RIGHTS, CONTRACT, AND UTILITY IN POLICY ESPOUSAL

Leland B. Yeager

Rival Criteria

This paper defends one version of utilitarianism against supposed alternatives to it as a policy criterion. First it reviews the natural-rights doctrine, contractarianism, and criticisms of each. Several sections state and defend a broad version of utilitarianism. Examples follow of writings about rights and contract that tacitly accept utilitarianism. A summary concludes the paper.

Natural Rights

Clear-cut examples of the antiutilitarian rights doctrine are rare. One reason, apparently, is that doctrines ostensibly of that kind are in fact tacitly utilitarian—a point developed later. Murray Rothbard (1973, pp. 23–25) observes that most libertarians have adopted natural rights and rejected both emotivism and utilitarianism as the foundation for their nonaggression principle. Their basic axiom is the "right to self-ownership," absolute property in one's own body. Accordingly, everyone has the right to perform actions necessary for surviving and flourishing without coercive molestation. Rothbard then develops a theory of property in nonhuman objects by appealing

Cato Journal, Vol. 5, No. 1 (Spring/Summer 1985).

The author is Ludwig von Mises Distinguished Professor of Economics at Auburn University. This paper combines material from three unpublished papers: "Utilitarianism and Rights in Policy Espousal," presented at a meeting of the American Association for the Philosophic Study of Society, Ann Arbor, May 1979; "Contract and Truth Judgment in Policy Espousal," presented in a seminar at George Mason University, October 1983; and "Utility, Rights, and Contract in Policy Espousal," presented at the meetings of the Midwest Economic Association, Chicago, April 1984. Yeager (1984/85) has briefly argued that the position expounded here is essentially, despite differences in terminology, the position of F. A. Hayek.

to John Locke's concept of a person's rightful ownership of previously unused natural resources that he first transforms by his labor (1973, pp. 26ff.). "These two axioms, the right of self-ownership and right to 'homestead,' establish the complete set of principles of the libertarian system" (p. 40).

Rights theorists reject the approach that would take a stand on each specific policy issue, such as deregulation of a particular industry or imposition of wage and price controls or government credit allocation, according to the apparent merits of the individual case; they reject narrowly focused cost-benefit calculations. Instead of being framed by case-by-case expediency, policy should conform to persons' rights.

And those rights should not be defended on a utilitarian basis, for doing so supposedly opens the door to all sorts of pragmatic demands for government intervention. The utilitarian, Rothbard complains (1973, p. 24), will rarely adopt a principle as an absolute and consistent yardstick. Instead, he regards it as a vague guideline or aspiration or tendency that may well be overridden. Milton Friedman, for example, although devoted to the free market as a general tendency, in practice allows many damaging exceptions to freedom against state intervention (Rothbard 1973, p. 24). Utilitarianism—or rather, in my view, its exaggerated pragmatist version—contrasts sharply with a pure doctrine of rights. Rights theorists derive positions even on quite specific policy issues from a very few propositions taken as axiomatic.

Unfortunately, the door is open to interventionist demands anyway. Libertarians cannot keep it closed by issuing methodological pronouncements or by reporting their intuitions about endangered rights. A pure rights position, untainted by utilitarian aspects, might serve for warding off illegitimate or undesirable interventions if it enjoyed general acceptance. Although it might be convenient if a particular doctrine were true and generally accepted, that convenience alone is no evidence, unfortunately, that the doctrine is in fact true. To make the best of reality, which often is inconvenient, we must face it as it is.

In reality, no doctrine will automatically protect us from bad interventions. Abuse of utilitarian arguments cannot be prevented by rejecting utilitarianism *tout court*. Instead, one must enter into discussion with one's pragmatist opponents, demonstrating how acting on an excessively narrow utilitarianism violates rights as intelligibly conceived and convincingly defended and so impedes the pursuit of happiness.

Rights and Value Judgments

What I am rejecting is a *pure* rights doctrine scornful of any utilitarian underpinning. I accept a pro-rights doctrine, provided that propositions about rights are recognized not as purely positive propositions of fact and logic but rather as normative propositions. A definite list of rights is unnecessary here. Suffice to say that rights are persons' entitlements to freedom from coercive interference by their fellows and by government; they concern life, liberty, property, and the pursuit of happiness. (When embodied in constitutions or statutes, of course, normative propositions like that take on an additional, legal, status.)

To identify assertions of rights as value judgments is emphatically not to disparage them as mere expressions of emotion or whim. It is instead the claim of imprescriptible ontological status for them that disparages them by exposing them to easy ridicule, as in Jeremy Bentham's remark (1973, p. 269) about "nonsense upon stilts." Although they are normative, assertions of rights can be supported by appeal to facts of human nature and other aspects of reality and to the findings of psychology, economics, and other disciplines.

As the philosopher Paul Edwards (1965) and the economists Sidney Alexander (1967, especially pp. 105–7, 114–15) and A. K. Sen (1970, especially pp. 62–64) have argued explicitly and as many other writers have recognized, fact and logic can be brought to bear in trying to clear up disagreement over all but fundamental value judgments. (Supporting considerations appear in Adler 1970.) It can be a constructive enterprise to try to clear up disagreement over specific or nonfundamental values. (Examples are the judgments that Jones should be sent to jail, that lying, cheating, and stealing are wrong, that private property is a desirable institution, and that specified rights should be recognized and respected.) It is antiintellectual simply to chalk disagreement up to irresoluble emotional differences. We can give and discuss *reasons* for value judgments.

Reasons for and against specific value judgments might include positive analysis showing why accepting some tends to promote and accepting others to subvert a society of a kind conducive to its members' successful pursuits of happiness. An important objective element, utilitarian in a broad sense, thus enters into the vindication of human rights. Only when we finally have nothing left to appeal to beyond some such fundamental value judgment as one favoring happiness and abhorring misery have we exhausted the relevance of facts and logic, investigation and discussion. But bona fide disagreements in the real world seldom if ever center on fundamental values,

openly avowed. For practical purposes of policymaking, then, the fact-value distinction fades away.

Abstract Reasoning in Favor of Rights

The most immaculately antiutilitarian version of the rights doctrine boils down all too soon to simply promulgating rights and even to anathematizing disagreement as a sign of moral deficiency. Some antiutilitarian proponents of rights (Rothbard 1973, Rothbard 1982, Gewirth 1978, Mack 1978, Paul 1978) do offer arguments, after all, but arguments of peculiarly abstract kinds—appealing (as already noted) to self-ownership and Lockean homesteading or, alternatively, to what one must say about rights to avoid logical error.

Consider, for example, what Alan Gewirth does with his Principle of Generic Consistency, which, "unlike utilitarian and material deontological theories, . . . contains within itself the ground of its necessity; it is self-justifying" (1978, quotation from p. 203). Certain rights must be respected if each person, a purposive being, is to strive effectively for his purposes. He cannot consistently claim these rights for himself while denying them to persons affected by his actions when the very reasons he gives for claiming the rights for himself also apply to those other persons. He would be uttering logically contradictory propositions. In effect he would be saying: All persons for whom such-and-such reasons hold, including me, have such-and-such rights; yet he would deny, when expedient for himself, that other persons have those rights even though the stated reasons do hold for them also.

I question the supposed logical contradiction. An egoist might consider it expedient to claim certain rights for himself and deny them to others when he can get away with it. *He* is not necessarily accepting certain statements about rights as objectively true; *he* is not committing logical error. Instead, he considers it expedient to encourage other persons to hold certain beliefs about rights, beliefs in which those others might perceive internal contradictions if they were astute enough. If he can thereby further his own purposes, why should he care about the contradictions in other persons' beliefs? (In taking up what he calls "the Machiavellian case," pp. 196–98, Gewirth does try, but ineffectually, to rebut a counterargument similar to but not the same as mine.) We might consider the person a scoundrel, but that is not the same as his being a poor logician.

Eric Mack (1978) tries to derive the existence of rights from the proposition that coercion is deontically wrong—wrong because of its very character and not just because of its consequences. Because

each person is an end in himself, it is deontically wrong for others to cause his actions to be out of accord with his own purposes, which is what coercion does. The deontic wrongness of coercion condemns any destruction of freedom by it. Contractual rights and property rights can also be vindicated by recognition of their violation as essentially coercive. Mack recognizes that utilitarian reasons for respecting rights could be grafted onto his argument but maintains that his argument does not depend on them.

Arguments, Not Just Intuition

The examples already given illustrate how antiutilitarian ethicists stop short, before a utilitarian would, with mere propounding or with appeal to irreducible intuition (even if they do not use the term). But what is intuition based on? Perhaps on an unarticulated recognition of consequences—tacit utilitarianism. Conceivably humans have an innate propensity, elaborated by natural selection, to develop such intuitions. If so, the consequences of having or not having them must have figured in the biological process.

Why not, then, strive to clarify those intuitions by disciplined observation and reasoning? It seems inadequate to rest everything on the assertion, for example, that individuals, as ends in themselves, simply should not be coerced. Such a line of argument does not take adequate account of the social context in which questions about rights arise. The utilitarian, however, does press on with an empirically oriented investigation into what sorts of institutions and practices do and what sorts do not accord well with human nature and the human condition.

Supposed axioms about rights cannot serve as the ultimate foundation of one's conception of desirable social arrangements. Instead, propositions about rights must be argued for, along with other propositions about what makes for a good society. John Gray (1983, especially pp. 59–60, 66, 68) maintains that John Stuart Mill in effect sought—successfully, Gray implies—to provide a utilitarian underpinning for respect for rights.

Another ethicist-economist who does so is Henry Hazlitt (1964, pp. 286–87). Within necessary qualifications, he says,

> legal rights are or ought to be *inviolable.* And so, of course, should moral rights be.
>
> This inviolability does not rest on some mystical yet self-evident "law of nature." It rests ultimately (though it will shock many to hear this) on utilitarian considerations. But it rests, not on *ad hoc* utilitism [sic], on expediency in any narrow sense, but on *rule* utilitism, on the recognition that the highest and only permanent

> utility comes from an unyielding adherence to *principle*. Only by the most scrupulous respect for each other's imprescriptible rights can we maximize social peace, order, and cooperation.

Elsewhere Hazlitt (1978, pp. 22–23) describes natural rights as "simply the rights that people ought to have." He notes the idea that rights gain in sanctity and respect by being called "natural," as if they were "something built into the universe, prior to creation, prior to existence." Actually, "natural rights" is "a mystical phrase. It's simply an unnecessary concept."

Before noting expositions of the rights doctrine that are tacitly utilitarian, we must consider the latter doctrine. First, though, a review of another rival doctrine is in order.

Contractarianism

A "contractarian" approach or attitude toward public policy has won respectful attention in recent years. Its most forceful and prolific advocate has been James M. Buchanan. (See the bibliography and, for some criticism, Gordon 1976 and Samuels 1976). Buchanan and other contractarians often also cite John Rawls (1971) with approval.

Contractarians exalt the individual over "society," agreement over coercion, and application of consent as the overriding criterion of desirability not merely to small-scale interpersonal relations but also in the large—to the broad framework of social, political, and economic institutions. A social contract—if not an actual one, at least a "conceptual" one—figures prominently in their vision.

Quotations from James Buchanan will help convey the contractarians' case and their objections to the allegedly opposed "truth-judgment" approach.

> To the contractarian that law is legitimate, and just, which might have emerged from a genuine social contract in which he might have participated. That law is illegitimate, and unjust, which finds no such contractual basis. [1977, p. 127]
>
> My point is mainly that of emphasizing the use of process, as opposed to end-state results. . . . For Rawls, as for contractarians generally, that which emerges from contractual agreement is just. . . . [1977, p. 61]
>
> That is "good" which "tends to emerge" from the free choices of the individuals who are involved. It is impossible for an external observer to lay down criteria for "goodness" independent of the *process* through which results or outcomes are attained. The evaluation is applied to the means of attaining outcomes, not to outcomes as such. [1975a, p. 6]

Many more passages of similar import can be found in Buchanan's writings. He would have us approve or disapprove of states of affairs

or sets of rules not by considering their substance but overridingly by appraising the process employed to reach decisions about them.

Some Preliminary Doubts about Contractarianism

That idea seems odd to me. It resembles the idea that whatever people freely choose is in fact good for them. (Broome 1978 exposes this fallacy. One of his examples concerns "Jane," who, perhaps out of a sense of duty somehow absorbed from her surroundings, chooses to sacrifice an independent life of her own to care for her aged mother. It does not necessarily follow that Jane's free choice best serves her own interest or fulfillment or happiness or even that it maximizes her and her mother's utilities combined. Broome is simply warning against an invalid inference, of course, and not saying that some authority should impose on Jane the lifestyle it thinks best for her.)

Price theory and welfare economics may legitimately, for some purposes, assume that people make choices so as to maximize their utilities on the basis of definite utility functions. It does not in the least follow, however, that freedom of choice is the very criterion of what to choose. A libertarian might deplore forcible interference with the use of addictive drugs. Yet this attitude does not commit him to the view that drugs serve the happiness of those who choose to take them. He would not be inconsistent in considering the drugs harmful and their use deplorable.

Similarly, voluntary agreement is not itself the criterion of what to agree on. To value voluntary agreement and the democratic process in no way commits an economist or social philosopher to value whatever institutions or policies such processes may grind out. Why should he feel obliged to withhold any criticism? Decisionmaking procedure is itself properly an object of approval or disapproval, but it cannot sensibly be taken as the sole criterion of what to decide.

Rather than suppose that proper procedure exhausts the content of the good society, it would seem reasonable to emphasize proper procedure as an important part of that conception. But it is hard to see how a procedure can be deemed good utterly apart from some consideration of its likely results.

As Scott Gordon observed in reviewing *The Limits of Liberty*, Buchanan was trying to derive "moral principles without the aid of any moral premise" by carrying over positive analysis of collective decisionmaking into fundamental political philosophy. Buchanan might reply that he does have a moral premise, a weak one favoring individualism. Anyway, in Gordon's view (1976, p. 583), Buchanan's attempt to get normative conclusions from analysis that is entirely

(or almost entirely) positive "cannot succeed. . . . [T]ry as one will, that troublesome word 'ought' cannot be excised from political philosophy and no degree of sophisticated 'is' can take its place."

Striving for clarity may justify some harshness: except in brief and untypical passages, Buchanan tries to conceal his employment of and to shirk his responsibility for values that he, like anyone, *must* be employing when he recommends anything, even when what he recommends is process rather than substance as the criterion for appraising institutions and policies.

Viktor Vanberg (1985) also raises apt questions about a supposedly purely procedural criterion. Can we appraise a process or a set of rules solely by the procedure of establishing and changing it, and so on? How do we avoid infinite regress? Isn't some substantive criterion needed somewhere? Furthermore, doesn't an "agreement test" unavoidably muddle together observations of people's preferences and of their theories about how alternative institutions would work? (Vanberg attributes the latter point to Karen Vaughn. As Vaughn has also said somewhere, or so I am told, choosing constitutional principles is not as easy as choosing a toaster.) One implication, I should think, is that economists and social philosophers have a legitimate role explaining and preaching what social arrangements they consider best, and why.

"Contractarianism gets its name," says one commentator (Pettit 1980, pp. 147–48), "from the device which it uses to filter out people's enlightened preferences." It identifies just social arrangements as those that answer to people's preferences—not the sort recorded by ordinary voting, however, but rather the preferences that people would have if they were not influenced by narrow self-interest and bias.

But on what grounds would people—people in real life and even or especially people stripped of distinctive self-interests (as by being placed behind a Rawlsian "veil of ignorance")—prefer one set of social arrangements over others? On what basis can a social philosopher hope to distinguish between laws or constitutions that could and those that could not have been agreed upon under either actual or idealized conditions? The only plausible basis, I submit, is that people stripped of narrow self-interest would consider the preferred arrangements as coming closer to an impartial conception of the good society, that is, as being more conducive to happiness, than the alternatives. A contractarian might say: No; impartial people would prefer those arrangements because they were *fair*. But why is fairness so desirable? Either because it just *is*, because a compelling intuition insists on it, because the question is not further discussible; or else

because people's treating each other fairly is conducive to their effective pursuit of happiness.

I assert not that contractarianism is flatly wrong but that it disguises its affinities with utilitarianism by repulsive and unnecessary fictions (about which I shall have more to say).

The Attack on "Truth Judgment"

Yet Buchanan sharply contrasts his contractarian vision with the "truth-judgment" approach, as he disparagingly labels a position akin to the utilitarianism defended in this paper. This scorned approach tends to "assume that there is a unique explanation, a unique set of rules which defines the elements of a good society and which, once discovered, will come to be generally accepted by informed and intellectually honest men" (1977, p. 75; the phrases quoted occur in interrogative sentences, but the context leaves little doubt that Buchanan is characterizing the approach he condemns).

Buchanan distinguishes further between his own approach and its rival. His contractarian conception is analogous to market activity, a search for agreement to the mutual benefit of the participants. The truth-judgment approach is analogous to the deliberations of a jury (1984, pp. 29–30). Earlier (1975a, p. 164) he had distinguished, similarly, between the politician and the judge. The politician seeks consensus and acceptable compromises.

> He is not engaged in a search for some one "true" judgment, and he is not properly behaving if he seeks to further some well-defined ideal drawn from the brains of his academic mentors. The judge is in a distinctly different position. He does seek "truth," not compromise.

As applied to politics, Buchanan deplores the judge or jury conception. It conduces to intolerance by those who think they have attained political truth. Implicitly they claim the right to impose truth on persons mired in error (1977, pp. 76–77). Their view entails

> a demonstrated willingness to impose nonvoluntary changes on the existing pattern of entitlements in social order. . . . Once truth is found, there is no moral argument to be raised against its implementation. Consent is meaningless in this context. Opposition can be variously characterized as stemming from ignorance, folly, or the exercise of selfish interest. In any case, the views of those who actively oppose the truth-carrying zealots are not treated as worthy of respect. And any requirement to compromise with such views arises only because the reformists might otherwise lack the power to impose 'truth' unilaterally. [1977, pp. 143–44]

Buchanan (1975a, p. 167) sees many social philosophers exhibiting

> intellectual and moral arrogance. An attempt to describe the social good in detail seems to carry with it an implied willingness to impose this good, independently of observed or prospective agreement among persons. By contrast, [his] natural proclivity as an economist is to place ultimate value on process or procedure, and by implication to define as 'good' that which emerges from agreement among free men, independently of intrinsic evaluation of the outcome itself.

Passages abound in which Buchanan dwells on this theme of the arrogance, the itch to play God, of those who presume to employ their own value judgments in trying to frame a coherent conception of a good society.

For contractarians, process and consent, not outcome or substance, form the criterion of goodness or desirability in human institutions and relations. " 'Truth,' in the final analysis, is tested by agreement. And if men disagree, there is no 'truth' " (1977, p. 113). "A scientist may advance an argument to the effect that a proposition is 'true.' His argument . . . may succeed in establishing a consensus among his fellow scientists. But the 'truth' of the proposition emerges only from this agreement and not from some original objective reality" (1977, p. 145n.).

Authoritarianism, Relativism, Fallibilism

This extreme relativism is remarkable, yet Buchanan finds adopting it necessary to avoid authoritarianism with regard to truth. Actually, these are not the only alternatives.

Harry Davis (1967/68) has described a third position distinct from the two between which Buchanan evidently thinks the choice must lie. The first of those is the authoritarian position of one who believes he possesses an infallible pipeline to objective truth. That is the position of the baseball umpire who insists that he calls balls and strikes as they objectively *are*. The second is a relativist-nominalist position of rejecting all absolutes and embracing a radical relativism or skepticism. An umpire holding this view says that pitches are neither balls nor strikes until he calls them. The third position, "fallibilism," combines metaphysical or ethical objectivism with epistemological relativism. The fallibilist umpire says, "I call 'em as I see 'em." On this view, it makes sense to seek objective truths about reality, even including truths about what is morally valuable and politically desirable. Yet no person or group is entitled to claim infallible possession of such knowledge. Each searcher contributes what he can, aware that his contribution is incomplete and perhaps erroneous. In science, culture, and philosophy, fallibilism calls for

free discussion open to the competition of all ideas, evidences, and arguments. (Davis recognizes fallibilism as a central concept in the philosophy of Charles Sanders Peirce. See also Wiener 1968 and Peirce 1955.)

Far from being subversive of constructive discussion, a willingness to state clearly what one believes and why, exposing one's views to inspection and possible refutation, is essential to it.

The fallibilist position adopts the scientific attitude and method. Belief in the meaningfulness or at least the heuristic value of the concept of objective truth to be sought through research and discussion need not entail arrogance, elitism, and an eagerness forcibly to impose one's beliefs. Belief, for example, that one type of society is more conducive to human happiness than another in no way entails an eagerness to implement one's vision with force. A concern for process and for how decisions are made and implemented, an extreme aversion to having policies, even good ones, rammed down one's own throat or down other people's throats, may well be a major element in one's conception of the good society. An adherent of the truth-judgment approach may well harbor this strong concern for due process; it is not the private property of the contractarians.

Yet the contractarians tend to suppose that a policy not commanding a strong consensus in its favor (or whose adoption would not at least be in accordance with an underlying constitution deemed to command unanimous consent) is thereby revealed to be bad or undesirable. (Passages to this effect in Buchanan and Tullock 1962 are quoted in Yeager 1978, p. 200 and note 17.) The contractarians overlook a vital distinction: What is undesirable in such a case is not necessarily the policy itself but rather its imposition by antidemocratic means. It is not necessarily inconsistent or antidemocratic or elitist for an economist or social philosopher, while deploring imposition of the policy, to continue advocating it and trying to explain its virtues. In short, the nihilistic relativism of the contractarians is by no means the only alternative to a repulsive authoritarianism.

Contractarian Fictions

Contractarians understand, of course, that specific policy measures cannot in practice be enacted only with unanimous consent. They therefore try to find constitutional authority for nonunanimous enactments. The constitution need not necessarily be a written document; it may consist of the fundamental features of the existing society. That broad constitution is deemed to command substantially unanimous consent by virtue of its actual existence and people's living

under it. (See, for example, Buchanan and Tullock 1962, pp. 254, 260–61.) Yet David Hume had long before mocked such notions of passive, tacit consent with his much-quoted example of the shanghaied sailor who, merely by refraining from jumping overboard, does not thereby consent to the captain's supposed authority over him ("Of the Original Contract," reprinted in Hume 1965, p. 263).

Buchanan and Tullock (1962, pp. 260–61) conceived of the "social contract" as

> a dynamic one. . . . We do not conceive the 'constitution' as having been established once and for all. We conceive the contractual aspects to be continuous, and the existence of a set of organizational rules is assumed to embody consensus. We think of the individual as engaging continuously both in everyday operational decisions within the confines of established organizational rules and in choices concerned with changes in the rules themselves, that is, constitutional choices. The implicit rule for securing the adoption of changes in these organizational rules (changes in the structure of the social contract) must be that of unanimity. This is because only through the securing of unanimity can any change be judged desirable on the acceptance of the individualistic ethic.

In later writings Buchanan also treats a supposed implicit social contract as if it had actual force. He refers (1975a, p. 96) to the "existing and ongoing implicit social contract, embodied and described in the institutions of the status quo. . . ." At greater length (1975a, pp. 84–85), he argues that the status quo must be evaluated as if it were legitimate contractually, even

> when an original contract may never have been made, when current members of the community sense no moral or ethical obligation to adhere to the terms that are defined in the status quo, and . . . when such a contract, if it ever existed, may have been violated many times over. . . . Does the presence of any one or all of these negations remove legitimacy from the status quo?
>
> Again it is necessary to repeat the obvious. The status quo defines that which exists. Hence, regardless of its history, it must be evaluated as if it were legitimate contractually. Things "might have been" different in history, but things are now as they are.

The interpretation conveyed by the foregoing quotations finds support in a book (1983) by one of Buchanan's former students. The social-contract theory of the state, Randall Holcombe explains, is an attempt to describe the legitimacy of the government's power. It views society as "a type of club, where all individuals conceptually agree to become members and adhere to the club rules." Actually, individuals are born into society and must adhere to its rules whether they agree to or not. "Here, the social contract theory of the state

must fall back upon the conceptual agreement of all members of society. The state operates as if all members of society had agreed to its rules—as if there is unanimous approval of the constitution." (Holcombe 1983, pp. 124–25; compare passages of similar import on pp. 9, 123, 125–26, 134.)

Holcombe does not accept Buchanan's formulations wholly without reservation. "Since all of the members of the society did not actually agree to a social contract, . . . some type of conceptual agreement must be fabricated if the theory is to have any connection with reality" (1983, p. 155). The words "must be fabricated" deserve emphasis.

The writings of Buchanan and other contractarians (including Holcombe 1983, especially chapter 8) bristle with words like "conceptual" and "conceptually"—"conceptually agree," "conceptual agreement," "conceptual social contract," "conceptual unanimous approval," and the like. The very use of the words indicates that a "conceptual" agreement is not an actual one, that a "conceptually" true proposition is not actually true. It is no mere joke to say that "conceptually" is an adverb stuck into contractarians' sentences to immunize them from challenge on the grounds of their not being true.

Buchanan (1975b, pp. 123, 125) distinguishes between constitutional and postconstitutional stages of decisionmaking and envisages agreement or "conceptual" agreement at the constitutional stage as authorizing "apparent coercion" and "apparent redistribution" at the postconstitutional stage. By such fictions, realities like actual coercion and actual redistribution are interpreted away. They vanish into the realm of the merely "apparent" by being deemed in accordance with some agreement that may itself be merely "conceptual."

Even punishment, in Buchanan's view (1975a, p. 192n.) implements a contract. "In a genuine contractarian theory, there is no problem raised concerning the 'right' of some persons to punish others, since, in effect, individuals who find themselves in the implicit social contract that any social order presupposes have presumably chosen to be punished as the law directs when they violate law." Here the word "presumably" seems to mean "conceptually" in Buchanan's sense.

Further evidence of the contractarians' reliance on fictions is that Buchanan and many other commentators accept John Rawls's (1971) characterization of his own method as contractarian. Actually, no social contract at all is involved in Rawls's derivation of his principles of justice. Instead, Rawls employs elaborate fictions (about deliberations behind a "veil of ignorance") in more or less disguising—

perhaps even from himself—his total reliance on his own intuitions. (It astonishes me how many eminent scholars swallow Rawls's own characterization of his approach. Among the apparent minority who do identify what Rawls actually does are Hare n.d. and Gray 1978.)

No one need object to fictions if they are heuristically useful—if they stimulate the flow of ideas. Nor is it necessarily objectionable to employ fictions and figures of speech for expository and stylistic purposes. But a doctrine should not *depend* on them. Ideas that defy expression in straightforward, nonmetaphorical language incur deserved doubt by that very fact.

Contractarians might strengthen their case by occasionally presenting it, if they can, without resort to their favorite fictions. In doing so, however, they would be bound to erase sharp distinctions between their approach and the supposedly despicable truth-judgment approach. The version of the latter advocated in this paper does lead to much the same individualistic values as contractarianism, but its conceptual apparatus and expository style are quite different—more straightforward, and charier of fictions.

Utilitarianism Under Attack

Utilitarianism is routinely caricatured and scorned nowadays, and some versions do deserve scorn. It is said to be lowbrow, crass, and subversive of personal rights. The Benthamites, says Joseph Schumpeter (1954, pp. 133, 407–8), created "the shallowest of all conceivable philosophies of life."

That assessment might well apply if utilitarianism really did recommend that people spend their lives pursuing immediate pleasure. The utilitarianism defended in this paper, however, concerns the appraisal of social arrangements—policy espousal, as Philbrook (1953) would say.

Jeffrie G. Murphy (1977, p. 232) criticized a version that he attributed, probably wrongly, to John Stuart Mill:

> This theory is so obviously morally bankrupt that very few contemporary moral philosophers take it at all seriously. . . . [It] fails to pay attention to . . . important *autonomy* values . . . and thus fails to articulate a satisfactory conception of *justice* or *respect for persons*. It does not . . . rule out the sacrifice of persons for the general good.

Walter Grinder (1978, pp. 9–10) bewails "the tired and woefully pragmatic doctrines of end-state utilitarianism—the cursed Benthamism in all its permutations, that has proved the bane of liberty's existence for almost 200 years. During the 19th century, utilitarianism almost singlehandedly short-circuited the great classical liberal

revolution." Frank S. Meyer (1962, pp. 1–2, 32–33) perceived a fatal flaw in the philosophical underpinnings of utilitarianism. Nineteenth-century liberalism "deserted its heritage of defense of freedom of the person" and "denied the validity of moral ends firmly based on the constitution of being. Thereby, with this denial of an ultimate sanction for the inviolability of the person, liberalism destroyed the very foundations of its defense of the person as primary in political and social matters." To utilitarians, "Human beings considered as the objects of operations are no more nor less than . . . objects. Kant's imperative is reversed. Our humanitarians of the welfare society take as their maxim: treat no person as an end, but only as a means to arrive at a general good."

The criterion of the greatest sum of the utilities of individuals is collectivistic, according to John Rawls; it regards individuals as processing stations for converting goods and services and experiences into increments to aggregate social utility. The ideal utilitarian legislator, in allocating rights and duties and scarce means of satisfaction, makes decisions similar to those of a maximizing entrepreneur or consumer; his correct decision is essentially a matter of efficient administration. "This view of social cooperation is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator. Utilitarianism does not take seriously the distinction between persons" (Rawls 1971, p. 27; cf. pp. 178–92, 449, 450, 572–73).

This last objection ties up with reference to the nonoperationality of the aggregate-utility criterion. Can one conceive of operationally meaningful rules for sacrificing individuals for the greater good of "society"? How good, how conducive to the pursuit of happiness, would a society with such rules be? And how would the utilities of different persons be measured and compared and added anyway? (Perhaps the clearest example of accepting the maximum-aggregate-utility criterion is Edgeworth [1881]. Edgeworth already pointed out [p. 136], as Rawls did later, that this version of utilitarianism requires extreme altruism; it connotes *"Vivre pour autrui."*)

Act-utilitarianism, as distinguished from rules-utilitarianism, is particularly objectionable. It calls on the individual to choose, in each separate case, the action appearing likely to contribute to the greatest excess of pleasure or happiness or good over the opposite. No notion of rights or principles should bar such a calculation, for respecting them is not an independent objective. Respecting them is fine when it happens in the individual case to serve the greatest

excess of pleasure over pain, but that excess alone remains the final criterion.

Perhaps the clearest recent example of wanting each case handled on its own merits with no presumption in favor of respecting rights or principles occurs in Joseph Fletcher's *Situation Ethics* (1966). Fletcher departs from act-utilitarianism as ordinarily conceived only in making "love" rather than happiness the criterion and in making the altruism it calls for more blatant and cloying. Even this substitution makes little difference, since Fletcher interprets "love" as conduciveness to well-being, especially of persons other than oneself. In the coalition that he recommends between the love ethic and the utilitarianism he attributes to Bentham and Mill, "the hedonistic calculus becomes the agapeic calculus, the greatest amount of neighbor welfare for the largest number of neighbors possible." Fletcher "holds flatly that there is only one principle, love, without any prefabricated recipes for what it means in practice, and that *all other* so-called principles or maxims are relative to particular, concrete situations! If it has any rules, they are only rules of thumb." "The situationist holds that whatever is the most loving thing in the situation is the right and good thing" (quotations from pp. 95, 36, 65 respectively).

No wonder critics reject utilitarianism understood as something like that. It betrays remarkable arrogance to take it for granted that the actor in the individual case, tacitly endowed with the omniscience of the act-utilitarian or act-agapeic philosopher himself, can foresee all the immediate and remote and all the direct and indirect consequences of his actions, even including those working through reinforcing or undermining principles and habits and through affecting persons' moral characters, and can assess the good and bad values of all these consequences and strike a balance. As Peter S. Prescott (1973) has said, "what was recently called 'situation ethics' . . . can be defined as action based on invincible trust in one's own moral perspective."

An extreme act-utilitarianism or situation ethics might indeed countenance framing and executing an innocent man to pacify an angry mob and so avoid worse outrages—to mention the example so routinely trotted out (for example, McCloskey 1969, p. 181; compare Rothbard 1973, pp. 24–25, on the execution of all redheads to delight the rest of the population).

Some Answers to the Critics

John Rawls comments perceptively on this sort of attack on a straw-man version of utilitarianism. (Rawls 1955, writing before McCloskey

1969 and before his own book of 1971, attributed the standard horrible example to E. F. Carritt. Rawls 1955 [pp. 76–78] also answered the question, raised in a similar vein, whether it is acceptable to break one's promise when the consequences of doing so appear good on balance. The very point of promising "is to abdicate one's title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans coordinated in advance. . . . The promisor is bound because he promised: weighing the case on its merits is not open to him." The institution of promising and promise-keeping itself has obvious utilitarian advantages. That the promisor's obligation may be overridden in exceptional hard cases does not mean that the obligation does not exist at all.)

How conducive to happiness would a society be, Rawls (1955) asks in effect, in which truth and rights were treated as contemptuously as in the hackneyed horrible example? More specifically, in what context might a judgment be made in favor of sacrificing the innocent victim to pacify the mob? It is vague to say that it would be a good idea if somebody did something to save many innocent lives by sacrificing one. How could such acts be institutionalized? Just who would be authorized, and in what circumstances and under what rules, to inflict "telishment" (by which Rawls apparently means ostensible punishment inflicted for ulterior purposes)? Several reasons are obvious, and Rawls suggests some, why an institution of telishment could hardly be justified on utilitarian grounds.

Does this dismissal of the telishment case simply postulate out of existence the difficulties that it is meant to illustrate? Am I denying that any single case could ever arise in which sacrificing an innocent person might appear to promise greater good on the whole? Well, can one ever be confident that such a case has in fact arisen? The consequences of supposing so and acting accordingly are unfathomable. Approving the violation of rights whenever the decision-maker thinks it would be beneficial on the whole would reinforce unhealthy temptations and undercut the very concept of rights. A society tolerating such violations would hardly be one in which people enjoyed relatively favorable opportunities to make good lives for themselves. Taking account of the associated institutions, habits, attitudes, and personality traits, as well as the fact that each person has a life and consciousness and purposes of his own, requires rejecting such a society. Endorsement of personal rights instead follows precisely on utilitarian grounds.

In the abstract, though hardly in convincing detail, one can contrive a case in which an act ordinarily deemed wrongful would have a net balance of good consequences, even with any undermining of respect

for rules and rights counted on the negative side in the assessment. Perhaps the wrongful act can be kept secret, and its victim would have died soon of agonizing disease anyway. The contrived assumptions would rule out such adverse consequences as impairment of the agent's attitudes and moral character. The assumptions would render the proposition about the acceptability of the otherwise wrong act an empty tautology. *If* the act really would lead to the greatest net utility, absolutely all things accurately considered, and *if* the greatest net utility is one's criterion of what ought to be done, then the act ought to be done. But in what actual context could these *if*s be met? When could one have absolutely all the relevant knowledge of consequences, including the consequences of violation of valued principles, certainty that one's knowledge was accurate and complete, and certainty of one's accuracy in weighing opposing considerations? The assumptions required negate the real-world context that in fact recommends rules-utilitarianism over act-utilitarianism.

Suppose for the sake of argument, nevertheless, and quite implausibly, that a clear case of the postulated kind did arise. Suppose, further, that arranging compensation acceptable to the prospective victim or victims was for some reason impossible and that the burden of decision fell on me. Then I would have to face up to that case. I cannot commit myself in advance, ignorant of the specific facts, to insisting on observance of rules and rights even though the heavens should crumble. And neither could a self-styled antiutilitarian champion of rights.

A Defensible Utilitarianism

A sounder version of utilitarianism than the one routinely pilloried has been called rules-utilitarianism or indirect utilitarianism. (John Gray 1983, especially pp. 11–15, 31–32, 38–39, 46–47, attributes an indirect utilitarianism to John Stuart Mill and tries to distinguish it from rules-utilitarianism; for present purposes the distinction is inessential.)

According to McCloskey, however, rules-utilitarianism arises from awareness that the act version will not do; yet it is only pseudo-utilitarianism. It opts for "irrational" conformity to rules even though no intrinsic moral significance attaches to them and even when conforming to them brings greater total evil. The rules-utilitarian prefers conformity to a rule to maximization of good. If he replies that "his is the best way of promoting the greatest good, he is abandoning rule for act utilitarianism" (McCloskey 1969, p. 188).

Why, though, does McCloskey speak of *irrational* conformity to rules? Rules serve human welfare. Utilitarianism of course recognizes dilemma cases—they figure in the human predicament—in which applicable rules clash and in which some must be overridden to permit conforming to others more demanding in the particular case. To recognize such cases is not to lapse back into act-utilitarianism or situation ethics. The rules version does stress the advantages of habituation to rules and does caution against excessive readiness to override a rule (especially against the temptation to make an exception in one's own favor). If the idea of framing the innocent man to pacify the mob so shocks us, it is because we rightly find it so hard to imagine cases in which the rule of justice should be the one to be overridden. The quality of McCloskey's debating tactics is evident in his example (p. 191) of choosing between abiding by Australia's drive-on-the-left rule and colliding with a car in the wrong lane.

As for rules having no "intrinsic" moral significance, well, what is so suspect about there not being irreducible ultimates for which no arguments can be offered? Of course utilitarianism does not and cannot insist that rules be followed for their own sakes. On the contrary, rules are *instrumental* to a good society and thereby to people's happiness. To treat rules as absolute ultimates would undermine respect for them by making them appear ridiculous.

Let us consider the question of justice and injustice a bit further. Victimizing an innocent person or minority for the supposed greater gain of others is indeed unjust. But we need not stop short with reporting our intuition to that effect; we can give reasons for our judgment. We do not downgrade justice by not regarding it as an undiscussable ultimate. Injustice subverts social cooperation and the pursuit of happiness. Sir James MacIntosh argued (*Vindiciae Gallicae*, quoted in Halévy 1955, p. 185) that the extreme usefulness of general principles of justice makes them morally obligatory.

> Justice is expediency, but it is expediency, speaking by general maxims, into which reason has concentrated the experience of mankind. . . . When I assert that a man has a right to life, liberty, &c. I only mean to annunciate a *moral maxim* founded on *general interest*, which prohibits any attack on these possessions. . . . [A Declaration of Rights is an expedient] to keep alive the Public vigilance against the usurpation of partial interests, by perpetually presenting the general right and the general interest to the Public eye.

John Stuart Mill (*Utilitarianism*, Chapter 5, p. 299 in Mill 1968) said: "Justice is a name for certain classes of moral rules which concern the essentials of human well-being more nearly, and are

therefore of more absolute obligation, than any other rules for the guidance of life. . . ."

Social Cooperation and Comparative Institutions

As an approach to understanding what sorts of individual conduct and especially what institutions and policies are desirable, rules- or indirect utilitarianism amounts to much the same thing as the comparative-institutions or good-society approach. These all have an affinity with the "truth-judgment" approach disparaged by James Buchanan.

For present purposes it matters little whether these different labels apply to exactly the same doctrine; if not identical, the doctrines do share a common orientation. Their adherents try to form a conception of the good society by contemplating and comparing alternative sets of mutually compatible social institutions. Their ideal is whatever arrangements best facilitate the success of individuals seeking to make good lives for themselves in their own diverse ways. (Strictly speaking, their ultimate criterion is human happiness, however best served. It is a researchable and discussable empirical judgment that happiness is served by institutions that facilitate voluntary cooperation, including ones that secure the rights mentioned in the U.S. Declaration of Independence.)

This approach recognizes the importance of mutually beneficial cooperation among individuals—through peace and security and through the gains from specialization and exchange. (Adam Smith pointed out that man is a social animal; he makes contracts. As Scott Gordon [1976, p. 586] notes perceptively, "the most important feature of that word is the final letter, which makes it plural. There is a world of difference between the conception of society as consisting of contracts and the conception of it as based upon a contract.")

The approach recommended here appraises particular principles, rules, institutions, and policies according to whether they are likely to serve or subvert social cooperation in the sense just indicated. (The concept if not the term is prominent in the philosophies of Thomas Hobbes and, as F. A. Hayek has emphasized, of David Hume. See Hobbes, *Leviathan*, chap. 15, and Kemp 1970. The term "social cooperation" is prominent in the writings of Herbert Spencer, Ludwig von Mises, and Henry Hazlitt.)

Social cooperation counts as a near-ultimate criterion, since it is an indispensable means to individuals' effective pursuit of their own happiness in their own diverse ways (Hazlitt 1964, especially p. 36). Cooperation is facilitated by rules that improve people's chances of

predicting each others' behavior and achieving coordination. Voluntary cooperation accords better than coercion with each person's having purposes and ideals of his own and with his having only one life to live. Emphasis on voluntary cooperation warns against authorizing any agency to impose unfair sacrifices on individuals for the supposed greater good of a greater number. But this approach does not simply postulate voluntary cooperation and deplore coercion. It investigates and compares the types of society likely to emerge from having alternative sets of institutions and rules and, in particular, from whether or not personal rights are recognized and respected.

The term "utilitarianism" as used here applies to any critical examination of social rules and institutions, their functioning, and their implications for happiness. In this wide sense, F. A. Hayek says (1976, pp. 17–18), anyone prepared to examine existing values rather than accept them unquestioningly is a utilitarian; Aristotle, Thomas Aquinas, and David Hume would so count.

In rejecting act-utilitarianism for rules-utilitarianism—but the terms are not his—Hayek explains (1969, pp. 45–46) why it may be rational to disregard known particular circumstances when making decisions. Accidental and partial bits of information might not change the probability that if we knew and could process all information about the circumstances, the net advantage would lie on the side of following the applicable rule. We should not decide each case on the basis of the limited number of individual facts that we happen to know.

One reason for abiding by rules, then, is that we simply cannot assess all the consequences and costs and benefits—direct and remote, immediate and delayed—of alternative actions in each particular case. One might object that this position is antiintellectual, making a virtue of ignorance. How can we know that advances in theory and technology may not make possible those allegedly impossible assessments? Part of the answer, I conjecture, is that the critic has not really seen the point. Rules-utilitarianism does not glorify ignorance. Rather, it perceives the rationality of acting, in certain cases and aspects of life, on generally applicable abstract principles instead of on the fragmentary and probably accidentally biased bits of concrete information that one may happen to possess. Furthermore, complexity and ignorance by no means form the entire case for rules-utilitarianism. Acting by rule or on principle often contributes to *overcoming* ignorance, namely people's ignorance of each others' probable behavior. General acceptance of principles contributes to predictability in the world and thus to people's chances of coordinating their activities to their mutual benefit.

As a utilitarian in the tradition of Hume rather than Bentham, Hayek does not envision maximization of some aggregate of numerical measures. He says (1976, pp. 129—30) that the aim in developing or altering rules of just conduct "should be to improve as much as possible the chances of anyone selected at random." He speaks of *chances* rather than *probabilities* "because the latter term suggests numerical magnitudes which will not be known." Equivalently, "the best society would be that in which we would prefer to place our children if we knew that their position in it would be determined by lot" (1976, p. 132; similar passages occur in 1967, p. 163; 1978, pp. 62–63; 1976, p. 114).

Hayek's formulations are similar to those of John C. Harsanyi, an avowed utilitarian, who considers a person contemplating alternative social arrangements in ignorance or at least in disregard of what his personal situation would be. On Harsanyi's theory, that person "would have to choose the social situation yielding him a higher expected utility, which in this case would mean choosing the situation providing a higher *average utility level* to the individual members of the society." (Harsanyi 1976, chap. 5, p. 67; cf. Harsanyi 1973, pp. 276–77. If Harsanyi's method resembles Rawls's [1971] notion of choice behind a veil of ignorance, the similarity goes to show that such a conception of impartiality need not be a distinctively contractarian one, as Rawls seems to think.)

The version of utilitarianism here attributed to Hayek, among others, might also, as already suggested, be called a comparative-institutions or good-society approach. Although Hayek repeatedly emphasizes how spontaneously evolved rules and institutions may serve an order that tends to reduce conflicts and ease cooperation among persons pursuing their own diverse ends, he does not discourage looking critically at those rules and institutions and sometimes deliberately modifying them.

Consciously designing a society from scratch, however, is not a live option. No one knows enough for such an undertaking. Through trial and error and survival of what works, our existing society incorporates much unarticulated knowledge. Throwing that knowledge away merely because of its being unarticulated and therefore unappreciated would be reckless. We should have a certain humility in undertaking reform—so Hayek in effect argues—but not reject all thought of reform.

Utilitarianism and Political Obligation

The comparative-institutions strand of utilitarianism does not try to ground government and political obligation in contractarian fic-

tions. The notion of consent—tacit consent—may have heuristic value, admittedly; but arguments using it should, if sound, be amenable to translation into straightforward English. In such arguments, tacit consent alludes to considerateness, reciprocity, and self-esteem, all of which are valuable on broadly utilitarian grounds. Most of us believe that we should ordinarily practice the everyday little courtesies toward one another, accepting trivial inconveniences for ourselves to spare others substantial ones. Ordinarily, for example, we do not complain about reasonable noise incidental to useful activity ("reasonable" is admittedly a weasel word here); for we ourselves benefit from a society in which such noise is tolerated. The point is not that we and others have agreed, or are "deemed" to have agreed, to suffer noise. Such a fiction is unnecessary. Rather, each of us refrains from complaining about reasonable noise in the expectation of others' similar forbearance and in the interest of the social cooperation from which we all benefit.

Each of us would be uneasy constantly and belligerently insisting on our "rights," refusing consideration of others at the cost of even the slightest momentary inconvenience, and insisting that others either refrain from activities exerting the slightest adverse externality or else pay compensation. That would be a nerve-wracking way to live. We would be inconsistent in being intolerant and inconsiderate of others while expecting them to be tolerant and considerate of us. Such behavior would emit messages to others about our own character.

For most of us, furthermore, it serves our self-esteem to think of ourselves as consistent, considerate persons who play fair and who support rather than subvert a decent society. Each of us benefits from courtesy and ease in relations with our fellows. It does not serve our self-esteem or interest to undercut that spirit. Thus, we need not interpret tolerant and considerate behavior toward others as compliance with a contract.

Much the same considerations argue for respecting the legitimacy of government and an obligation to obey its laws. The argument also explains why the legitimacy and obligation are not total. Most of us feel obliged to obey a reasonably decent government on the grounds that doing so contributes to our own and our fellows' welfare—in view of the Hobbesian alternative. Consideration of our fellows, which ordinarily serves our self-esteem, requires our not contributing to the subversion of a generally useful institution (which government is, even though a "necessary evil"). Unfairly arrogating special privilege to oneself, picking and choosing which laws to obey, and making exceptions in one's own favor does something toward undermining the legitimacy and authority of a government from which we

ourselves derive net advantages. (I distinguish, of course, between a government that is decent on the whole and, on the other hand, a tyrannical one that ought, on the same grounds of concern for ourselves and our fellows, to be overthrown.)

On grounds involving one's own and other persons' happiness as served through social cooperation, then, one can make a case for people's (1) according everyday courtesies to one another, and (2) practicing considerateness and reciprocity in yet another way, through respecting political obligation toward a reasonably decent government.

Much of the following ties in with possible answers to what Brand Blanshard calls the fundamental question of political theory: "Why should I obey the law? An adequate answer to that question would carry with it the answer to such questions as, Why should there be a government at all? What are the grounds of its rights against me and my rights against it?, and How in principle are those rights to be limited?" (Blanshard, 1961, chap. 14, "Reason and Politics," quotation from p. 376.)

According to the first theory that Blanshard reviews, political rights and duties are based on nothing. This anarchist view is "doctrinaire idealism of a pathetically irresponsible sort" (1961, p. 378). Second is the doctrine that might makes right; it sets ethics aside. The third appeals to divine authority, the fourth, the doctrine of Hobbes and Rousseau, to a social contract.

Contractarianism begs the question, Blanshard explains. If, before entering into the social contract, I do not have an obligation to keep contracts, then the social contract to keep future contracts is not binding, nor are future contracts supposedly made under it. But if I do have an obligation in the first place to keep contracts or to honor certain other duties, then the theory is superfluous.

Fifth is the doctrine of the Declaration of Independence: the self-evident truths that men have certain unalienable rights, that governments are instituted to secure these rights, and that if a government becomes destructive of them, the people have the right to alter or abolish it. This doctrine, says Blanshard, comes close to the correct one. He does not deny the existence of natural rights resting on no government and no convention and identifiable by reason, but he doubts that the doctrine of self-evidence states their true ground. Natural rights can break down: cases are conceivable in which the community can legitimately exercise coercion. All sorts of rights would be desirable—here I am embroidering on Blanshard a bit—if recognizing them did not cost too much in various ways. Now, considering costs means going beyond what is supposedly self-evident.

Sixth comes Blanshard's doctrine of "rational will":

> that men have a common moral end which is the object of their rational will, that the state is a contrivance that they have worked out [that has evolved, Hayek would probably say] to help them realize that end, and that its authority over them rests on its being necessary for that end. If it is politically obligatory at times to obey a law that one regards as bad, that is because the state could not be run at all if the citizens could pick and choose which laws they would obey. Ultimately, therefore, political obligation, even that of obeying a morally bad law, *is* a moral obligation; and when, as occasionally happens, it become [sic] a duty to disobey, the ground is still the same. [1961, p. 395]

Four propositions elaborate this doctrine:

> First we can distinguish within our own minds between the end of our actual or immediate will, and the end of our rational will, which is what on reflection would commend itself as the greatest good. Secondly, this rational end is the same for all men. Thirdly, this end, because a common end, is the basis of our rights against each other. Fourthly, the justification of the state, and its true office, lie in furthering the realization of this end. . . . [T]he theory of a rational will provides a natural and intelligible ground both for obedience in normal cases and for disobedience in abnormal cases. [Pp. 395, 402]

Briefly interpreted, Blanshard's rational-will doctrine says that the obligation to support government is binding because—and to the extent that—it serves social cooperation. The obligation to support rather than subvert social cooperation rests, in turn, on ordinary ethical precepts. (I do not maintain, however, that Blanshard would himself accept the utilitarian label.)

We have no need for contractarian fictions. I might well obey the laws of an absolute monarchy, and even consider such obedience in the general interest and morally obligatory, while disapproving of that government's nondemocratic character and of some of its actions.

A Utilitarian Conception of Government

A restatement is worth attempting. We go along with the existing form of government and generally obey its laws because, first, we have no real alternative. For an individual, revolt would be fruitless and moving abroad too costly. (Besides, where would we go?) We individuals have not agreed even to having a government at all, much less to the particular constitution in force. We have not even been asked whether we agree (and asking us now would be a mockery). Rather, we of the current generation find ourselves living under a form of government and under laws that have evolved over time

without our individually having had any effective say. Government and laws are *not* primarily results of an organized and deliberate process of collective decisionmaking, certainly not of one in which we the living have taken decisive part.

A second reason for acquiescence is that we find the existing system preferable to general lawlessness. Peace and security and a stable legal framework serve social cooperation and thus happiness. We individuals benefit from others' abiding by the law and feel that we in turn should do the same. We feel that it would be morally wrong to make exceptions in our own favor at others's expense. In self-defense we apply force against criminals who flout such of the moral code as has been reinforced by law.

The most—which is perhaps too much—that can be said for a social-contract theory is that most of us abide by the law and refrain from unconstitutional subversion of existing government in expectation or in consideration of others' doing the same. But this very nebulous contract, if it is a contract at all, is of the same sort as the one in accordance with which we generally observe ordinary ethical precepts. We ordinarily show some consideration for other people and their rights because we expect them to show similar consideration for us and because behaving with this consistency and decency serves our own self-esteem. Considerateness for each other yields gains from trade.

It would really be reaching, however, to interpret this sort of implicit trading as a social contract, and particularly as a contract whereby each of us has consented to the existing constitution and is thus deemed to have consented to government decisions made in accordance with the constitution. It is an exaggeration to call the government's laws and actions the result of collective decisionmaking in any literal sense of the term. Let's face it: government decisions are made by government officials (and the composite of those decisions undergoes some unintended drift over time); we ordinary citizens are not the government.

Under democracy, it is true, we have some influence on those decisions through voting, through helping shape public opinion, and thus through influencing what decisions public officials will consider in their own interest. But our control over government is less precise and effective than our control over economic activity through our "voting in the marketplace." Some analogy does hold between political and economic decisions, but we should not delude ourselves about how closely it holds.

Is the state a product of its citizens' voluntary consent, a mechanism voluntarily established to attend to their common concerns? Non-

sense. I have no choice about being subjected to its laws. True enough, I am glad that the state exists; I prefer it to anarchy; but the state is there whether I want it or not. My welcoming certain arrangements does not mean that they are not compulsory. I am glad to have seat belts in my car and would probably have bought them willingly if I had had a free choice, but the fact remains that I did not have a free choice and that the belts were installed under compulsion of law.

Far from the state's being a voluntary arrangement, then, its essence is compulsion. It relies as a last resort on its power to seize goods and persons, to imprison, and to execute. If obedience to government is not compulsory, then what is? What does the word "compulsory" mean? What happens to the distinction between the voluntary and the compulsory?

To say this is not to glorify the compulsory aspects of government. I concede their necessity only with regret. I want to keep them tightly restrained, as the cause of human liberty requires. One serves that cause poorly if one deludes oneself into thinking that government embodies free exchange and that compliance with its orders is voluntary. Hard-headedness or tough-mindedness better serves one's values.

While libertarians want to extend the voluntary aspects of society and government, they should not delude themselves about reality and the human condition. Society and government are not and cannot be the results of a social contract. Their justification rests on other considerations.

The key element in the case for democracy, as I see it, is that democracy lessens the necessity or desirability of violent rebellion. It makes the alternative, discussion, relevant. If a policy or a law really is oppressively bad, citizens and their political representatives may come to understand why and may change it peacefully. This case for democracy is a far cry from asserting that all decisions made under democratic government are therefore made in accordance with each citizen's will, or his real will, or are to be "considered" as having been so made. We need not appeal to any fiction about unanimous constitution agreement to waive unanimous agreement on specific issues.

Tacit Utilitarianism Among Rights Theorists

Even several rights theorists who disavow utilitarianism do tacitly employ a version similar to the one recommended in this paper. I ask them to conduct a mental experiment. Suppose, just for the sake

of argument, it could be demonstrated that insistence on the inviolability of human rights as they conceive of them would lead to general misery, whereas a pragmatic policy of respecting rights or not as conditions seemed to recommend would lead to general happiness. Would those theorists still insist on the inviolability of rights as the supreme goal to be upheld even at the cost of prevalent human misery?

Perhaps they would reply that this is a preposterous supposition and that respect for rights promotes human fulfillment and happiness, whereas a pragmatic attitude toward rights is an obstacle. Well, I think so too. But unless the rights advocates do answer "yes" to the question, insisting on rights even at the cost of general misery, they are taking a broadly utilitarian stance. If they answer as I think they must, they are insisting on rights because of the good consequences of upholding them and the bad consequences of disregarding or overriding them. At the back of their minds, at least, they must have some notion of a workable social order as an indispensable means to happiness.

Why do I care about the word "utilitarian"? Why am I anxious to pin that label onto everyone? Well, I do not care about the word as such. (And I do distinguish between versions of utilitarianism, although I do not find the supposed distinction between utilitarianism and consequentialism of much importance.) However, when a doctrine that plausibly and in accord with established usage bears the label "utilitarian" comes under attack, it serves clear thinking and communication to defend that doctrine under its own name rather than cast about for a new one. Playing the latter game is like trying to defend capitalism by inventing a new name for it. The game seems to admit that the doctrine or system defended really is so odious that it must be referred to only by euphemisms.

Robert Nozick, who avowedly just postulates rights without developing an argument for them, provides an example of tacit utilitarianism in the way he handles the question of blackmail. Murray Rothbard, another rights theorist, had put blackmail on a par with any other economic transaction; it would not be illegal in a free society (1962, vol. 1, p. 443, n.49). Nozick counters that blackmail is wrong, akin to the protection racket. He takes a step toward assessing its effect on the character of society by noting that it, like the racket, is an unproductive activity, whereas bona fide protective services are productive. (Nozick 1974, pp. 85–86. Rothbard 1977, pp. 53–55, rejects Nozick's distinction, but with arguments that strike me as feeble, even though they too are in part, unavowedly, utilitarian.)

Tacit utilitarianism creeps into the discussion of risky activities also. Suppose that your neighbor handles explosives recklessly or plays Russian roulette with a cannon mounted on a turntable. Even if he has liability insurance, he harms you, probably by raising your own insurance rates, lowering the value of your property, and striking fear and apprehension into you. You might plausibly argue that your neighbor is infringing on your rights, even though no explosion or cannon ball happens to damage your house. Rothbard appears to brush aside such problems by asking, in effect: If "fear" of others' "risky" activities is allowed to justify action against them, won't *any* tyranny become justified? What about the greater risk of having a state empowered to control activities it deems risky? (Rothbard 1977, especially pp. 48–50. The particular example used here is mine, not Rothbard's or Nozick's, but it suits the general tenor of their discussion.)

Nozick (1974, pp. 74–75, 78), on the other hand, candidly recognizes that "Actions that risk crossing another's boundary pose serious problems for a natural-rights position. . . . Imposing how slight a probability of a harm that violates someone's rights also violates his rights? . . . It is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others." Many kinds of actions do impose some degree of risk on others. A society that prohibited them all unless the actors had adequate means or adequate insurance to pay for possible harm would "ill fit a picture of a free society as one embodying a presumption in favor of liberty, under which people permissibly could perform actions so long as they didn't harm others in specified ways."—Again, the good-society approach, utilitarianism!

Other utilitarian strands are evident in Nozick's book. His flexibility about property rights is an example. He supposes that a natural disaster destroys the entire supply of water except one man's, which is sufficient for everyone. Under these circumstances, other persons may take the water or at least are not obliged to pay whatever exorbitant price its owner may demand. Nozick appeals to the Lockean proviso that one man's appropriation of a resource is justified only if it leaves enough and as good of that resource for others. He is not, in his own view, saying that recognized property rights may be overridden. Instead, "Considerations internal to the theory of property itself, to its theory of acquisition and appropriation, provide the means for handling such cases." (1974, pp. 180–81. Nozick adds another example: "Similarly, an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso.")

It is mere word play, however, to wonder whether rights are overridden or are defined in the first place to be appropriate even for the catastrophe case. Nozick misapplies the Lockean proviso anyway, since it concerns someone's original acquisition of property, not its retention in the face of changed circumstances of other persons (Hodson 1977, especially pp. 221, 224–27).

Nozick tacitly appeals to utilitarian considerations in framing his conception of property rights in a sufficiently complicated and flexible way to allow the actions that intuition and utility would suggest in the catastrophe case. He would have us permit acts that threaten to cross our boundaries—loosely speaking, violate our property rights—when certain conditions are satisfied, including those of the case in which the benefits in harm prevented or good produced far outweigh the costs of fully compensating the person whose boundaries are crossed. (Rabinowitz 1977, p. 93. Lawrence A. Scaff 1977, p. 202, looks behind Nozick's assertion that moral theory has priority in political discussions and finds his language of moral theory consisting of "economic terms, calculations, categories, and assumptions. Moral discourse is suffused with cost-benefit analysis. Thus, even in the realm of morality, all values carry a price tag.")

Nozick (p. 79) adduces similar considerations in recommending cost-benefit analysis and the test of compensation (actual or merely potential?) in decisions on which polluting activities to forbid and which to permit. He recognizes (p. 182) that he cannot derive a definite position on patents from considerations of rights alone. Although a patent does not deprive others of what would not exist if not for the inventor's work, knowledge of the patented invention does tend to discourage independent efforts to reinvent it. "Yet . . . in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery."

Tibor Machan, avowedly a rights theorist, is another tacit utilitarian. Instead of simply postulating or intuiting rights, he inquires into the political principles of a good society—good for man's pursuit of happiness or perhaps excellence, given his nature and his character as a moral agent. Machan seeks to demonstrate that since "each person is responsible to achieve his own happiness, that society that is suited for him is one in which his individual liberty is fully secured. . . . [I]t is only in such a free society that the moral agency, the freedom and the dignity, of each person can be respected. Thus

only in that kind of community can the moral life flourish" (1975, p. 100).

Machan asks why someone who has the option of either taking from another person or producing and trading on his own should support the institution of private property. He suggests essentially utilitarian answers, reasons why respecting the institution of ownership is generally advantageous even for the person in question. He concludes "that ownership is a morally appropriate institution for human beings in general. . . . [T]o rely on *his* own work (and/or trade, creativity, ingenuity, etc.) is better for the person than to live off the work of others" by stealing or confiscating (pp. 133–34). Finally, Machan's approving characterization of Ayn Rand's doctrine is tacitly utilitarian. Rand, he says, defends "capitalism as morally right because human beings can work (trade, create, risk) for their own good only when and where it prevails." She advocates it as "a system that is good for human beings, morally good for them, to choose for themselves" (Machan 1975, p. 136).

Even Murray Rothbard has at least once (1973, pp. 23–25) lapsed into a tacit utilitarianism, seeing it as "vitally necessary for each man's survival and prosperity that he be free to learn, choose, develop his faculties, and act upon his knowledge and values. . . . [T]o interfere with and cripple this process by using violence goes profoundly against what is necessary by man's nature for his life and prosperity."

Tacit Utilitarianism Among Contractarians

In the contractarian camp, John Rawls in effect says we should ask: "If a group of ideally rational beings came together in order to pick rules to govern their mutual relations, which rules would they be compelled (by the power of their rationality) to pick?" (restatement by Murphy 1977, p. 233). Well, what do those beings rationally take into account? Facts of reality and applicable economic and other theories, presumably, together with a value judgment in favor of happiness, especially their own. Rawls assumes that the parties negotiating in the original position already accept a "thin theory of the good," according to which "liberty and opportunity, income and wealth, and above all self-respect are primary goods," goods conducive to happiness for persons almost regardless of their specific personality traits and plans of life. This list of primary goods "is one of the premises from which the choice of the principles of right is derived" (Rawls 1971, pp. 397, 433–34, and *passim*).

When Rawls considers what principles would help make primary goods available and so serve persons' pursuit of their life plans, he

is appealing to broadly utilitarian considerations. The same is true when he rhapsodizes over the benefits of public commitment to avowed principles of justice: ". . . deliberate injustice invites submission or resistance. Submission arouses the contempt of those who perpetuate injustice and confirms their intention, whereas resistance cuts the ties of community" (p. 384). In discussing the problem of envy, Rawls notes the advantages of having a plurality of associations and many noncomparing groups. His "principles of justice are not likely to arouse . . . envy . . . to a troublesome extent. . . . What a social system must not do clearly is to encourage propensities and aspirations it is bound to repress and disappoint. So long as the pattern of special psychologies elicited by society either supports its arrangements or can be reasonably accommodated by them, there is no need to reconsider the choice of a conception of justice. . . . [T]he principles of justice as fairness pass this test" (1971, pp. 536–37, 541; Rawls's discussion of envy covers pages 530–41). Furthermore, Rawls's whole method of reflective equilibrium—testing tentative principles by how they are likely to work out in practice and adjusting both principles and judgments about particular cases to achieve consistency between them—is a kind of utilitarianism.

Rawls himself rejects this label. He recognizes that the parties in the original position might adopt some form of utility principle in defining the principles of social cooperation. Still, he says, it would be "a mistake to call these principles—and the theory in which they appear—utilitarian. . . . In fact, the case for the principles of justice is strengthened if they would be chosen under different motivation assumptions." Contract theory could eventually lead "to a deeper and more roundabout justification of utilitarianism" (1971, pp. 181–82). In saying so, Rawls is forgetting that his notion of a contract negotiated in an original position is utter fiction.

Buchanan's wing of contractarianism has already been described sufficiently to suggest how it is tacitly utilitarian. According to its tenets, an economist is entitled to recommend a policy only tentatively, only as a hypothesis that it is in accord with a unanimously made contract, or that it conceptually commands agreement, or that it could command agreement, presumably after a sufficient amount of sufficiently enlightening public discussion. Well, on what basis could the economist expect or hope for the necessary degree of agreement? The probable effects of the contemplated policy must surely figure prominently in the answer.

Contractarians like Buchanan distinguish between propounding hypotheses about what policies could ideally command agreement and recommending policies because they are expected to enhance

social cooperation and so serve human happiness. The distinction seems operationally empty to me.

Conclusion

The pure doctrine of natural or human rights cuts analysis short either by merely postulating rights as axioms or by questionably deriving rights from supposedly axiomatic propositions that in fact require further examination themselves. In truth we cannot infer one infallibly best set of institutions and policies from one or more first principles whose implications are guaranteed never to clash. It is a "great illusion" in political philosophy to seek "solutions to insoluble problems. . . . [T]here is more than one basic principle that appeals to moral sense and for which good argument can be made. . . . We live in a morally messy world. But it is the one we are stuck with" (Gordon 1976, p. 589).

Contractarianism rests on farfetched fictions. Or if it does not exactly rest on them, its rhetoric does abound in them; and if it is stripped of its fictions and translated into straightforward language, contractarianism turns out to be not much different from a form of utilitarianism.

We can hardly make progress in social philosophy or policy analysis by adopting *fictions* as our first principles. While wishing to enhance the voluntary and market-like aspects of government, for example, we must not blind ourselves to its essentially coercive character. Instead of beguiling ourselves with attractive myths, we can better serve our fundamental values by trying to compare alternative sets of institutions, alternative big pictures, avoiding excessively narrow and short-run focus. Investigation, analysis, and discussion of the features and probable consequences of contemplated institutions and policies all are indispensable aspects of the search for agreement—assuming, for the sake of argument, that agreement were the touchstone of policy. Actually, agreement itself cannot form the decisively appealing substance of a state of affairs capable of commanding it.

Discussion in search of agreement relies ideally on investigation, reasoning, and checking and comparison—the ordinary scientific process. This process is poles apart from dictatorship and from appeals to infallible insight. In this process, we can communicate better and guard better against misunderstandings if we employ straightforward language.

Conceivably the rights doctrine and contractarianism are not the only alternatives to the approach to policy espousal that I recommend.

If so, those other alternatives deserve further investigation and discussion. Meanwhile, I submit, a rules-utilitarianism or indirect utilitarianism—in other words, a good-society/comparative-institutions approach—turns out to be the only one that stands up under critical inspection.

References

Adler, Mortimer J. *The Time of Our Lives*. New York: Holt, Rinehart, and Winston, 1970.

Alexander, Sidney S. "Human Values and Economists' Values." In *Human Values and Economic Policy*. Edited by Sidney Hook. New York: New York University Press, 1967.

Bentham, Jeremy. "A Critical Examination of the Declaration of Rights." Reprinted in *Bentham's Political Thought*, pp. 257–90. Edited by Bhikhu Parekh. New York: Barnes & Noble, 1973.

Blanshard, Brand. *Reason and Goodness*. New York: Macmillan, 1961.

Broome, John. "Choice and Value in Economics." *Oxford Economic Papers*, n.s. 30 (November 1978): 313–33.

Buchanan, James M. *Freedom in Constitutional Contract*. College Station: Texas A & M University Press, 1977.

Buchanan, James M. *The Limits of Liberty*. Chicago: University of Chicago Press, 1975a.

Buchanan, James M. "Natural and Artifactual Man." Manuscript.

Buchanan, James M. "Sources of Opposition to Constitutional Reform." In *Constitutional Economics*. Edited by Richard B. McKenzie. Lexington, Mass.: Lexington Books, 1984.

Buchanan, James M. "Utopia, the Minimal State, and Entitlement" (a review article on Robert Nozick, *Anarchy, State, and Utopia*). *Public Choice* 23 (Fall 1975b): 121–26.

Buchanan, James M. "Who Should Distribute What in a Federal System." In *Redistribution Through Public Choice*. Edited by H. Hochman and G. Peterson. New York: Columbia University Press, 1974.

Buchanan, James M. "Why Does Justice Have Value?" Manuscript.

Buchanan, James M., and Tullock, Gordon. *The Calculus of Consent*. Ann Arbor: University of Michigan Press, 1962.

Davis, Harry R. "Toward Justifying Democracy." *The Key Reporter* 33 (Winter 1967/68): 2–4, 8.

Edgeworth, Francis Y. *Mathematical Psychics*. London: Kegan Paul, 1881; photoreprint, New York: Kelley, 1961.

Edwards, Paul. *The Logic of Moral Discourse*. New York: Free Press, 1965.

Fletcher, Joseph. *Situation Ethics*. 1st British ed. London: SCM Press, 1966 (fourth impression, 1974).

Gewirth, Alan. *Reason and Morality*. Chicago: University of Chicago Press, 1978.

Gordon, Scott. "The New Contractarians." *Journal of Political Economy* 84 (June 1976): 573–90.

Gray, John N. "Social Contract, Community and Ideology." In *Democracy, Consensus & Social Contract*. Edited by Pierre Birnbaum, Jack Lively, and Geraint Parry. London and Beverly Hills: Sage Publications, 1978.

Gray, John N. *Mill on Liberty: A Defence*. London and Boston: Routledge & Kegan Paul, 1983.

Grinder, Walter. "Cross Currents." *Libertarian Review*, May 1978, pp. 9–10.

Halévy, Élie. *The Growth of Philosophic Radicalism*. Trans. by Mary Morris. Boston: Beacon Press, 1955.

Hare, R. M. "Rawls' Theory of Justice." In *Reading Rawls*. Edited by Norman Daniels. New York: Basic Books, n.d. (but apparently 1974).

Harsanyi, John C. *Essays on Ethics, Social Behavior, and Scientific Explanation*. Dordrecht and Boston: D. Reidel Publishing Company, 1976.

Harsanyi, John C. "Cardinal Welfare, Individualistic Ethics and Interpersonal Comparisons of Utility." *Journal of Political Economy* 63 (August 1955). Reprinted as selection #10 in *Economic Justice*, pp. 266–85. Edited by E. S. Phelps. Baltimore: Penguin Books, 1973.

Hayek, Friedrich A. *The Constitution of Liberty*. Chicago: University of Chicago Press, 1960.

Hayek, Friedrich A. *Freiburger Studien*. Tübingen: Mohr (Siebeck), 1969.

Hayek, Friedrich A. *Law, Legislation and Liberty*. Vols. 1–3. Chicago: University of Chicago Press, 1973, 1976, 1979.

Hayek, Friedrich A. *New Studies in Philosophy, Politics, Economics, and the History of Ideas*. Chicago: University of Chicago Press, 1978.

Hayek, Friedrich A. *Studies in Philosophy, Politics and Economics*. Chicago: University of Chicago Press, 1967.

Hazlitt, Henry. *The Foundations of Morality*. Princeton: Van Nostrand, 1964.

Hazlitt, Henry. "An LR Interview." *Libertarian Review*, November 1978, pp. 22–23.

Hobbes, Thomas. *Leviathan*. In *Great Books of the Western World*, vol. 23. Chicago: Encyclopaedia Britannica, 1952.

Hodson, John D. "Nozick, Libertarianism, and Rights." *Arizona Law Review* 19, no. 1, 1977, pp. 212–27.

Holcombe, Randall B. *Public Finance and the Political Process*. Carbondale and Edwardsville: Southern Illinois University Press, 1983.

Hume, David. "Of the Original Contract." Reprinted in *Hume's Ethical Writings*. Edited by A. MacIntyre. New York: Collier Books, 1965.

Kemp, J. *Ethical Naturalism: Hobbes and Hume*. London: Macmillan, 1970.

Machan, Tibor. *Human Rights and Human Liberties*. Chicago: Nelson Hall, 1975.

Mack, Eric. "An Outline of a Theory of Rights." Manuscript, 1978.

McCloskey, H. J. *Meta-Ethics and Normative Ethics*. The Hague: Martinus Nijhoff, 1969.

Meyer, Frank S. *In Defense of Freedom*. Chicago: Regnery, 1962.

Mill, John Stuart. *Utilitarianism*. In *Selected Writings*. Edited by M. Cowling. New York: New American Library, 1968.

Von Mises, Ludwig. *Human Action*. New Haven: Yale University Press, 1949.

Von Mises, Ludwig. *Theory and History*. New Haven: Yale University Press, 1957.

Murphy, Jeffrie G. "Rights and Borderline Cases." *Arizona Law Review* 19, no. 1, 1977, pp. 228–41.

Nozick, Robert. *Anarchy, State, and Utopia.* New York: Basic Books, 1974.

Paul, Jeffrey. "On the Foundations of Natural Rights." Manuscript, 1978.

Peirce, Charles S. "The Scientific Attitude and Fallibilism." In *Philosophical Writings of Peirce,* pp. 42–59. Edited by Justus Buchler. New York: Dover, 1955.

Pettit, Philip. *Judging Justice.* London and Boston: Routledge & Kegan Paul, 1980.

Philbrook, Clarence. " 'Realism' in Policy Espousal." *American Economic Review* 43 (December 1953): 846–59.

Prescott, Peter S. Review of Thornton Wilder, *Theophilus North. Newsweek,* 22 October 1973, p. 128b.

Rabinowitz, Joshua T. "Emergent Problems and Optimal Solutions." *Arizona Law Review* 19, no. 1, 1977, pp. 61–157.

Rawls, John. *A Theory of Justice.* Cambridge: The Belknap Press of Harvard University Press, 1971.

Rawls, John. "Two Concepts of Rules." *Philosophical Review,* 1955. Reprinted in *Contemporary Utilitarianism,* pp. 59–98. Edited by M. D. Bayles. Garden City: Anchor Books, 1968.

Rothbard, Murray. *The Ethics of Liberty.* Atlantic Highlands, N.J.: Humanities Press, 1982.

Rothbard, Murray. *For a New Liberty.* New York: Macmillan, 1973.

Rothbard, Murray. *Man, Economy, and State.* 2 vols. Princeton: Van Nostrand, 1962.

Rothbard, Murray. "Robert Nozick and the Immaculate Conception of the State." *Journal of Libertarian Studies* 1 (Winter 1977).

Samuels, Warren J. "The Myths of Liberty and the Realities of the Corporate State: A Review Article." *Journal of Economic Issues* 10 (December 1976): 923–42.

Scaff, Lawrence A. "How Not to Do Political Theory: Nozick's Apology for the Minimal State." *Arizona Law Review* 19, no. 1, 1977, pp. 193–211.

Schumpeter, Joseph A. *History of Economic Analysis.* New York: Oxford University Press, 1954.

Sen, Amartya K. *Collective Choice and Social Welfare.* San Francisco: Holden-Day, 1970.

Spencer, Herbert. *The Principles of Ethics.* 2 vols. Indianapolis: Liberty Classics, 1978 (originally published in 1897, and parts earlier).

Vanberg, Viktor. "Liberty, Efficiency and Agreement: The Normative Element in Libertarian and Contractarian Social Philosophy." Manuscript, George Mason University, n.d. (but 1984 or 1985).

Wiener, Philip P. "Charles Sanders Peirce." *International Encyclopedia of the Social Sciences,* vol. 11, pp. 511–13. 1968.

Yeager, Leland B. "Pareto Optimality in Policy Espousal." *Journal of Libertarian Studies* 2 (Fall 1978): 199–216.

Yeager, Leland B. "Utility, Rights, and Contract: Some Reflections on Hayek's Work." In *The Political Economy of Freedom: Essays in Honor of F. A. Hayek.* Edited by Kurt R. Leube and Albert H. Zlabinger. Munich and Vienna: Philosophia Verlag, 1984/85.