime becomes obvious.

Another point also needs to be made. While governments start to lose their legitimacy when they pass laws that take property from some individuals and groups and give it to others who have not earned it -- when they go from being the protectors of property rights to the redistributors of other people's property -- a distinction needs to be made between the legitimate role of government and private morality. While most people would agree that a legitimate function of government is to protect property rights,<sup>66</sup> there is disagreement over the legitimacy of other functions of government, and whether governments should be used to enforce morality.

It is immoral to take a person's property without that person's consent. So, in a sense, laws that make theft illegal are legislating morality. But it cannot be said that governments should attempt to legislate morality in areas other than the protection of life, liberty and property. To do so would be to violate the rights of some individuals or groups. For example, if there were laws that forced people to go to church on Sunday (or Friday or Saturday), as was the case in colonial America, the property rights of those individuals who would not otherwise go to church would be violated because they would not be free to use their bodies as the saw fit.<sup>67</sup> Their bodies would have to be in church instead of being able to stay in bed or go to the local race track or tavern.

A number of other laws, some of them quite popular, also disparage property rights. For about 75 years it was illegal to drink coffee in Sweden because of the belief that caffeine was bad. During the 1920s it was illegal to buy alcoholic beverages in a bar in the United States because a group of temperance advocates convinced Congress to pass a constitutional amendment making the practice illegal. Perhaps drinking coffee and alcohol are bad for people, but it

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<sup>66</sup> Some people would disagree with even this function. For example, communists would disagree with this role for government because they believe that personal property should be illegal. Anarchists would disagree with the property protection role of governments because they think that all governments are illegitimate and anything they do is illegitimate. We will leave discussion of these points for another day.

<sup>67</sup> Their liberty rights would also be violated. However, liberty rights are a subset of property rights, as was discussed above.

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does not follow that prohibiting such practices should be a function of government. Where no one's rights are violated, governments should leave people alone to seek their own form of happiness, even if doing so might be considered immoral by some small or large segment of the population.

A whole range of victimless crimes falls into this category of illegal, (perhaps) immoral activity, from prostitution and cocaine use to ticket scalping and dwarf tossing.<sup>68</sup> The reason why these kinds of activities should not be illegal is quite simple. Making them illegal violates someone's property, contract or association rights, whereas keeping them legal violates no one's rights. Women (and men) have a right to rent their bodies for immoral purposes such as prostitution. Individuals have the right to harm themselves, or even kill themselves, which might result if they take drugs like cocaine or coffee. But no one's rights are violated by these activities. But the rights of those who take these drugs are violated if some government prevents them from ingesting these substances into their bodies. To the extent that some government punishes individuals from taking the drugs of their choice, it claims a property right in their bodies.

Thus, properly speaking, the laws of men do not primarily aim at promoting virtue, but only at securing a peaceful living together: they do

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<sup>68</sup> I say "perhaps" because it is not always clear that certain activities are immoral. People who are licensed as sexual surrogates may legally have sex with their clients. It is considered a legitimate form of therapy and beneficial to recipients. Yet if some unlicensed person takes money for having sex with a client it is considered prostitution, and therefore immoral. The only substantive difference between the two individuals is that the state has sanctioned the therapist but not the prostitute. Thus, one may logically reach the absurd conclusion that the state can make an immoral activity moral by licensing it. A similar argument can be made for gambling. It is supposedly immoral to gamble but it is somehow acceptable if the state grants a license to sell lotto tickets.

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not forbid all that is evil, but only that which imperils society;<sup>69</sup>

By now it should have become clear that a negative rights regime is morally superior to either a positive rights regime or a utilitarian regime. Utilitarianism suffers from several fatal flaws, as does a positive rights regime. A regime that does not violate rights is morally superior to a regime that does violate rights. Only a negative rights regime passes the rights test.

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<sup>69</sup> A.P. d'Entrèves, *Natural Law: An Introduction to Legal Philosophy*, second edition (London: Hutchinson University Library, 1970), 84.