THE UTILITARIAN IMPERATIVE: AUTONOMY, RECIPROCITY, AND EVOLUTION*

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* The thesis of this article is contrary to the anti-utilitarian position taken by various articles in the Hofstra Law Review (Symposium on Efficiency as a Legal Concern, 8 Hofstra L. Rev. 485 (1980); A Response to the Efficiency Symposium, 8 Hofstra L. Rev. 811 (1980)) and in the Journal of Legal Studies (Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 49 (1979); Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979); Symposium Change in the Common Law: Legal and Economic Perspectives, 9 J. Legal Stud. 189 (1980)).

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I. INTRODUCTION: THE CONCEPT OF EVOLUTIONARY UTILITARIANISM

As long as humans have lived together, they have been groping for the source and ultimate goal of behavior standards, i.e., of moral
values. Early derivation of those standards from transcendental, supernatural, or mystical (i.e., nonexperiential) sources and goals generally accompanied early reliance on such sources and goals for explanations of natural phenomena.¹

The usefulness of transcendental explanations and guidelines has diminished with expanded information about the physical and social environment.² The utilitarian perception of "the greatest happiness of the greatest number"³ as the goal of moral conduct was engendered by the empiricist identification of experience as the source of knowledge⁴ and reinforced by the pragmatist-consequentialist preference for empirically ascertained effects on human welfare as the measure of ethical behavior.⁵

The utilitarian perception has been implemented by the majoritarian institutions⁶ that have emerged from antecedent forms of social organization. The Social Compact conceptualizes government as the agent of the governed, with the function of restraining individuals and allocating resources for the general welfare⁷—a concept reflected in the Preamble to the Constitution of the United States.

Classical utilitarianism, however, did not clarify "happiness" (or "pleasure") and suggested no effective method for maximizing it, i.e., for assigning priorities to competing happiness preferences.⁸ The

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². See authorities cited supra note 1.


⁶. See infra text accompanying note 44.


⁸. See Bayles, Introduction to CONTEMPORARY UTILITARIANISM 1-12 (M. Bayles ed. 1968); J. FLAMENAZ, THE ENGLISH UTILITARIANS (1958); L. STEPHEN, THE ENGLISH UTILITARIANS (1900); Monro, supra note 3, at 282-83; Smart, Utilitarianism, in 8 THE ENCYCLO-
result has been a persistent attack on utilitarian morality, as incapable of distinguishing social from asocial happiness, and a resurgence of transcendental morality in the guise of a priori or innate "rights" existing independently of human needs and revealed by a mystical intuition. Such rights are offered as the alternative to a utilitarian quest for the general welfare.

An empirical basis for the assignment of general-welfare priorities is provided by the Darwinian process of natural selection, which translates happiness into need/want fulfillment and identifies long-run survival as the overriding goal of such fulfillment. Behavior that facilitates survival is generally preferred by humans, because human structure and function are products and facilitators of the survival process.

Darwin perceived the relevance of evolution to the morality of behavior but had difficulty reconciling the survival value of strength and aggression (i.e., of uninhibited autonomy) with such traditional virtues as sympathy and altruism. Those virtues promote human reciprocity, but the survival value of reciprocity as a modifier of autonomy was then indistinct. The result was a schizophrenic evolutionary ethic that discerned the influence of natural selection on the development of social traits but posited a "noble" human capacity for "sympathy."

The survival role of reciprocity in the process of sociobiological evolution is now established. Reinterpreted as part of that process,
utilitarianism reconciles autonomy and reciprocity, surmounts the strident intuitionist attack, and exposes the utilitarian underpinning of a priori rights.¹⁷

In the context of the information provided by biology, anthropology, economics, and other disciplines, a functional description of evolutionary utilitarianism identifies enhanced per capita need/want fulfillment as the long-term utilitarian-majoritarian goal, illuminates the critical relationship of self interest to that goal, and discloses the trial-and-error process of accommodation and priority assignment that implements it.¹⁸ The description confirms that process as arbiter of the tension between individual welfare and group welfare (i.e., between autonomy and reciprocity)¹⁹ and suggests a utilitarian imperative: that utilitarianism is unavoidable, that morality rests ultimately on utilitarian self interest, that in the final analysis all of us are personal utilitarians and most of us are social utilitarians.

II. NEED/WANT FULFILLMENT AND INDIVIDUAL SURVIVAL

Human survival depends on fulfillment of human needs, i.e., on access by individuals to the environmental resources that sustain human life. Long-run survival necessitates food, drink, breathable air, shelter, and repose. It is facilitated by an environment that fosters good health, perceptual and mental alertness, amelioration of pain and anxiety,²⁰ sexual satisfaction, affection and companionship, the approval of others, self awareness and self esteem, inquiry and learning, comfort, communication, and activity.²¹ Need fulfillment is accompanied by pleasure, which facilitates survival by stimulating the quest for such fulfillment.

Pleasure is additionally derived from fulfillment of human wants. Not all wants are needs. Many fulfillments do not significantly facilitate survival. Want fulfillment expands need fulfillment beyond its survival value.

Most unneeded wants are probably derived from needs: the capacity to expand consumption of food when available facilitates survival when food is scarce but not when it is regularly obtainable;

¹⁷. See infra text accompanying notes 38-152, 154-220, 245-51.
¹⁸. See infra text accompanying notes 21-118, 221-51.
²⁰. Survival is aided both by the general pain-anxiety response, which induces corrective behavior, and by pain-anxiety relief, which mitigates the debilitating psychological consequences.
²¹. The list, of course, is not necessarily exclusive.
pleasure derived from infliction of pain on others is perhaps a remnant of the ability to compete aggressively for need fulfillment; curiosity, which facilitates need fulfillment, also engenders wants and the pleasure of fulfilling them. Abilities that facilitate need fulfillment facilitate want fulfillment; hence the latter accompanies the former.  

Fulfillments that exceed survival requirements generally enhance pleasure without impairing survival. Some in fact provide marginal need fulfillment because they contribute to reduced anxiety and increased self esteem.  

But some, such as excessive consumption of food, alcohol, tobacco, or narcotics, and enjoyment derived from hazardous activity or from infliction of pain, clearly have survival costs. When extreme, such fulfillments may result from physiological malfunction or genetic variation. Survival is thus enhanced by fulfillment of needs, as well as need-consistent wants, and nonfulfillment of countersurvival wants.  

III. AUTONOMY AND SOCIAL ORGANIZATION AS PRODUCTS OF EVOLUTION  

Survival is facilitated for individuals with sufficient stamina, intelligence, and self confidence to secure and defend a need-fulfilling environment, i.e., for individuals capable of vigorous autonomous action. Autonomy of the individual, an aspect of self awareness and self esteem, has thus evolved to facilitate need fulfillment.  

But violent competition between autonomous individuals for scarce resources threatens survival. Each risks defeat, and the winner may also suffer physical injury. A group, however, can subdue a physically dominant individual. In the long run, need fulfillment, and consequent survival for individuals and their offspring, are enhanced by collaborative endeavor involving mutual protection, sharing of information, division of labor, sexual access, and reciprocal recognition of the needs of others in the group.  

22. See infra text accompanying note 25.  
23. For example, the fulfillment provided by entertainment and conspicuous consumption.  
24. See generally C. DARWIN, supra note 1; R. DAWKINS, supra note 1; K. LORENZ, EVOLUTION AND MODIFICATION OF BEHAVIOR (1965); J. MAYNARD SMITH, THE THEORY OF EVOLUTION (1976); H. SPENCER, FIRST PRINCIPLES (1858); H. SPENCER, I THE PRINCIPLES OF BIOLOGY (London 1864); H. SPENCER, supra note 15; E. WILSON, supra note 1.  
26. See R. DAWKINS, supra note 1, at 73-90.  
27. See R. DAWKINS, supra note 1, at 179-205; A. MONTAGU, THE NATURE OF HUMAN
Such endeavor augments environmental resources and reduces the survival costs of competition. Membership in the group establishes a claim to collaborative fulfillment of needs and noncounter-survival wants, as well as an obligation to contribute, if possible, to fulfillment resources. A system of reciprocity, then, and the social organization it implies, is also an evolutionary product that facilitates need/want fulfillment and survival for the individual.28

Cultural as well as physical traits are winnowed by natural selection.29 Individuals who can enhance need fulfillment transmit to their offspring (1) organic need-fulfilling abilities through the genetic process and (2) need-fulfilling information about the environment and social organization through the learning process.30 Survival-enhancing behavior thus results from both biological structure and learned response.31 Self defense, for example, may be triggered by endocrine secretions or cultural perceptions.32 And older persons contribute to human survival after their reproductive period by continuing to accumulate and communicate survival-enhancing knowledge.
Competing claims to need/want fulfillment manifest the tension between autonomy and reciprocity. The evolutionary process rewards those who effectively accommodate the survival-promoting values of both. Consequently, the evolved function of social organization includes the resolution of competing claims by imposition of social controls. Effective accommodation results from resource allocations and behavior constraints that promote, for most individuals, first long-run survival and then long-run enjoyment. Behavior that increases fulfillment for most is encouraged by favorable allocations; behavior that reduces such fulfillment is inhibited by deprivals.

IV. NEED/WANT PREFERENCES AND COMMUNITY SURVIVAL

The structure of social organization is molded by the adjustment of individuals in a particular environment to evolutionary pressures. The adjustment necessarily involves an amalgam of (1) force and (2) reciprocal autonomy or consent. Early social groupings probably reflected both subordination of the weaker to the stronger and a tacit consent to subordination for such purposes as sustenance, protection, and sexual access. Majoritarian government is legitimated only by the consent or acquiescence of a majority plus force sufficient to deter violent resistance by a dissenting minority. Although totalitarian governments claim majoritarian legitimation through single-party, single-candidate elections, legitimation in fact rests on minority force plus the acquiescence of many.

Group dissatisfaction with need/want fulfillment erodes and modifies social organization. Community survival, therefore, is facilitated by fulfillment for individuals of needs and of wants that do not hinder need fulfillment.

Of course, differences in environment and genetic structure produce different need/want perceptions and solutions. For some com-

33. See id. at 120-29, 563; Campbell, supra note 27, at 76-80; Trivers, supra note 27, at 45-54.
34. See E. Wilson, supra note 1, at 120-29, 563; Campbell, supra note 27, at 76-80.
35. I.e., assignments to individuals of anything that fulfills needs and wants (often referred to as distribution) or is used to produce anything that fulfills needs and wants (usually referred to as allocation).
36. I.e., by positive and negative reinforcement. See infra notes 239-40 and accompanying text.
38. See R. Dawkins, supra note 1, at 117-23; R. Hinde, Biological Bases of Human Social Behaviour 274, 339-54 (1974); E. Wilson, supra note 1, at 279-97, 567; Campbell, supra note 6, at 77; Trivers, supra note 27, at 35-37.
communities the survival goal may encompass reincarnations, an immortal after-life, or an ultimate state of harmony, enlightenment, and repose. Other communities may not perceive survival as a goal: fulfillment of short-term countersurvival wants may be preferred to fulfillment of long-term survival needs. Long life, though commonly preferred, is subordinated by some individuals in all communities not only to relief from anxiety or pain but to enjoyable consumption.\(^{39}\)

But the inexorable process of earthly survival through natural selection continues to winnow the allocations and constraints of each group.\(^{40}\) And communities that discern the significance of that process can more effectively accommodate or "prioritize," and thereby enhance, fulfillment of individual needs and wants.\(^{41}\)

Although belief in an afterlife may aid survival by reducing anxiety and augmenting confidence,\(^{42}\) present-life survival is more likely to be achieved by those who do not subordinate it to a later existence. Consequently, most surviving individuals perceive and assiduously pursue earthly-survival goals. The collective goal of long-run community survival is an evolutionary corollary of the drive for individual survival.\(^{43}\)

Evolutionary progression toward majoritarian decisionmaking follows from the utilitarian function of social organization to enhance human need/want fulfillment.\(^{44}\) Because the need/want preferences of community members are best known to them, resource allocations and behavior constraints that significantly reflect their input best implement those preferences. The need/want fulfillment of such members expands with their approval of community decision-making institutions. Such approval lowers the costs of dissenter disruption while increasing psychological security and productive efficiency.

The utilitarian enhanced-fulfillment goal is most effectively implemented by communities that optimize (not maximize) individual

\(^{39}\) Such individuals prefer to pay the suicide or reduced life-expectancy costs of such benefits.

\(^{40}\) See R. DAWKINS, supra note 1, at 179-206; E. WILSON, supra note 1, at 120-29, 145-47, 156, 159, 168, 254-55, 550-51, 562-75; Campbell, supra note 27; Trivers, supra note 27, at 45-54.

\(^{41}\) This "autocatalytic" response accelerates social evolution. See E. WILSON, supra note 1, at 567-72, 575.

\(^{42}\) See R. DAWKINS, supra note 1, at 207.

\(^{43}\) See A. MONTAGU, supra note 27, at 44, 137-52; E. WILSON, supra note 1, at 22, 551-54, 562, 565-69; Campbell, supra note 27, at 78-79; Trivers, supra note 27, at 45-54.

\(^{44}\) See infra text accompanying notes 63-66.
participation in policy formulation. Optimal participation involves the selection of capable officials who make independent community fulfillment decisions but remain subject to effective community supervision. Self-constrained majoritarianism thus appears to be the evolving political counterpart of utilitarianism, a continuity suggested by the progression of western nations from autocracy toward representative democracy, the enhanced need/want fulfillment that has accompanied the progression, and the inability of totalitarian governments to match that fulfillment.

V. EVOLUTION AND MORALITY: THE "IS" AND THE "ought"

Identification of the utilitarian need/want fulfillment goal with evolutionary survival does not imply that all evolved behavior is "desirable", i.e., that it "ought" to be because it is. The survival value of evolved behavior is tentative: not all such behavior continues to facilitate survival. The evolutionary process is experimental, and Utopia has not been reached. The evolutionary process is also "auto-catalytic", i.e. self stimulating. It has developed humans with the capacity to comprehend the process and to facilitate it by survival-enhancing behavior modifications.

The process thus reveals the long-run survival goal as inseparable from long-run human behavior: it identifies need/want fulfillment as the function of that behavior. And that function necessarily affects the "morality" of behavior. How people ought to behave relates to the structure of people as they are, not as moralists may


In every system of morality, which I have hitherto met with, I have always remark'd that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.

Id. at 469 (emphasis in original); see also R. Dawkins, supra note 1, at 3; G.E. Moore, Philosophical Studies 253-75 (1922); G.E. Moore, Principia Ethica (1968) (identifying the "naturalistic fallacy") [hereinafter cited as Moore, Principia Ethica]; MacNabb, Hume, David, in 4 The Encyclopedia of Philosophy 74, 86-87 (P. Edwards ed. 1967); Smart, An Outline of a System of Utilitarian Ethics, in Utilitarianism For and Against 68 (1973).

46. See supra note 41 and accompanying text.
wish they were.  

Hume's observation, made a century before Darwin, that an "ought" cannot be derived from an "is," suggested the lack of empirical criteria for choosing between oughts. The evolutionary process qualifies that suggestion. Evolving human structure and function shape the "oughtness" of human behavior.

The search for the ought is a search for the goals of human behavior. Underlying the ought of every goal is an implicit description of reality that predicts the consequences for humans of compliance or noncompliance with the ought. Humans choose the goals. And the perceived accuracy of the description, along with the perceived value of the consequences predicted by the description, influence the choice. Ought and is thus coalesce.

The goal of enhanced human need/want fulfillment implies that such enhanced fulfillment is possible and will facilitate long-run human existence. Goals that facilitate human existence are persistently chosen by most humans, because human structure and function have evolved and are evolving to facilitate such existence. The decisionmaking organism is structured to generally prefer survival, although some may trade long-term existence for short-term pleasure, and physiological malfunction or traumatic experience may induce the preference of a few for personal nonsurvival. Intermediate human goals change with human structure and function; long-run human survival remains the ultimate human goal as long as there are humans.

G.E. Moore has suggested that no behavior can be equated with "goodness," because there is no verifiable standard of goodness to refute a denial that the behavior is good. But the relevance to human morality of human structure and function is an empirical datum that cannot be offset by a denial. The moral decision is inescapably molded by the structure and function of those who make it.

Structural needs and the need/want fulfillment function confirm the long-run survival goal. A denial that such survival is desirable suggests the fragility of neither the goal nor its derivation from human structure and function but rather the idiosyncracy of the

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47. See R. Dawkins, supra note 1, at 3.
48. D. Hume, supra note 45, at 469.
49. See infra text accompanying notes 245-48, 256.
50. See infra text accompanying notes 60-61, 84-88, 221-26, 245-48.
51. See G.E. Moore, PRINCIPIA ETHICA, supra note 45, at 1-36 (1968); see also J. Hospers, HUMAN CONDUCT 532-41 (1961).
Like most generalizations, the is-ought dictum overgeneralizes. The is of evolved human existence implies the human goal, or ought, of human need/want fulfillment. At least minimal compliance with that ought is a condition to the existence of humans and of human oughts. Rejection of that ought is a rejection of all oughts, because any other ought necessarily assumes present or future survival.

VI. ENHANCED PER CAPITA FULFILLMENT VS. DEFINITIONAL OBJECTIONS TO UTILITARIANISM

Critics contend that utilitarian-majoritarian decisionmaking can reliably identify neither the needs and wants of most persons nor effective methods of increasing fulfillment. Seizing on the verbal ambiguities of classical utilitarianism, they assert that “maximized happiness,” the traditional utilitarian goal:

(a) suggests equal weight for the happiness (1) of humans and animals, (2) of existing and future persons;

(b) may imply that total happiness should be increased by expanding the population, though the share of each individual is thereby reduced;

(c) does not distinguish the happiness of strangers from the happiness of family, friends, and countrymen;

(d) sacrifices individual happiness to a fictitious aggregate or collective happiness that no one experiences;
(e) is stultified by unmeasurable differences in the subjective intensity of happiness.60

These criticisms are inapplicable to a utilitarianism derived from the evolutionary process of need/want fulfillment.

A. Existing Humans vs. Animals and the Unborn

Because evolutionary utilitarianism is concerned with human survival and depends on human response, its goal is necessarily fulfillment of human needs and wants. Utilitarian choices are made by existing humans. The decisions of every human are derived from the experience, and reflect the desires, of that human. Humans may be concerned with the needs and wants of animals or of future generations, but that concern is inescapably a product of existing human needs and wants.60

Those who apparently subordinate human to animal happiness or existing-human to future-human happiness are made “happier” by doing so. Whether such subordination generally increases human need/want fulfillment is determined initially by the physical and psychological consequences for existing humans and ultimately by the effect on long-run human survival.

B. Total vs. Per Capita Fulfillment

Nor is it the goal of evolutionary utilitarianism to squeeze more people and consequently more total human happiness into the world regardless of the effect on individual happiness and on long-run survival. The utilitarian process reflects the striving of individuals for personal need/want fulfillment and their perception that reciprocity facilitates fulfillment and ultimate survival. The goal is enhanced fulfillment for the individuals whose strivings and perceptions fuel the process. Despite the asserted “old dispute among utilitarians over whether . . . to maximize average or total happiness,”81 the objective is clearly an increase not in total but in average or per capita need/want fulfillment for community members.

These alternatives are in fact closely related. Initially, the fulfillment contributions of an expanding population may raise both per

59. See authorities cited infra note 67.
capita and total fulfillment. But eventually the marginal fulfillment costs of increasing births exceed the marginal fulfillment benefits. At that point the utilitarian optimal-population goal is reached, though total fulfillment might, for a time, continue to increase with an uninhibited birth rate.\textsuperscript{62}

C. Individual and Group Fulfillment: Allies vs. Strangers

Utilitarianism seeks neither a greater quantity of total happiness nor a mystical collective happiness. Rather, it seeks to facilitate the process of increasing individual need/want fulfillment through group endeavor. Fulfillment is enhanced for each person by simultaneous membership in a progression of overlapping groups: the family community, the local community, special-interest communities, the national community, and the international community. Individuals may have common fulfillment interests as members of the same large group and competing fulfillment interests as members of different small groups.\textsuperscript{63}

Group bonds, engendered by protection, assistance, affection, and shared experience, tend to be weaker in larger groups. The primary goal of each group is increased per capita fulfillment for its members. But reciprocal benefit compels accommodation of competing group-fulfillment goals just as it compels accommodation of competing individual-fulfillment goals.\textsuperscript{64} Adjustment to the needs and wants of nonmembers, i.e., of "strangers" to the particular group, depends on the fulfillment consequences for members, just as adjustment to animal needs and wants depends on the fulfillment consequences for humans.\textsuperscript{65}

D. Individual and Aggregate Happiness: Enhanced Per Capita Need/Want Fulfillment

Per capita, or average, fulfillment is a theoretical concept that does not allocate specific fulfillment shares. But it is not a fallacious or meaningless concept that sacrifices individual fulfillment to a fictitious collective happiness. Rather, it is a useful hypothesis that iden-

\textsuperscript{63} See E. Wilson, supra note 1, at 128-29; Boonin, Man and Society: An Examination of Three Models, in Voluntary Associations 70-71 (J. Pennock & J. Chapman eds. 1969); Campbell, supra note 27, at 76-79; Trivers, supra note 27, at 35-37; supra text accompanying notes 27-28.
\textsuperscript{64} See E. Wilson, supra note 1, at 129; Boonin, supra note 63.
\textsuperscript{65} See supra text accompanying note 60.
ifies the fulfillment goal of the community.

Averages overgeneralize: attribution of equivalent shares to each individual is seldom an accurate description of reality. But the average is an effective tool for comparing the characteristics, accomplishments, and resource distributions of groups. Expanding per capita fulfillment is, in the long run, likely to result from the enhanced fulfillment of many, rather than a few, individuals, because the former tends to increase productivity more than the latter. Enhancing per capita need/want fulfillment, though necessarily imprecise, perhaps describes the utilitarian goal more effectively than "maximizing happiness." It replaces satisfaction of idiosyncratic desires, implied by "happiness," with the basic process of biological and social survival. It emphasizes that a hypothetical "maximum" goal is realistically approached through relative improvement. And it connotes a process of accommodation.

E. The Subjective Intensity of Fulfillment

Utilitarians resolve competing individual claims to need/want fulfillment by appraising the effects on per capita fulfillment of proposed alternative allocations and constraints. The critics, however, reject such an appraisal as futile because differences in the subjective intensity of competing individual fulfillments cannot be measured: per capita fulfillment or happiness, they reason, can be increased only by a subordination of weaker to stronger fulfillments and such a subordination is forestalled by the incomparability of fulfillment intensities.

If, however, fulfillment intensities are not measurable, an assumption of their equivalence accommodates the survival enhancing

66. See infra text accompanying notes 89-95. But the correlation between increased fulfillment for most and increased productivity does not imply fulfillment equality. Id.; see also Rawls, supra note 62, at 35.


consequences of both autonomy, which sharpens such intensities, and reciprocity, which moderates them. Equivalence is particularly relevant to competing group preferences, because any intensity variations among holders of one preference may well offset such variations among holders of a different preference, leaving the average intensity in each preference group about the same.

The assumption is not critical, because the choice between competing fulfillments depends less on their intensities than on community consequences. The fulfillment derived by a thief from stolen money may be more intense than the owner’s feeling of deprival, but the productivity disruption that results from uninhibited stealing impairs need/want fulfillment for almost everyone. As later indicated, general fulfillment priorities can be derived from the evolutionary need/want experience without weighing individual fulfillment intensities.

VII. THE PROCESS OF ENHANCING PER CAPITA FULFILLMENT

Identification of the resource allocations and behavior constraints that enhance per capita fulfillment is the function of utilitarian-majoritarian decisionmakers. That difficult function includes the assignment of need/want priorities and the accommodation of competing fulfillment claims. Ascertainment of current majoritarian fulfillment preferences, if possible, would facilitate, though not control, such assignment and accommodation.

A. Balloting as an Indicator of Majoritarian Preferences

Kenneth Arrow has indicated that there is no rational method for deriving an ultimate majority preference from aggregated individual preferences when no one of more than two alternatives is the initially designated choice of a majority. Consequently, a clear electoral (or polling) indication of majoritarian preference may be infrequently available. The electoral or polling process often reveals a dispersion of voter preferences among a number of candidates and among their various general-welfare positions. A majority that ap-

(W. Stark ed. 1952); Posner, Utilitarianism, supra note 55, at 115.
71. See infra text accompanying notes 84-86.
proves or disapproves the policy presented in an initiative, a referen-
dum, or a public-opinion poll may in fact be divided over critical
issues implicit in the chosen alternative. 73

Moreover, replacement of need/want investigation and discus-
sion with a mechanical tabulation of current preferences not only
tends to subordinate long-term to short-term preferences and to in-
hibit accommodation of competing interests; it also discourages deci-
sionmaker contributions to a clearer perception of community need/
want fulfillment goals. 74

B. The Market as an Indicator of Majoritarian Preferences

While gross national product (i.e., the total value of all goods
and services annually produced) 75 is measurable and significantly re-
lated to per capita fulfillment, less tangible but no less important
fulfillsments, such as affection, companionship, sexual satisfaction, re-
lief from pain, reduction of anxiety, the approval of others, and self
esteem, are not reflected in that total. And the total, alone, does not
identify (1) the causes of an increase or decrease, (2) the social costs
of either, 76 nor (3) the net effect on per capita fulfillment.

Individuals, however, know their own preferences and often im-
plement them by resource exchanges. A voluntary exchange of re-
sources (including land, goods, services, money, and obligations) by
two or more persons usually increases need/want fulfillment for all
of them because each prefers the fulfillment derivable from the ac-
quired resource to the fulfillment derivable from the relinquished re-
source. The allocations of a competitive market thus reflect many
accommodations that presumably enhance need/want fulfillment for
the transacting parties. Nevertheless, those allocations do not neces-
sarily increase per capita fulfillment:

(a) Exchanges that increase need/want fulfillment for the par-
ties may decrease such fulfillment for nonparties. 77 For example, fre-

73. For example, a hypothetical majority against abortion on demand might include
those who oppose abortion: in all circumstances, after the first trimester, unless the mother's
life or health is threatened, unless the pregnancy resulted from incest or rape, unless the fetus
is abnormal, when not approved by the father, when not approved by the parents of an unmar-
rried teenage mother, when not approved by a committee of doctors, or in any combination of
such circumstances.


76. See C. Stone, supra note 60, at 45-46; J. Harte & R. Socolow, Patient Earth
(1971).

77. See Posner, The Ethical and Political Basis of the Efficiency Norm in Common
Law Adjudication, 8 Hofstra L. Rev. 487, 488-91 (1980) [hereinafter cited as Posner, Effi-
quent alcoholic-beverage purchases may deprive the purchaser’s family of necessities or increase driving hazards for others. By purchasing the entire available supply of a scarce product, a dealer may force competitors out of business while confronting consumers with a monopoly price. “Pareto superior” exchanges, i.e., exchanges that increase need/want fulfillment for at least one person while decreasing it for no one, necessarily enhance per capita need/want fulfillment. But exchanges that adversely effect nonparties may or may not enhance such fulfillment.

The difficulty is scarcely ameliorated by the Kaldor-Hicks proposition that a reallocation of resources is efficient, i.e., increases per capita fulfillment, when the gain to those who benefit is at least sufficient to compensate those who lose. If adversely affected nonparties are compensated by subsequent agreement, they simply become additional parties to a Pareto superior exchange. But if negotiated compensation is forestalled by transaction costs (which are often prohibitive), by lack of legal compulsion to compensate, or by failure to agree, compliance with the Kaldor-Hicks criterion (that party plus nonparty gain at least equals nonparty loss) can be confirmed only by determining whether per capita need/want fulfillment is enhanced. And Kaldor-Hicks provides no guide for that determination.

(b) The fulfillment preferences implemented by market exchanges are influenced by the pre-exchange distribution of resources: a different distribution may generate different preferences. Poor consumers, for example, might prefer a safer though more expensive product if they could afford to buy it. Market allocations do not disclose whether need/want fulfillment would be more significantly enhanced by the exchanges that would follow a redistribution of resources.

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78. See Coleman, Efficiency, Utility, and Wealth Maximization, 8 HOFSTRA L. REV. 509, 512-13, 515-17 (1980). An exchange is “Pareto optimal” when no further allocation of the resources can increase fulfillment for anyone without decreasing it for someone else. Id. at 517-18.

79. See Sen, supra note 66, at 22; Coleman, supra note 78, at 518; Posner, Efficiency, supra note 77, at 488-91; see also Sager, Pareto Superiority, Consent, and Justice, 8 HOFSTRA L. REV. 913, 915-30 (1980).

80. See Coleman, supra note 78, at 513-14, 518-20; Posner, Efficiency, supra note 77, at 491.

81. See Coleman, supra note 78, at 512-13, 515-17; Posner, Efficiency, supra note 77.

(c) Executed exchanges based on inadequate or erroneous information may not in fact increase fulfillment for the contracting parties.

(d) And because an efficient market depends on enforceable agreements, need/want fulfillment through market allocation varies with the agreement-enforcing policies of government. The market alone presumably effectuates only mutually desired exchanges. But enforcement policies may compel or induce compliance with executory agreements later revealed by further information as initially disadvantageous for one of the parties.83

C. The Survival Priority: Subordination of Wants to Needs

"Majoritarian" decisionmakers, then, must ultimately choose the policies or procedures likely to increase per capita fulfillment. And the choice must be made with the help of neither a quantifying formula nor clearly ascertainable majoritarian preferences. But the utilitarian-majoritarian process is not stultified.

Fulfillment priorities are implicit in the evolutionary function of social organization to facilitate first survival and then enjoyment.84 Such priorities can be identified without comparing the intensities of individual fulfillments or ascertaining particularized majoritarian preferences. The survival process confirms a generic preference for fulfillment of (1) more vital (i.e., critical to life) needs before less vital needs and (2) needs before wants.85 That preference permits a survival-value comparison of competing need/want fulfillments.

Fulfillments with greater survival value can be generally, though not precisely, distinguished from those with less or no survival value. Needs can be distinguished from wants: food and drink are essential for survival; attending a baseball game is not (though it may aid survival by reducing anxiety). Want fulfillments that seriously impair need fulfillment can be distinguished from those that do not: injecting heroin is a greater threat to survival than eating chocolate. Want fulfillments that augment need-fulfillment resources can be distinguished from those that do not: a college education usually in-

83. For example, a husband contracts to purchase an automobile and then learns that his wife had contracted to purchase another one. See Kennedy & Michelman, supra note 70, at 739-42.
84. See supra notes 20-24, 34-36 and accompanying text.
85. See A. Maslow, The Farther Reaches of Human Nature (1971) (need hierarchy); A. Maslow, Motivation and Personality 97-104 (2d ed. 1970); E. Wilson, supra note 24, at 550; Campbell, supra note 27, at 69.
creases productivity; playing pool does not. More vital need fulfillments can be distinguished from less vital ones: sustenance, shelter, good health, and existence, itself, have manifestly greater survival value than less critical needs such as affection, self esteem, and comfort.

The priorities, derived from human need/want experience, are tentative, not absolute, and vary with circumstances. No clear demarcation separates more vital from less vital needs, and needs from wants. At the margins, the trade-offs are almost imponderable. The accumulated evidence of need/want experience includes empirical data about physiological structure, psychological response, productivity, availability of resources, and widely-shared fulfillment preferences.\textsuperscript{86}

Groups or individuals who apparently subordinate long-run survival to the fulfillment of countersurvival wants\textsuperscript{87} may reverse the need/want priority. But many of them deny, minimize, or obliterate the survival cost. Most humans, as products of the evolutionary process, prefer long-run survival (for themselves and their descendants) to clearly countersurvival want fulfillment.\textsuperscript{88}

\textbf{D. The Survival Priority and Marginal Wealth Utility}

Priorities often turn on the existing resources of affected individuals. An allocation of money may fulfill the food need of an indigent but only the entertainment want of a nonindigent. Economists have long recognized that the marginal utility of wealth, i.e., of need/want fulfilling resources, usually diminishes with each increment.\textsuperscript{89} Such diminishing marginal utility reflects and confirms fulfillment priorities.

Wealth increments lose utility because the fulfillments obtained with the last increment are needed, and preferred, less than those obtained with earlier increments. Individual utility curves may be irregular, with the utility of additional increments sometimes in-

\textsuperscript{86} See \textit{supra} text accompanying notes 28-44; see \textit{infra} text accompanying notes 89-95.

\textsuperscript{87} \textit{E.g.}, to enjoyable but life-threatening consumption or activity. See \textit{infra} text accompanying note 39.

\textsuperscript{88} See \textit{supra} text accompanying notes 25-36, 38-43.

creasing just before transition to higher social status.90 And the intensity of preferences may vary unpredictably among individuals.91 But the persistently diminishing marginal utility of wealth for most, and the biological preference for need fulfillment over want fulfillment, establish a generally inverse correlation between fulfillment priorities and additional wealth. A thousand dollars is usually worth more to an indigent than to a millionaire. High medical costs impair need fulfillment for the poor, not the rich.

Without the increase in productivity induced by wealth incentives, the diminishing marginal utility of resources implies that per capita need/want fulfillment is maximized by an equal distribution of such resources,92 because the needs of the less affluent have a higher survival priority than the wants of the more affluent. But correlation of individual fulfillment with individual productivity increases per capita fulfillment by inducing greater effort, resourcefulness, and saving. More need fulfillment may therefore result from disproportionate allocations to stimulate need-fulfillment productivity than from an invariable priority for poorer recipients.93

Want-fulfilling productivity contributes to need fulfillment in the long run by augmenting the incentives that stimulate need-fulfilling productivity. But excessive allocation of resources to stimulate want-fulfilling productivity reduces long-run (as well as short-run) need fulfillment, a reduction that is accelerated by the lowered productivity resulting from consequent resentment and disruption.94

Decreasing marginal wealth utility also suggests (1) that the increase in productivity, and in per capita fulfillment, resulting from a system of wealth incentives lessens with successive incentive increments, and (2) that incentives should be increasingly subordinated to lower-income need fulfillment as the marginal utility of incentives diminishes. Productivity and lower-income need fulfillment are accommodated when the per capita fulfillment increase resulting from a productivity-incentive allocation, equals or exceeds the increase that would otherwise result from a need-priority allocation.

The graduated income tax implicitly attributes to all taxpayers

90. See Bernouli, supra note 89, at 201; Friedman & Savage, supra note 89, at 298, 303.
91. See infra text accompanying notes 67-71.
92. See authorities cited supra note 69.
94. I.e., a production shift from necessities to luxuries, stimulated by excessive incentive allocations, causes higher need-fulfillment costs with consequent resentment and lowered productivity.
a diminishing marginal-income utility and a need-fulfillment priority. Combined with welfare distributions to the poor, the progressive rate is designed to regain the loss in per capita fulfillment resulting from greater than optimal productivity incentives. The wealth redistribution resulting from such a tax may increase need fulfillment more than the reduction in marginally diminishing incentives decreases productivity.  

Taxpayers receive compensatory benefits from the fulfillment-enhancing services funded by the taxes. Such benefits include protection and resulting stability. Taxpayers also benefit from the distribution of tax funds to involuntarily unproductive indigents and their dependents because: (1) such a policy increases the psychological security and the productivity of all persons by insuring them against the hazards of unproductiveness;  

(2) the policy ameliorates the disruption costs of indigent discontent. For nonindigents, tax benefits tend to increase with income.

But for the diminishing marginal utility of wealth, a proportionate, rather than a progressive, tax would probably better accommodate competing need/want fulfillments by more closely correlating tax payments with tax benefits. But the incremental cost to the taxpayer of a proportionate tax diminishes as income increases, while the incremental stability benefit does not diminish, because the entire wealth of the taxpayer remains vulnerable to national as well as international instability and the last increment of protection or amelioration may be critical. In Utopia, the utility cost of a tax to the taxpayer never exceeds the benefit.

Need fulfillment priority and diminishing marginal wealth utility also frequently support compensation to an owner deprived by the community of "property" for the general welfare. Such compensation enhances per capita fulfillment when (1) uncompensated deprival has been neither a foreseeable, and therefore discountable, risk of such ownership nor an enterprise cost reallocable to the com-

95. *But see W. Blum & H. Kalven, Jr., The Uneasy Case for Progressive Taxation* (1953).

96. In a competitive, majoritarian system that apparently requires significant unemployment to maintain worker productivity and to inhibit the fulfillment-impairing dislocations of inflation, need-priority distributions minimally compensate the unemployed for the costs imposed on them to bolster per capita fulfillment. (A portion of the premium for limited unemployment compensation insurance is, of course, paid to the government by the employee.)

97. The marginal utility of benefits from nonprotective government services, however, probably does diminish.

98. I.e., something of value.
munity through pricing, and (2) any benefit to the owner is substantially exceeded by the deprival.

Allocation to the generally benefiting taxpayers of all the costs mitigates discontent, while enhancing productivity, by protecting the incentive to invest and the ability to plan. Not infrequently the allocation is also supported by a need priority, because the marginal utility cost of the large assessment to the slightly benefiting (and not necessarily affluent) owner will usually exceed the aggregated marginal utility costs of those taxpayers for whom the small per capita assessment exceeds the benefits.99

E. Accommodation of Competing Fulfillments: Government-Facilitated Private Ordering vs. Priority Assignment

The complex process of identifying need/want priorities and reconciling long-run productivity with short-run need fulfillment is facilitated by accommodation solutions that substantially satisfy the competing preferences. Reciprocity prefers reconciliation to subordination. The function of the community is to suppress individual autonomy no more than necessary to enhance per capita need/want fulfillment.100

As previously indicated, market allocations usually accommodate the preferences of transacting parties because the reciprocal exercise of autonomy increases fulfillment for each of them.101 It also enhances their productivity.102 Yet because of imperfections in the bargaining process,103 the effectiveness of such accommodations often depends on community regulation that promotes competition and information flow, provides compensatory remedies, redistributes wealth, and constrains need-impairing fulfillment.

Buyer and seller preferences, for example, are accommodated by market exchanges as facilitated by truthful-advertising, implied-warranty, and antimonopoly protections as well as by choice-preserving subsidies for the poor. And the preference of those who buy, sell, and use tobacco is perhaps accommodated with nonuser preferences by required health warnings and nonsmoking areas. When prohibi-

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99. The owner as taxpayer contributes to the reimbursement and thereby pays for any general-welfare benefits received by the owner.
101. See supra text following note 76.
102. Efficient exchange of production goods and services, as well as increased fulfillment of needs and noncountersurvival wants, usually enhances productivity.
103. See supra text accompanying notes 77-83.
tive transaction costs forestall private resolution of conflicting fulfillment preferences, transaction costs forestall private resolution of conflicting fulfillment preferences, community intervention is the only nonviolent alternative.

After short-run survival is accommodated with productivity-inducing incentives, a tension remains between vital need fulfillment for some and less vital need, plus want, fulfillment for many. Hazardous occupations, high speed transportation, and cheaper but less safe products, for example, enlarge need/want fulfillment for many at the cost of death or injury for an unlucky few.

Because the losers have usually accepted the risk in exchange for enhanced fulfillment, that market resolution, augmented by risk-disclosure regulation, may effectively accommodate the competing fulfills. But regulatory compensation for the losers, despite their prior choice, may increase per capita fulfillment by reducing the injury loss: imposition of a liability cost on those better able to reduce the hazard induces them to diminish that cost, if possible, by more efficient hazard-reduction efforts.

Safety regulation, whether through liability rules or operational controls, may also moderate the choice-constraining effect of minimal wealth on poor workers or consumers and more effectively protect the interests of third parties (e.g., bereaved family members, medical consumers, and injured nontravellers or involuntary travellers such as children). An increase in price resulting from the liability-safety cost minimizes the marginal-utility loss by spreading the cost among the many who benefit.

When no effective accommodation is available, priority assignment subordinates want fulfillment to need fulfillment and less vital need fulfillment to more vital need fulfillment. That priority thus supports outright proscription of such conduct as: (1) murder, assault, and theft, (2) dangerous driving, (3) use of debilitating narcotics if, despite health warnings or supervised distribution, impairment

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104. For example, when a factory with many employees pollutes the environment of an entire community.
105. See Posner, Utilitarianism, supra note 55, at 133.
106. See Posner, Efficiency, supra note 77, at 492.
107. Transaction costs manifestly preclude private determination of such ubiquitous safety controls as speed limits.
109. Or a reduction in hazardous-occupation wages.
110. See authorities cited supra note 108. Loser insurance can also spread the cost.
THE UTILITARIAN IMPERATIVE

of need fulfillment for others (through increased medical and welfare costs, decreased user productivity, and family deprivations) exceeds the productivity and anxiety costs of severe official intrusion, (4) medical practice without a license, because the survival cost of market information is high: though wider choice and lower medical costs may improve health care for some, others may die after the first visit to an unlicensed, incompetent doctor.

A market solution, however, remains an effective accommodation, despite substantial need fulfillment costs, when those costs are exceeded by the need fulfillment costs of official intervention, with its inefficiencies, expense, and intrusion on autonomy. Thus, less stringent government certification of new medications may be indicated if the survival cost of distribution before exhaustive hazard identification is surpassed by the survival cost of certification delay and official reluctance to approve less than maximally safe products.

When confronted with hostile adversaries, a community may subordinate the vital need fulfillment (plus productivity) of conscripted wartime combatants and of noncombatant victims to the more general need/want fulfillment of others. Historically, group per capita fulfillment has not infrequently been enhanced by military aggressiveness as well as by effective defense.111 But the survival costs of intergroup violence and the survival value of intergroup reciprocity have inexorably increased.112

Reluctance to subordinate extensive combatant and victim need fulfillment to an increase in community want, and less vital need, fulfillment reflects the perception that per capita fulfillment is seldom enhanced by hostilities in such circumstances. The fulfillment costs of widespread death, injury, loss of productivity, and discontent may well exceed the fulfillment gains of victory. And the chance of defeat increases the deficit.

The result may be human progression toward an "evolutionarily


stable strategy” of territorial self defense similar to that achieved by many animals. In response to the countersurvival consequences of territorial aggression for victims and ultimately for competing aggressors, as well, such animals fiercely defend their own territory but retreat from the territory of others when challenged. The traditional balance-of-power strategy suggests such an accommodation.

Without effective reciprocity, self-defense is the only survival remedy. Passive resistance to a Hitler has survival costs that are acceptable to few communities. Rejection of those costs is perhaps being accommodated with the intolerable survival costs of nuclear warfare by payment of more immediate nuclear-deterrence costs.

Negotiations to reduce the nuclear-deterrence costs confront the participants with a predicament like the “prisoner’s dilemma” if nuclear weapons can escape detection: although both participants would benefit from a reduction, each is impelled to increase its nuclear weapons as protection against an undetected increase by the other. But each may also be impelled to refrain from their initial use. If that accommodation fails, so may the evolutionary process.

While the accommodation holds, nonnuclear self defense remains the survival remedy pending a reciprocity solution. The survival costs of nonnuclear warfare of course continue to be high, but when the survival costs of capitulation are perceived as exceeding them, compensation for combatants commensurate with risk would provide a kind of market accommodation for those induced thereby to volunteer and would reduce the disproportionate wartime-conscription assessment.

Some form of private ordering, i.e., of reciprocal autonomy, perhaps augmented by transaction-facilitating regulation, is necessarily

113. R. Dawkins, supra note 1, at 71-94.
115. I.e., the costs of developing, constructing, and maintaining nuclear weapons.
116. Each of two separately confined prisoners arrested for the joint commission of a crime is told by the prosecutor: “I can send both of you to jail for a year. But if you alone confess that you both committed a more serious offense, I’ll get you off with a three month sentence, while your partner gets ten years. If, however, you both confess, both of you will get five years.” What should each do? See A. Rapoport & A. Chamah, Prisoner’s Dilemma 24 (1965). See also J. Von Neumann & O. Morgenstern, Theory of Games and Economic Behavior (1944).
the ultimate nonviolent resolution for conflicting fulfillment preferences (including need versus need and want versus want) when neither a need-fulfillment priority, a more effective accommodation, nor an apparent majoritarian preference is discerned by official decisionmakers. The survival value of individual autonomy then provides both a priority and an accommodation. But official resolution, even by the toss of a coin, has survival priority to avoid violence.

Expansion of per capita need/want fulfillment by the accommodation and “prioritization” of fulfillment preferences is a process of experimentation. The problems of human interaction are so complex, the consequences so variable, the data so diffuse and unquantifiable that survival solutions emerge only from trial-and-error testing of hypotheses or of fortuitous social variations.\textsuperscript{117}

Countersurvival choices are likely to be ultimately discarded if the majoritarian political process provides effective procedures for appraisal and modification of fulfillment policies. Though the problems may appear intractable, humans have been confronting them for some two thousand millenia. The utilitarian decisionmaking process is disparaged as “uncertain” and dependent upon “empirical hunches,”\textsuperscript{118} but uncertain hunches and human problem-solving have been inseparable for the same period.

VIII. THE SPECTRE OF “MONSTROUS” UTILITARIAN RESULTS

Nonutilitarians nevertheless insist that, however well-intentioned, the utilitarian goal of happiness, or increased per capita fulfillment, can justify “monstrous”, i.e., unnatural, inhuman, or grossly immoral, results\textsuperscript{119} because:

(a) A substantial increase in majority satisfaction may outweigh such severe minority deprival as the persecution, or even extermination, of a small, miserable, and hated group.\textsuperscript{120}

(b) Majority fulfillment can justify minority control: an increase in per capita fulfillment may vindicate the replacement of democracy

\textsuperscript{117} See R. Dawkins, supra note 1, at 203-15.


\textsuperscript{119} See R. Nozick, Anarchy, State, and Utopia 41 (1974); Donagan, Is There a Credible Form of Utilitarianism?, in Contemporary Utilitarianism 187 (M. Bayles ed. 1968); McCloskey, A Non-Utilitarian Approach to Punishment, in Contemporary Utilitarianism 239, 246 (M. Bayles ed. 1968) (asserting that such results are sometimes “dictated” by utilitarianism) [hereinafter cited as McCloskey, Punishment]; Posner, Utilitarianism, supra note 55, at 116, 131 (the utilitarian approach “yields results violently inconsistent with our common moral intuitions”); Williams, supra note 56, at 92-93.

\textsuperscript{120} Posner, Utilitarianism, supra note 55, at 113, 117; Williams, supra note 56, at 105.
with dictatorship.\textsuperscript{121}

(c) Fulfillment derived from "asocial" behavior (such as sadism, envy, or greed) is not distinguished from, and can therefore outweigh, fulfillment derived from socially approved behavior.\textsuperscript{122} Animal torture is thus preferable to kind treatment if the enjoyment of torturers exceeds the enjoyment of benign masters.\textsuperscript{123}

(d) Conversely, socially desirable results can outweigh serious individual deprival. "[T]he innocent individual [may be] sacrifice[d] on the altar of social need."\textsuperscript{124} Thus, the painless and undetectable killing of an unhappy old man by his grandson is justified if the grandson's enjoyment of his inheritance exceeds the grandfather's enjoyment of his wretched existence.\textsuperscript{125} And the punishment of an innocent person for the commission of a heinous crime in order to deter such crimes is justified if the deception is undetectable and the deterrence substantial.\textsuperscript{126}

These fervent anti-utilitarian attacks ignore the priority of need fulfillment and the eventual antisurvival consequences of short-run oppression. "Monstrous" results do not increase per capita need/want fulfillment in the long run.\textsuperscript{127}

A. Mistreatment of Minorities

The legalized persecution or extermination of a disfavored minority ultimately decreases, rather than increases, majority fulfillment. The resulting discontent kindles violent resistance, crime, and social disruption. Those marked for extermination may kill and injure a good many of the exterminators. Affection and companionship

\begin{footnotes}
\item[121] Posner, \textit{Utilitarianism}, supra note 55, at 116.
\item[122] Id. at 116, 131-32.
\item[123] See Kornhauser, supra note 55, at 602; Posner, \textit{Utilitarianism}, supra note 55, at 116. This objection apparently assumes that fulfillment intensities can be weighed. But see supra note 67 and accompanying text.
\item[124] Posner, \textit{Utilitarianism}, supra note 55, at 116, 117-18; see Donagan, supra note 119, at 188-89; see also Hart, supra note 58, at 829-31; Kornhauser, supra note 55, at 602; Morawetz, \textit{supra} note 67, at 346-51.
\item[125] See Donagan, \textit{supra} note 119, at 188; Posner, \textit{Utilitarianism}, supra note 55, at 116-17.
\item[127] See infra text accompanying note 254. Concerning the difference between rule utilitarianism and act utilitarianism, see infra text accompanying notes 227-44.
\end{footnotes}
costs are high for nonminority family and friends of the victims. The noncooperation of dissenting majority members undermines the discriminatory policy and increases social friction. The condemnation of disapproving communities impairs social and economic exchange as well as self esteem.

The disregard for life and suffering engendered by such policies is likely to foster a more general disregard for life and suffering that threatens members of the majority. Violence begets violence. Insecurity and anxiety are the result. If minority extermination is extended to indigent, minimally productive community members, perhaps through starvation, majority insecurity and anxiety are intensified. Majorities are but shifting coalitions; some in the majority today may be in the minority tomorrow.

These consequences diminish the productivity of the majority as well as the minority. In the long run, need/want fulfillment is substantially reduced for the large as well as the small group. The cost of the majority satisfaction derived from minority mistreatment is impairment of long-run survival.

B. Justification for Dictatorship

Increased per capita fulfillment may justify the replacement of democracy with dictatorship by majoritarian action or acquiescence. But a continuing majoritarian resistance to dictatorial control negates the per capita fulfillment premise. And the survival costs of dictatorship suggest the improbability of that premise in a productive, though perhaps not in an impoverished, community. In the long run, greater per capita fulfillment generally results from government fulfillment policies that are subject to the effective supervision of the governed.128

C. Asocial Fulfillments

The survival costs of clearly “asocial” behavior exceed the survival value of fulfillments derived from such behavior. The anger or hatred of a murderer, the gratification of a sadist, the malice of a defamer, and the greedy indolence of a thief lack significant long-run survival value and are therefore subordinated to the existence, health, dignity, and productivity of the victims.129

128. See supra text accompanying note 44.
129. The survival value of Hitler’s assassination, however, would have exceeded survival costs and significantly increased per capita need/want fulfillment. But consider the significance of rule utilitarianism, i.e., adherence to community rules. See infra text accompanying notes
The gratification derived by a few from the torture of animals not only lacks survival value; it may stimulate an appetite for infliction of pain on humans, with countersurvival consequences, while concern for the needless suffering of living creatures contributes to long-run human survival.

D. Innocent Victims of Social Need

Nor is "social need," i.e., the general welfare, a sacrificial altar for the immolation of "innocent individuals." Social need is derived from individual need, and effective social organization accommodates the tension between them.\textsuperscript{180} The need/want fulfillment of unoffending individuals must sometimes be subordinated to "social need" but no more than necessary to enhance the need/want fulfillment of most individuals. The least intrusive method is the essential accommodation.\textsuperscript{181} In the long run, enhancement for the most results from carefully limited intrusion on the few.

Social need does not justify the painless, undetectable killing of a miserable old grandparent by an inheriting grandchild, because per capita need/want fulfillment is not enhanced. Even with the strained assumption of undetectability, made to escape the anxiety and reduced-deterrence costs of condonation,\textsuperscript{182} fulfillment costs are high.

Successful grandparent killers are encouraged to kill others for gain. And other grandchildren, perceiving the benefits of early grandparent demise and the possibility of an undetected killing, are tempted to follow a similar path, though their grandparents may be less expendable. The fulfillment balance is not difficult for a benefitting executioner-judge.

The rising mortality rate for grandparents and other elderly family members feeds temptation and increases the anxiety of potential victims. Such killings thus enhance less vital need plus want fulfillment for the killers at the cost of life and intense anxiety for actual and potential victims, who may in the future include almost anyone. In fact, of course, undetectability cannot be assured. Such killers are ordinarily deterred by the risk of community sanctions imposed to avoid the fulfillment costs described above.\textsuperscript{183}

\textsuperscript{227-44.} Such assassination by a threatened Jew would probably be viewed in democratic communities as self defense.

\textsuperscript{130.} See supra text accompanying notes 25-36.

\textsuperscript{131.} See supra note 100 and accompanying text.

\textsuperscript{132.} See, e.g., Posner, Utilitarianism, supra note 55, at 117.

\textsuperscript{133.} See supra text accompanying notes 33-36; infra text accompanying notes 238-40.
By contrast, increased per capita fulfillment probably results from the painless killing of terminally ill and suffering individuals at their request. Pain and anxiety are mitigated, while the value of life is not depreciated. Though some family members may have affectional or religious objections, long-run survival is facilitated by respect for autonomy, reassurance for those with a similar preference, and reduction of medical costs.

Even if general deterrence is enhanced by an undetected policy of convicting and punishing persons for crimes they did not commit,\(^1\) per capita fulfillment is not. In addition to the suffering of the innocent victims and their families, the institutional costs are formidable. The surreptitious adoption of such a policy by police, judges, prosecutors, and others involved in the deception invests them with an indeterminate power that threatens everyone in the community. If the deception is ever discovered, the resulting anxiety, distrust, reclusion, and diminished productivity undermine community cohesion.\(^2\) Per capita fulfillment is manifestly impaired.

The less intrusive method of implementing the deterrence goal, i.e., the method with lower fulfillment costs, is clear: intensified efforts to convict and punish those who are guilty. Although deterrence is greater before disclosure of the deception, thereafter it is not; and in any event the fulfillment costs of maximum deterrence are excessive.

The essential premise of undetectability is not sensible in a nontotalitarian community. A single disclosure triggers the social harms, while the difficulty of the deception, the number of perpetrators, and the evidence, resistance, and protests of those aggrieved, make prompt detection likely and ultimate detection inevitable. Concealment may in fact be effective in any particular case, but the risk of disclosure cannot be eliminated, and the fulfillment costs of that risk are prohibitive. In a totalitarian community the per capita fulfillment costs of such punishment merge with the fulfillment costs of the entire system.

### E. A Pseudo Dilemma: Monstrous Possibilities

Some nonutilitarians derive the possibility of a monstrous utilitarian result from the premise that the social benefit of monstrous conduct could conceivably exceed the social harm. In such a case,

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134. See supra note 126 and accompanying text.
135. See Rawls, supra note 126, at 11-12; Sprigge, \textit{A Utilitarian Reply to Dr. McCloskey}, in \textit{Contemporary Utilitarianism} 261, 276-78 (M. Bayles ed. 1968).
they insist, utilitarians must either approve the monstrous conduct or cease to be utilitarians. The premise, however, is fallacious.

First, if such a case is conceivable, nonutilitarians have the burden of conceiving it, and the conception must be viable, i.e., consistent with reality and in sufficient detail to permit a utilitarian cost-benefit analysis. The fulfillment consequences of fanciful or conclusory assumptions cannot be ascertained.

Second, the required utilitarian evaluation resolves the pseudo dilemma. Conduct that reduces long-run per capita fulfillment is indisputably objectionable, whether or not labeled "monstrous." Conduct that is necessary to increase such fulfillment, i.e., to facilitate long-run human survival, is not socially perceived as monstrous, although a nonutilitarian may continue to denounce it as contrary to some a priori morality divorced from human consequences and resting on faith.

Most communities occasionally sacrifice "innocent" individuals, who have harmed no one, when the sacrifice is considered necessary to enhanced per capita need/want fulfillment. Individuals who prefer not to serve in the armed forces during a war must risk their lives or go to prison. Someone in an overcrowded lifeboat may be thrown overboard to save the others. The known cost of cheaper and faster transportation is increased loss of life, including the lives of children who are involuntarily subjected to the risk.

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136. See M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP, 238-43 (1984); McCloskey, Punishment, supra note 119, at 246-48; McCloskey, A Note on Utilitarian Punishment, 72 MIND 599 (1963); Smart, supra note 45, at 70.

137. See Sprigge, supra note 135, at 261, 272-76.

138. See id. 276-92; infra text accompanying note 254. The word is, of course, ambiguous.

139. See R. SARTORIUS, supra note 67, at 136-38; Smart, supra note 45, at 70-73; Sprigge, supra note 135, at 276-92; see also G. CALABRESI & P. BOBBITT, supra note 82, at 77-78.

140. Cf. conscientious objectors.

141. See United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (nonessential seamen have a duty to first save the passengers); Queen v. Dudley and Stephens, L.R. 14 Q.B.D. 273, 15 Cox C.C. 624 (1843); MODEL PENAL CODE § 3.02, 10 U.L.A. 477 (1974); LAW, JEFFRIES, & BONNIE, CRIMINAL LAW, CASES AND MATERIALS, 530-41 (1982). The choice should be impartial (probably by lot), not made by a few who assume authority without placing themselves in jeopardy; see preceding authorities.

142. See supra text accompanying notes 105-09. The need/want fulfillment choice is, of course, made for the child by the parent. Nor does the despot who threatens to kill an entire group of dissidents unless a guest shoots one at random, see Williams, supra note 56, at 98-99, evoke a utilitarian monster. A utilitarian decision to sacrifice the life of one rather than the lives of all would probably be the choice of most nonutilitarians as well as utilitarians. See Posner, Utilitarianism, supra note 55,
Utilitarians may, of course, disagree as to the utility balance. Some, intent on short-run advantage, might contend that the elimination of a disfavored minority would enhance per capita fulfillment. But the possibility of such disagreement does not confirm monstrous utilitarian results nor single out utilitarians as the justifiers of such results. Nonutilitarians may also disagree as to the morality of monstrous behavior. The Scriptures were cited to justify slavery.\footnote{See \textit{Stringfellow, A Scriptural View of Slavery} (1856), in \textit{Slavery Defended: The Views of the Old South} 86 (E. McKittrick ed. 1963).}

A monstrous policy can be categorically rejected by an a priori morality, but proponents of the policy can defend it with a contrary a priori morality. Only a utilitarian evaluation can resolve the a priori impasse. Such an evaluation may, in part, underlie the objection of nonutilitarians to monstrous behavior, because all human choice reflects the needs and wants of the chooser and those needs and wants reflect the chooser's perceptions of the needs and wants of others.\footnote{See \textit{infra} text accompanying notes 221-26.}

Utilitarianism is a process of decisionmaking, not a code of conduct. It is not refuted because some may claim support for monstrous conduct in its name. Apologists for asocial behavior often find shelter in the ambiguities of language. A majoritarian preference for the short-term satisfactions of minority mistreatment may sometimes prevail, but it need not be approved by utilitarians who relate per capita fulfillment to long-run survival.

\section{The Spurious Inconsistency: Utilitarian Retribution}

Utilitarians are also accused of sometimes inconsistently accepting a nonutilitarian justification for punishment, namely, retribution.\footnote{See generally \textit{H.L.A. Hart, Punishment and Responsibility} (1968); \textit{H. Pack-}} But retribution has utilitarian support.

Most communities punish those found guilty of serious antisocial behavior because punishment (1) tends to deter others, as well as the offender, from such behavior in the future, (2) may rehabilitate, i.e., improve the social attitude of, the offender, and (3) protects community members from harm during confinement or after execution of the offender.\footnote{See \textit{infra} text accompanying notes 221-26.} These traditional utilitarian purposes
are perceived as enhancing long-run per capita fulfillment.

Many community members, however, also justify punishment on the ground that suffering proportionate to wrongdoing is "deserved." This retributive justification is conventionally viewed as expressing a nonutilitarian, a priori moral principle, reflected in the outrage of victims and empathizers, that proportionate punishment is "just" regardless of consequences. The principle, if accepted by utilitarians, undermines utilitarianism.

But the anger of injured persons, the accompanying desire to "get even," and the consequent feeling that the offender deserves to suffer, all reflected by retribution, are components of a post hoc self-defense response that has had an enduring survival value. Although the harmful act is completed, the deterrent defense is not; the emotional pressure to respond aggressively continues, with deterrent consequences.

Retribution also manifests the resentment of cooperative community members, who have accepted autonomy constraints, toward uncooperative members who seek community benefits without payment of autonomy costs and thereby impose additional costs on the cooperators. The resentment, which shields reciprocity, underlies the feeling that penalties are compensatory.

Anger, resentment, and self help, however, have countersurvival consequences as well. Feuds and private violence are socially disruptive; resentment undermines community confidence and cohesiveness. The accommodation that enhances per capita fulfillment is community imposition of punishment, one purpose of which is to minimize discontent and disruption by assuaging feelings of outrage and resentment. "Vengeance is Mine; I will repay, saith the Lord" may be the theological expression of that utilitarian goal.

Utilitarians may differ as to whether utilitarian retributive purposes (which are closely related to nonretributive deterrence and personal protection) justify the fulfillment cost of punishment in the absence of nonretributive purposes. Nonutilitarians, who prefer to rely

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\[ \text{ER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968); R. SARTORIUS, supra note 67, at 133-38; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 33-55 (1976) (report of the Committee for the Study of Incarceration); Morris, Persons and Punishment, 52 The Monist 475, 477-78 (1968); Rawls, supra note 126, at 4-9.} \]

147. See H. SPENCER, supra note 15, at 401-09; authorities cited supra notes 145-46.
148. See Trivers, supra note 27, at 49.
149. See Id.
150. See Morris, supra note 146, at 482-83.
on a priori desserts, need not confront that choice. (When utilitarian purposes support the punishment, the utilitarian-nonutilitarian distinction is largely academic.)

Attempts to compel a utilitarian choice between no punishment for a serious offense and punishment based solely on nonutilitarian retribution produce such fanciful queries as the propriety of only pretending (for deterrence and antiresentment purposes) to punish a rapist whose sexual drive has been destroyed by a later injury. But that scenario does not quite eliminate the possibility of subsequent assaultive behavior, nor of disclosure to the community with resulting discontent, and ignores the asocial effects of usurpation by dissembling officials.

If in fact all feelings of outrage and resentment could be assuaged, all risk of future harm eliminated, general deterrence preserved, and any other adverse consequences forestalled, utilitarians would probably have little difficulty in remitting punishment. But, alas, that is the world of make believe.

X. ILLUSORY ALTERNATIVES TO UTILITARIANISM: "COMMON MORAL INTUITIONS" AND PREEXISTING RIGHTS

To evaluate resource allocations and behavior constraints, most nonutilitarians replace an empirical inquiry into need/want fulfillment with "common moral intuitions," apparently derived from an innate awareness of what is good and right, perhaps implanted in the genes. The original source of these a priori standards, and the agency of implantation, is presumably God or some less traditional transcendental intelligence, possibly a collective social conscience existing independently of need/want fulfillment and revealed in myths.

152. See M. Moore, supra note 136, at 241.
153. See supra note 35.
155. See R. Dworkin, supra note 154, at 158-59; see infra text accompanying note 177.
Moral intuitions, however, are cognitive products of the human brain, which has evolved to record, integrate, and recall the experience of the individual and to activate need/want fulfilling responses. Such intuitions are non-deliberate, semi-articulated impressions of desirable behavior, derived by each individual from a cerebral record of perception, conditioning, communicated information, and prior reflection. They consequently reflect the needs and wants, i.e., the utilitarian preferences, of the individual. Common intuition reflects common need/want experience.

Disregarding the significance of evolutionary survival, non-utilitarian intuitionists deny that utilitarianism provides a "moral" basis for choice between competing need/want fulfillments. They seek instead to identify the intuitive "preexisting rights" that must, they insist, underlie such choice. But they disclose no non-mystical source of the rights, which are, in fact, derived from the search for increased per capita need/want fulfillment. Although frequently accorded a transcendental immutability, rights identify the resource and behavior allocations that are perceived by the community as enhancing such fulfillment. Indeed, revelation of various a priori rights or moral standards is often accompanied by disparagement of other such rights or standards as crypto-utilitarian.

A priori rights divorced from need/want fulfillment depend on the magic power of language. When not determined by social consequences, the morality of behavior tends to be resolved by definition

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157. See infra text accompanying notes 221-26; Sprigge, supra note 135, at 271-72 (suggesting "a subtle interplay between . . . ordinary moral sentiments and the principle of utility").


159. See Wilson, supra note 1, at 562 ("The Achilles heel of the intuitionist position is that it relies on the emotive judgment of the brain as though that organ must be treated as a black box.").

160. See Monro, supra note 3, at 281.

161. See, e.g., Kornhauser, supra note 55, at 598 (criticizing Posner's wealth maximization principle as "a [s]pecies of [u]tilitarianism"); Posner, Utilitarianism, supra note 55, at 115 (questioning whether "Dworkin is a 'genuine' Kantian, and not simply a utilitarian of the egalitarian school"); id., at 118 (criticizing "the tendency of Kantianism" and "the moral philosophy of John Rawls" "to merge into utilitarianism").
of the words used to characterize the behavior. Necessarily ambiguous generalizations, evolved to describe and correlate heterogeneous events, acquire a controlling normative role.

Definition, of course, reflects human experience. But the equivocal significance of that experience may be replaced with the illusory security of fixed meaning. Ethical connotations are then drawn not from the underlying empirical lessons that provide a context for meaning, but from inflexible linguistic "principles" and their emotional overtones. Derivation of meaning from the social purposes that engender the terminology leads to a utilitarian appraisal of need/want fulfillment.

The preexisting rights of nonutilitarian morality are usually identified as components of "liberty," "equality," and "autonomy,"\(^\text{162}\) labels that suggest a concern with individual need/want fulfillment and its social constraints. Liberty is perceived as freedom for behavior that improves the quality of existence, such as speech, religion, and other "civil rights" activity; equality as rejection of disparate individual worth and "discriminatory" treatment; autonomy as the individual choice implied by liberty and equality.\(^\text{163}\)

**A. Autonomy, Equality, and "A Sense of Justice"**

John Rawls derives an equality principle from individual autonomy by presuming that "in the original position," i.e., in a "state of nature", where a "veil of ignorance" cloaks prospective resource distributions, everyone (1) would be reluctant to risk impoverishment for a chance at abundance, and, consequently, (2) would agree to equal distribution generally, but (3) would allow above-average distributions for productivity incentives that increase resources sufficiently to reimburse those with below-average distributions.\(^\text{164}\)

Similar agreement on voting equality (which is the essential

\(^{162}\) See R. Dworkin, supra note 154, at 271-78; C. Fried, supra note 158, at 114-19; J. Rawls, supra note 62, at 5, 11-17, 64-65, 142-45, 150-51; Epstein, supra note 158, at 75; Kronman, Wealth Maximization as a Normative Principle, 9 J. Legal Stud. 227, 233 & n.18 (1980); Morawitz, supra note 67, at 351-56; Posner, Efficiency, supra note 77, at 489-90; Posner, Utilitarianism, supra note 55, at 127.

Rights derived primarily from autonomy have been characterized as "Kantian," though they were not necessarily identified by Immanuel Kant. See B. Ackerman, Private Property and the Constitution 71-72 (1977); Posner, Utilitarianism, supra note 55, at 104 & n.4, 127.

\(^{163}\) See authorities cited supra note 162.

\(^{164}\) See J. Rawls, supra note 62, at 12, 14-15, 136-42, 150-51. Rawls does not discuss the tension between his risk-averse assumption and his requirement of unanimity. See id., at 141-42; see also R. Dworkin, supra note 154, at 153-54.
procedural norm for majoritarian choice)\textsuperscript{165} and on such “basic liberties” as “freedom of speech . . . conscience . . . thought . . . person . . . property [ownership] . . . and freedom from arbitrary arrest”\textsuperscript{166} is premised on a general awareness that the “quality of civilization”\textsuperscript{167} will be enhanced by “the most extensive liberty [for each] compatible with a like liberty for all,”\textsuperscript{168} i.e., by equal liberty “unless an unequal distribution . . . is to everyone’s advantage.”\textsuperscript{169}

This concept, offered as “an alternative to [all] utilitarian thought,”\textsuperscript{170} is rested ultimately on “a sense of justice,” derived from an inherent “moral capacity,” “considered [moral] judgments,” “intuitively appealing” presumptions, and a “reflective equilibrium” reached after weighing competing moral positions.\textsuperscript{171}

But the intuitive conclusion suggests utilitarian perceptions. The presumed majoritarian preference for assured need fulfillment rather than possible need-plus-want fulfillment; the productivity-incentive corollary; and the voting-equality, basic-liberties postulate imply: a long-run survival goal; the diminishing marginal utility of resources;\textsuperscript{172} the priority of need fulfillment over want fulfillment;\textsuperscript{173} the need-fulfilling consequences of productivity incentives; the need-impairing, counterproductive effect of minority discontent, majority insecurity, inhibited thought, disrupted communication, and arbitrarily constrained movement; the enhancement of per capita need/want fulfillment by avoidance of need-impairing allocations; and the contributions of both individual autonomy and majoritarian choice to such fulfillment. The accuracy of these propositions in fact turns on empirically verifiable information about the world as it is, not on intuitively appealing presumptions about a fictitious state of nature.

Despite his explicit rejection of utilitarian thought,\textsuperscript{174} Rawls intimates a utilitarian foundation for his equal-treatment conclusions by noting that a sense of justice, moral feelings, and altruistic reci-

\begin{itemize}
\item \textsuperscript{165} See H. Kelson, A General Theory of Law and the State 88-89 (1949).
\item \textsuperscript{166} J. Rauls, supra note 62, at 61.
\item \textsuperscript{167} Id. at 542.
\item \textsuperscript{168} Id. at 64.
\item \textsuperscript{169} Id. at 62.
\item \textsuperscript{170} Id. at 22.
\item \textsuperscript{171} Id. at 46-53.
\item \textsuperscript{172} The reluctance to risk impoverishment for the chance of abundance reflects the diminishing utility of abundant resources. See supra notes 89-90 and accompanying text. For the risk-averse, the amount that may be won has less utility than the amount that may be lost.\textsuperscript{173} Abundance represents want fulfillment; impoverishment, the loss of need fulfillment.
\item \textsuperscript{174} J. Rauls, supra note 62, at 22.
\end{itemize}
proxity may have evolutionary origins and by designating scarce resources, conflicting resource claims, and resulting collaborative arrangements as "circumstances of justice." His environmental paradigm, however, is not an epochal struggle to survive but "the original position," and his rationale is not long-run survival, but innate moral intuition.

B. The Right to "Equal Concern and Respect"

Endorsing the Rawls position, Ronald Dworkin says:

It may mean, at its most profound, that these principles are innate categories of morality common to all men, imprinted in their neural structure, so that man could not deny these principles short of abandoning the power to reason about morality at all.

To these categories he adds the right of "human beings who are capable of suffering and frustration, and [of deciding] how their lives should be lived," to be treated by the government "with equal concern and respect.

The right is derived from a morality independent of the common good:

If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.

For Dworkin, this "liberal conception of equality" implies special governmental consideration for everyone's "personal" preferences (i.e., preferences as to personal treatment) but not for their "external" preferences (i.e., preferences as to the treatment of others), a distinction he apparently considers necessary to avoid the contradiction of "equal concern and respect" for the personal preferences of one person and the external preferences of another that conflict.

The innate right, however, has a utilitarian foundation. "Government concern and respect" increases need/want fulfillment, along with productivity, by reducing anxiety, uncertainty, and discontent.

175. Id. at 503; see also id. at 431.
176. Id. at 126-30.
177. R. DWORKIN, supra note 154, at 158-59.
178. Id. at 272-73 (emphasis added).
179. Id. at 269 (emphasis added); see also id. at 267, 270-72.
180. Id. at 273.
181. See id. at 275-77.
Whether or not "personal" preferences necessarily include "external" preferences (because individual fulfillment is necessarily affected by the fulfillment of others), the attempt to distinguish between them suggests the survival value of individual autonomy, the priority of "personal" needs over "external" wants, and the goal of enhanced need fulfillment.

The "right to equal concern and respect" presumably restrains community intrusion on individual autonomy. And that restraint reflects the broader utilitarian perception that the community should intrude on individual autonomy no more than necessary to promote the general welfare, i.e., to enhance per capita need/want fulfillment through the priority-accommodation process. Dworkin's insistence on equal government concern and respect even when "not . . . in the general interest" nor "for the general welfare" is sophistical because in the long run such a policy does promote the general welfare. He gives no example of an a priori right that does not.

Nor does he disclose the biological process for imprinting moral categories on neural structures. Perhaps such categories, in varying forms, are products not of a mysterious prebirth conditioning but of social evolution. Perhaps they are behavior norms with survival value that have been transmitted to successive generations through the learning process.

The equality that Rawls and Dworkin seek can be described in utilitarian terms as reciprocal or community recognition that the well-being (i.e., the need/want fulfillment or autonomy) of each individual concerns all individuals because it affects all individuals. The socially disruptive impact of disparate autonomy intrusion by government is ameliorated only when such intrusion is necessary for long-run enhancement of per capita need/want fulfillment.

C. Intuitive Rights and "Wealth Maximization"

Richard Posner perceives the traditional utilitarian goal of maximum happiness or pleasure as: (1) justifying monstrous majoritarian preferences because it provides no moral basis for preferring

182. "Personal and external preferences are sometimes so inextricably combined . . . that the discrimination [between them] is psychologically as well as institutionally impossible." Id. at 276.

183. See supra notes 100, 131 and accompanying text.


185. See supra notes 28-32 and accompanying text.
good pleasures over bad ones,\textsuperscript{188} and (2) creating moral uncertainty because it depends on changing empirical data, apparently extends to animals as well as people, attempts to weigh interpersonal utility, and perhaps seeks to maximize total rather than per capita happiness.\textsuperscript{187} He consequently searches for a more discernible source of morality and finds it in “initial” rights to “life, liberty, and labor.”\textsuperscript{188} Those rights, revealed by “basic ethical [or common moral] intuitions,” affirm the dominion of individuals, as “natural owners,” over their bodies, work products, ideas, and property.\textsuperscript{189}

Such rights alone, however, he finds inadequate to resolve “moral dilemmas,” i.e., competing claims to life, liberty, or labor, because the supporting intuitions become uncertain.\textsuperscript{189} Therefore, to provide further ethical guidance, he annexes to the rights the principle of “wealth maximization.”\textsuperscript{190} The principle identifies as moral, or ethical, those resource allocations that maximize “wealth,” defined as “the value in dollars or dollar equivalents . . . of everything in society . . . measured by what people are willing to pay for something or . . . what they demand in money to give it up.”\textsuperscript{192}

Wealth is “maximized” when resources are owned “by those who value them most”, i.e., by those “willing and able” to pay or forego the most in money, or its equivalent, to have them.\textsuperscript{193} A reallocation of resources thus maximizes wealth when, in accordance with the Kaldor-Hicks criterion,\textsuperscript{194} the gains exceed the losses, as measured by the monetized value of the resources to the winners and the losers.\textsuperscript{195}

That value, according to Posner, is disclosed by voluntary market transfers, which “reassign” the initial rights “to other uses,” and by involuntary transfers, which are imposed by a rights-protecting system of legal rules and remedies that “simulate[s] the operations of the market when the costs of market transactions are prohibi-

\begin{itemize}
  \item \textsuperscript{186} See Posner, Utilitarianism, supra note 55, at 116-17.
  \item \textsuperscript{187} See id. at 111-16, 127-35.
  \item \textsuperscript{188} See id. at 108-09, 125-27, 135.
  \item \textsuperscript{189} Id. at 110-11, 125, 127, 133, 135.
  \item \textsuperscript{190} See id. at 111.
  \item \textsuperscript{191} Id. at 119-20, 125-26.
  \item \textsuperscript{192} Id. at 119.
  \item \textsuperscript{194} See supra text accompanying note 80.
  \item \textsuperscript{195} See Posner, Efficiency, supra note 77, at 491, 498 & n.8; Posner, Wealth, supra note 193, at 244.
\end{itemize}
These solutions, he finds, are reinforced by the Kantian "principle of consent" (or autonomy): losers who can anticipate and adjust for a loss before it occurs necessarily accept, or consent to, the risk and are compensated "ex ante," (i.e., in advance). Although acknowledging that added wealth generally augments happiness, Posner insists that wealth maximization is not congruent with happiness, and therefore not utilitarian, because: (1) it necessarily benefits others, along with the maximizer, while "[t]here is no such constraint on the pursuit of selfishness in a utilitarian society"; (2) it encourages traditional efficiency-promoting "pieties ... virtues ... and capacities" such as diligence, honesty, altruism, and intelligence rather than the "hedonistic," "epicurean," "selfish," pursuit of personal happiness; and (3) it provides an objective measure of value that avoids the harmful-pleasure, animal-happiness, and total-happiness pitfalls of the subjective-happiness goal.

Without a utilitarian justification, however, the moral foundation for wealth maximization (or "the pursuit of wealth") becomes as evanescent as the lingering smile of the Cheshire Cat. The moral foundation, says Posner, is provided by initial intuitive rights:

\[ \text{The wealth-maximization principle implies ... an initial distribution of individual rights ... to their natural owners. ...} \]

... [Such] a moral system ... is congruent with ... everyday moral intuitions.

The principle is offered to reinforce and clarify the rights when intuition is indistinct:

\[ \text{What is desired ... [is] a structure which organizes our intuitions and provides guidance in dealing with ethical issues where our intuitions are uncertain. ... [I]n the solution of moral dilemmas ... a systematic ethical theory, consistent with but not lim-} \]

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196. See Posner, Utilitarianism, supra note 55, at 127; see also id. at 120.
199. Id. at 132.
200. Id. at 123-24, 132, 136.
201. See id. at 128-29, 132.
202. Id. at 122.
203. Id. at 127 (emphasis added).
204. Id. at 133; see also id. at 111, 125-27.
itized to our basic ethical intuitions, can be useful. 205

Whereupon, by transposition, the rights are derived from the principle:

Dworkin and Kennedy are incorrect [in saying] that the source of the rights exchanged in a market economy is . . . external to the wealth-maximization principle. The principle itself ordains the creation of a system of exclusive rights, one that, ideally, will extend to all valued things that are scarce . . . . 206

. . . . [A] system of rights or entitlements can be deduced from the goal of wealth maximization itself. 207

And the genetic reversal is reiterated:

The crucial point . . . is that the specific distribution of wealth is a mere by-product of a distribution of rights that is itself derived from the wealth maximization principle. A just distribution of wealth need not be posited. 208

If the purpose of the principle is to implement the rights and the rights are “deduced” from the principle, what is the “moral” justification for either? Can the rights, which are uncertain without the principle, and the principle, which depends upon the rights, support each other like symbiotic inebriates?

Resolution of that conundrum is obviated by Posner’s ultimate reliance on the capacity of both to encourage behavior that increases per capita need/want fulfillment. Thus he asserts that the rights and the principle:

(a) initially assign personal resources (i.e., “life, liberty, and labor”) to the “natural owners,” who “value them the most,” slavery being “inefficient” because the output of slaves is less than if they were free; 209

(b) reward “traditional virtues . . . and capacities . . . [that] promote the efficiency with which resources can be employed”; 210

205. Id. at 111.
206. Id. at 125 (footnote omitted).
207. Id. at 135.
(c) underlie common law rules that are “supported by a broad consensus and distribute their benefits very widely”; 211

(d) reflect the “preference” or “desire for wealth” of “most people”; 212

(e) “[can] be viewed as [a system] of constrained utilitarianism,” derived from “the principle of consent,” which allows people to “maximize autonomous, utility-seeking behavior”; 213

(f) require that each individual “understan[d] and appea[l] to the needs and wants of others.” 214

Regardless of moral intuition, utilitarian fulfillment thus emerges as the underlying goal of wealth maximization. Nevertheless, Posner maintains, wealth maximization avoids the “boundary” ambiguities and selfishness implications of happiness or pleasure, because it objectively measures the value of wealth by “actual market transaction[s]” (i.e., by “voluntary exchange[s]”) or by a process of involuntary transfer that simulates such exchanges (i.e., that fashions a “hypothetical” market). 215

A voluntary transfer of course helps to identify the market price of the transferred resource and usually increases need/want fulfillment for the parties. But the transfer maximizes wealth only when those fulfillment gains exceed the fulfillment losses of adversely affected nonparties, most of them with an uncertain capacity to anticipate and adjust in advance for such losses. 216

The monetary value of party gains presumably equals the amount by which the transfer price (1) exceeds the subjective, and usually unascertainable, minimum price that the seller was willing to accept for the resource, and (2) is exceeded by the subjective, and usually unascertainable, maximum price that the buyer was willing to pay for it. In the absence of agreed-upon compensation, the monetary value of nonparty loss, or, more generally, of loss caused by wrongful conduct, presumably equals the maximum amount that a nonparty or a wrongful-conduct victim would pay to avoid the loss.

That amount may be ascertainable when the loss consists of the market price of injury-alleviating services or a diminution in the

211. Posner, Efficiency, supra note 77, at 500.
213. Posner, Efficiency, supra note 77, at 497. “[E]nlightened utilitarianism will incorporate the sorts of constraints that makes wealth maximization an appealing ethical norm.” Id. at 507.
216. See supra text accompanying notes 77-81.
market value of property, but not when it includes such intangible fulfillment deprivals as anxiety and suffering, which are not priced in any ascertainable voluntary market. Consequently, comparison of party gains and nonparty losses, like evaluation of victim losses, is a function of community institutions, such as legislatures, administrative agencies, and courts, that may compel involuntary transfers when high transaction costs or inability to agree forestall private resolution.

Those institutions sometimes determine the hypothetical value of resources to competing claimants by reference to market prices, as when marketable property or services are involved. But when a claimed injury is personal, involving pain or anxiety, a "simulated market" is more fanciful than hypothetical. The evaluation rests less upon an illusory consent to exchange good health for money than upon the estimated effects of cost-spreading recovery, and the accompanying deterrence, on suffering, on productivity, and on the utility cost to claimants and to compensators, i.e., on per capita need/want fulfillment.

The high deterrence costs imposed by the community on the unauthorized manufacture, sale, and use of such dangerous products as narcotics inhibit voluntary exchange and a consequent increase in the wealth of the contracting parties. The added costs, which may include incarceration, protect the need/want fulfillment of adversely affected nonparties, precluded by excessive transaction costs from market participation. The community process that compares the effects on per capita fulfillment of inhibited and uninhibited narcotics use is not more effectively explained by being described as a simulated market.

If all fulfillments can be assigned artificial market values and labelled "wealth," the wealth to be maximized is per capita need/want fulfillment, and the simulated market is a misleading metaphor. More accurately described, the process of involuntary transfer identifies need/want priorities and accommodations, not imaginary bargains.

217. Physical and/or psychological injury are personal injuries involving pain and anxiety, which may extend to loss of affection, companionship, sexual gratification, reputation, privacy, or pleasant environment.

218. As affected by the diminishing marginal utility of wealth. See supra text accompanying notes 89-95.

A wealth-maximization rationale based ultimately on per capita need/want fulfillment does not refute the capacity of evolutionary utilitarianism to inhibit "selfish" pursuits that reduce per capita fulfillment, to encourage traditional "pieties and virtues" like diligence and honesty, to stimulate endeavors that benefit others, and to exercise, along with the total-happiness and animal-happiness bugaboos, the spectre of monstrous results.  

XI. TRANSCENDENTAL AND UTILITARIAN ETHICS: THE INEVITABILITY OF SELF INTEREST

All systems of morality, however transcendental, rest ultimately on utilitarian self interest (i.e., on personal need/want fulfillment), because those who fashion such systems, like those who accept or reject them, cannot escape their own humanness. The physically controllable acts of each individual are the choice of that individual, though all of the consequences may not be foreseen or desired. Behavior choices are necessarily determined by the experience, feelings, habits, and attitudes; the concerns and beliefs; the needs and wants—in short, by the ultimate self interest—of the individual.

Self interest behavior is implied by the tautological description of all individuals as "rational maximizers" of personal utility (i.e. of personal need/want fulfillment), "rational" being superfluous. An observer may view an act as an irrational (i.e., ineffective) way to fulfill the needs or wants of an individual. But the individual is the final judge of those needs or wants, and they determine the methods.


221. As used herein, an act is physically controllable or "volitional" when a motor response to sensory stimuli is initiated by nerve impulses in the cerebral cortex.

222. As when robbery victims choose to preserve life by relinquishing money, though preferring to retain both.


224. See D. Mueller, supra note 74, at 184. But see Kennedy & Michelman, supra note 70, at 713-14 ("rational maximizers" concept categorized as "false argument").
chosen by the individual to fulfill them.

A. Self Interest and Per Capita Fulfillment: Individual Acts vs. Community Rules

Although self interest implies a personal utilitarian decision that turns on individual, rather than per capita, need/want fulfillment, in the long run the two are not incompatible. Self interest includes a concern for others, because reciprocity reduces conflict, ameliorates adversity, and promotes mutually beneficial arrangements. Altruism results not from innate goodness but from (1) the benefits of affection, friendship, and group approval; (2) identification with, i.e., self substitution for, those in need; (3) guilt feelings evoked by the distress of others and engendered by social conditioning; (4) the satisfactions of self esteem; (5) an awareness that the altruist or the altruist's family may someday need help (i.e., that sharing survival costs provides survival insurance); and (6) the perception that help for those in need helps everyone by reducing discontent and increasing productivity.

The deferred benefits of reciprocity, however, tend to be subordinated to more immediate advantages. Consequently, to promote the general welfare, i.e., to enhance per capita fulfillment, "rule utilitarians" assert that the individual should adhere to community rules (or practices) that increase per capita fulfillment in most cases, even when the individual believes that adherence in a particular case will reduce such fulfillment. Ad hoc decisions of individuals ought not,
according to this view, determine whether utilitarian consequences justify specific applications of a community rule: individuals may object to but must abide by community rules because individual autonomy to determine the utilitarian justification for each act would undermine the utilitarian reasons for adherence to the rules.228

A community rule that lawful promises should be kept, for example, could not survive a permissible redetermination by each promisor of the utilitarian grounds for keeping the promise. Consequently, a son who privately promises his dying father to make a certain disposition of money entrusted to him by the father should abide by a promise-keeping rule though he later concludes that doing so would reduce per capita fulfillment.229

"Act utilitarians," on the other hand, concerned that "rule worship" (i.e., a rigid adherence to rules) may sometimes impair general-welfare goals, view a rule as a guide, derived from generally accepted solutions, that assists individuals to evaluate for themselves the ultimate utilitarian consequences of their acts and to behave accordingly.230 The son may therefore repudiate the promise if he decides that adherence to it will reduce per capita fulfillment.231

Although rule, rather than act, utilitarianism generally better implements the per capita fulfillment goal, neither paradigm adequately describes the relationship between community rules and individual choice.

Rules are adopted by democratic communities to enhance per capita fulfillment.232 They are ambiguous because language is ambiguous and because they are formulated in terms sufficiently general to reach an indeterminate number of variable future situations, some anticipated, some not, at the time of formulation. Consequently, no rule can be understood or correctly applied without iden-

Philosophy of J. S. Mill, in CONTEMPORARY UTILITARIANISM 13, 17-23 (M. Bayles ed. 1968).
228. See supra note 227.
229. See Rawls, supra note 126, at 15.
230. See J. Mackie, supra note 5, at 125-29; D. Regan, supra note 227, at 12-65, 83-93; Diggs, Rules and Utilitarianism, in CONTEMPORARY UTILITARIANISM 203, 203-38; Donagan, supra note 119, at 187-202; McCloskey, Examination, supra note 126, at 117-41; Smart, supra note 45, at 3-12, 30-73; Smart, Extreme and Restricted Utilitarianism, in CONTEMPORARY UTILITARIANISM 99, 114 (M. Bayles ed. 1968) [hereinafter cited as Smart, Restricted Utilitarianism], Sprigge, supra note 135, at 292-96.
231. See W. D. Ross, THE RIGHT AND THE GOOD 38-39 (1930); Mabbott, Punishment, 48 MIND 152, 155-57 (1939); Melden, Two Comments on Utilitarianism, 60 PHIL. REV. 508-23 (1951); Smart, Restricted Utilitarianism, supra note 230, at 109-10; see also Rawls, supra note 126, at 15.
232. See supra text accompanying notes 34-36, 84.
tifying its purpose—without discerning the reasons why it is perceived as enhancing per capita fulfillment.

The applicability of a rule to an act turns on whether the purposes of the rule and of other relevant community rules will be implemented by the application. And each application further explicates the rule. The rule-application process is part of the rule-making process: the application interprets, and thereby qualifies, the formulation.

Every rule or practice thus includes the variations or “exceptions” implicit in its underlying policy. The exceptions are in fact consistent with the rule. A community promise-keeping rule, as reflected by the enforcement of agreements and trusts, generally enhances per capita fulfillment by encouraging the plans, protecting the expectations, and increasing the productivity of promisees and beneficiaries; by mitigating their anxiety; and by reducing interpersonal distrust. But the rule does not require that every promise be kept—certainly not ones with countersurvival consequences, such as a promise to commit a crime or to make a lavish gift when the promisor needs the money to survive.

The sharply delineated distinctions of some rules are designed to eliminate the uncertainty and cost of a difficult purposive determination. Posted limits control driving speed though some lower-speed roads are safer for fast driving than some higher-speed roads. Minimum age requirements for driving, voting, and marriage supplant an inquiry into the capabilities of each under-age applicant, because the underlying purposes include predictability and efficiency of application.

But even such “bright line” rules are subject to purposive exceptions. A traffic signal may be ultimately disregarded if it does not change from red to green. It may perhaps be ignored at 3:00 A.M. when an unobstructed view reveals no other approaching vehicles and surely may be disregarded under such circumstances when a badly injured passenger is being taken to a hospital. A rule with no exceptions is a rule whose purpose is implemented by every linguistically tenable application.

The rule-utilitarian admonition to act in accordance with community rules thus, in fact, requires the individual to identify: (1) the relevant rules (e.g., rules that enforce promises to buy or sell

233. See Rawls, supra note 126, at 7-18; Brandt, Toward a Credible Form, supra note 227, at 172-78.
nonharmful goods or services); (2) the community purposes of each rule (e.g., enhancement of per capita fulfillment by facilitating plans, expectations, mutually-beneficial exchange, and productivity); (3) applications that implement the purpose (e.g., agreements when based on mutual understanding but not when based on mutual mistake); and (4) the community accommodation of competing purposes (e.g., validation of narcotics sales that are authorized by medical prescription). The identifications are usually clear, but may sometimes be so uncertain that they differ with the fulfillment preferences of the identifier.

By this process the individual identifies but does not reevaluate community purposes, although the individual's perception of those purposes molds their application. The role of individual choice for rule utilitarians thus approaches but remains more limited than the role of individual choice for act utilitarians. The latter role includes not only identification of community purposes, but reevaluation of their per capita fulfillment effectiveness. A contracting promisor may, for example, conclude (1) that carrying out the promise will implement the planning, expectation, and productivity purposes of the community's promise-keeping rule, but (2) that per capita fulfillment is more greatly enhanced by allowing promisors to rescind improvident promises.

A rule-adherence mandate, i.e., a meta-rule that precludes case-by-case reevaluation of rule-designated policy, enhances per capita fulfillment by preserving social order, i.e., by increasing predictability, reducing anxiety, facilitating cooperative endeavor, and minimizing anarchic disruption. Those purposes are impaired by overt individual reevaluation of and deviation from ostensible community policy.

Act utilitarians, recognizing the socially disruptive effect of known deviations from ostensible policy, justify such deviations only when a perceived increase in fulfillment is thought to outweigh that disruptive effect. The rule-act hiatus is thus further narrowed. Act utilitarians do assert, however, that reevaluation and deviation, without such weighing, are appropriate when known to no one but the reevaluator, because the purposes of the adherence rule are not

234. See D. Lyons, supra note 227; R. Sartorius, supra note 67, at 57-59, 60-66, 71-74; Smart, supra note 45, at 11-12; Smart, Restricted Utilitarianism, supra note 230, at 102, 115; Sprigge, supra note 135, at 292-96.

235. See Brandt, Toward a Credible Form, supra note 227, at 159-63; Rawls, supra note 126, at 11-18; authorities cited supra note 234.
then significantly impaired (e.g., a breach of promise known only to
the breaching promisor does not create uncertainty, anxiety, or dis-
ruption for others).\textsuperscript{236}

But neither inclusion of disruptiveness in the reevaluator's scale
nor undetectability justifies deviation from the adherence rule. An
additional purpose of that rule is to protect the per capita fulfillment
benefits preferred by most of the community from impairment by
dissenters: strongly held dissenting views are not necessarily sound.

That purpose is also implicit in every other rule. When applica-
tion of any rule implements its purpose, the purpose of the adherence
rule is implemented. Per capita fulfillment is thus enhanced by ad-
hering to community rules and by applying them only in accordance
with their per capita fulfillment purposes.

If repudiation of the son's private promise to his dying father
will thwart socially permissible plans of the father, nonrepudiation
will implement a community promise-keeping policy that prefers the
property disposition of owners, based on usually superior informa-
tion, to the contrary disposition of trustee-promisors. The anti-dis-
senter purpose of rule adherence, and the ultimate goal of enhanced
per capita fulfillment, will then also be implemented, regardless of
the son's per capita fulfillment perceptions and the unawareness of
others.

Adherence to community policy must, however, be reconciled
with self interest, the decisive behavior determinant. Neither rule
utilitarian nor act utilitarian precepts are effective without its sup-
port. Enjoined to abide by such policy, individuals necessarily decide
whether they wish to do so, i.e., whether adherence is consistent with
self interest.\textsuperscript{237}

For those who respond to reciprocity satisfactions, adherence
and self interest are strongly linked.\textsuperscript{238} For those who do not, the link
is reinforced by community imposed sanctions that increase the cost
of nonadherence.\textsuperscript{239} As a result, the self interest decision of the indi-
vidual and the per-capita-fulfillment decision of the community more

\begin{itemize}
\item \textsuperscript{236} See authorities cited supra note 231.
\item \textsuperscript{237} See supra text accompanying notes 221-24.
\item \textsuperscript{238} See supra text accompanying notes 225-26.
\item \textsuperscript{239} See R. SARTORIUS, supra note 67, at 57-59, 66-67; Feeley, Coercion and Compli-

ance: A New Look at an Old Problem, 4 L. & Soc'y Rev. 505 (1970); supra text accompany-
ing notes 33-36; see also Campbell, supra note 27, at 78.

Self interest is also reinforced by community incentive distributions that stimulate produc-
tivity. See supra text accompanying notes 92-93.
\end{itemize}
Civil disobedience and the ensuing sanctions, which together presumably enhance protestor fulfillment, may sometimes enhance per capita fulfillment by dramatizing the intensity of disagreement with dubious per-capita-fulfillment policy. But the per-capita-fulfillment costs of the lawbreaking and the sanctions probably exceed the per-capita-fulfillment benefits of highly dramatized dissent when lawful avenues for effective protest are open. Such avenues include voting, political campaigning, media publicity, public speeches, pamphlet distribution, communication with elected representatives, and litigation, as well as peaceful picketing, marches, and demonstrations.

Unconstrained autonomy is restored to an individual whose behavior is so private that disregard of a community policy will escape notice and penalty. Whether self interest then induces policy adherence depends on the motivations of the individual as influenced by the learning process. Per capita fulfillment, though relevant to self interest, may not only be reevaluated; it may be ignored in favor of more immediate personal advantage. A consequent reduction in per capita fulfillment becomes an unavoidable cost of such privacy. But total privacy accompanied by undetectability is rare.

Thus, the son who privately promises his dying father to make a certain disposition of money may, after concluding that sanctions are unavailable:

(a) Disregard the promise because his personal fulfillment will be enhanced (1) by the pleasure of keeping or disposing of the money and, perhaps, (2) by self esteem and other altruistic satisfactions derived from thwarting a disposition that he believes would reduce per capita fulfillment; or

(b) Carry out the promise because his personal fulfillment will be enhanced (1) by the absence of guilt feelings and, perhaps, (2) by anticipated rewards from the designated recipient and, perhaps, (3) by the approval, self esteem, and other altruistic satisfactions derived (i) from increasing the fulfillment of the recipient, (ii) from a general adherence to community policy, or (iii) from an adherence to community policy that in his opinion enhances per capita fulfillment.

242. See A. Bickel, supra note 154, at 91-123.
243. See supra text accompanying notes 132-33.
When a commentator or other uninvolved evaluator decides whether a hypothetical promise ought to be kept in the absence of effective sanctions, the decision is neither personal nor private. The need/want fulfillment of the decider is not affected by the keeping or breaking of the promise, though fulfillment derived from self esteem, community approval, and resulting emoluments, necessarily motivates the assessment. Such an "impersonal" decision turns, either overtly or implicitly, on the per capita fulfillment purposes that underlie community promise-keeping and rule-adherence policies. That decision, when imparted to the community, may influence the personal determinations of "private" promisors.244

B. Self Interest and A Priori Morality

Although Immanuel Kant is identified with a priori morality, his Categorical Imperative ("Act as if the maxim of your action were to become through your will a general natural law"),\textsuperscript{248} like the analogous Golden Rule (Do unto others as you would have them do unto you),\textsuperscript{246} suggests the utilitarian process of self interest reciprocity. Along with Bentham's "greatest happiness of the greatest number,"\textsuperscript{247} they offer no substantive moral standard but rather a procedure for identifying reciprocally beneficial behavior—behavior that increases the need/want fulfillment of others and of the behaving individual as well.

The Rule may undermine deterrence: no one who would prefer not to be punished should punish others; and the Imperative may not surmount the special-circumstances rationalization: anyone in my situation should act as I do. But, whatever Kant's intention, both Rule and Imperative suggest that ethical behavior is derived from a shared concern for the well being of everyone, i.e., from a reciprocal

\textsuperscript{244} Courts interpret and apply relevant legislative rules and policies by (1) identifying the legislative purpose for the rule or policy, i.e., the legislative plan for increasing per-capita-fulfillment, and (2) determining whether that purpose will be implemented by application of the rule or policy to the conduct in question. A judicial choice between alternative ambiguous legislative purposes is necessarily influenced by judicial fulfillment-policy preferences. In the absence of a relevant legislative rule or policy, courts independently derive common law rules and policies from judicially perceived community goals or values, which turn ultimately on per-capita-fulfillment consequences. A common law rule or policy is applied to a dispute when the application implements a community per-capita-fulfillment goal.

\textsuperscript{245} See B. Russell, A History of Western Philosophy 711 (1945); Walsh, Kant, Immanuel, in 4 The Encyclopedia of Philosophy 305, 317 (P. Edwards ed. 1967).


\textsuperscript{247} See Monro, supra note 3, at 282.
interest in need/want fulfillment.

Moral precepts derived from God are disclosed by the humans who espouse them. The precepts are urged upon others as beneficial—if not in this life, then hereafter. The proffered benefits are necessarily individual need/want fulfillments, present or anticipated.248

Because the evolutionary process has produced individuals with a persistent drive to survive in this life, the precepts perceived as offering greater earthly fulfillment tend to gain greater adherence. Utilitarian self interest determines the choice. Whether or not predetermined, choice remains the generally unpredictable product of individual preference. Individuals have no choice but to choose.

C. Shocking Human Desires vs. The Veil of Mystical Constraint

The reluctance of nonutilitarians to acknowledge need/want fulfillment as the source of ethical behavior apparently reflects a distrust of human nature—an unwillingness to grapple with the behavior implications of the evolutionary survival process. Although sometimes sanctified as a source of a priori rights,249 individual autonomy is also viewed as original sin and some consequences of that autonomy as too sinful to be evaluated in terms of human fulfillment. Instead, preexisting moral constraints are postulated to forestall such consequences without argument. “[C]lassical utilitarianism is mistaken,” says Rawls, because “[i]t permits one to argue . . . that slavery is unjust on the grounds that the advantages to the slaveholder . . . do not counter balance the disadvantages . . . to society . . . [whereas] gains accruing to the slaveholder . . . cannot be counted as in any way mitigating the injustice of the practice.”250

Thus slavery, like rape and murder, is evil per se. And we dare not subject such conduct to a utilitarian scrutiny that turns on the needs and wants of humans, because too many of those needs and wants are “monstrous”: most people cannot be trusted to derive standards of conduct from their feelings and desires. Consequently, shocking majoritarian desires must be concealed by the fig leaf of a transcendental moral code. To preserve the immutability of a priori rights, the wellsprings of behavior are shrouded in a veil of mysti-

248. See R. DAWKINS, supra note 1, at 207; E. WILSON, supra note 24, at 561. Anticipated fulfillment also provides present fulfillment.

249. See R. NOZICK, supra note 158, at 57-87; Posner, Efficiency, supra note 77, at 492-95; Kronman, supra note 162, at 233 & n.18.

cism that screens out not only the needs and wants of most but new information about environment and conduct:

The arguments are quite beside the point. Individual rights do not rest upon foundations so insecure that any fresh wave of empirical research may displace them. These rights do not rise and fall with each new refinement in economic theory, or with each daily discovery of a new market imperfection. The revulsion towards slavery, rape, and murder rests on the easily understood belief that each person is entitled to the protection of individual autonomy against the aggression of all others, no matter how numerous or powerful.  

D. Misperceived Majoritarian Goals and Monstrous Conduct: Utilitarian vs. A Priori Standards

The lack of confidence in utilitarian-majoritarian ethics results from a distorted perception of majoritarian goals. Long-term goals, concerned with survival, continuity of need/want fulfillment, and reciprocity, tend to be obscured by more immediate and strident short-term goals that are sometimes inconsistent with the long-term objectives.

The widespread disapproval of slavery, rape, and murder is not so fragile that it must be shielded from new disclosures relevant to its utility. It is not easily displaced by such disclosures because it rests on a more secure foundation than the bare assertion of “the easily understood belief” in protection from aggression. Supporting the belief is accumulated evidence that uninhibited aggression, in the long run, reduces need/want fulfillment for most, though some forms of aggression (e.g., arrest, imprisonment, execution, justifiable homicide, and punishment by parents) enhances such fulfillment and is not disapproved.

Nonutilitarian reluctance to allow pro-and-con argument about the utilitarian consequences of monstrous conduct reflects a fear that the pro argument will prove more credible. The utilitarian monster is created by this fear. But the pro argument cannot prove more credible if the conduct is really monstrous, because the reasons that make it monstrous make it inconsistent with the general welfare. “Monstrous” implies countersurvival conduct.

251. Epstein, supra note 158, at 75 (footnote omitted).
252. Id.
253. See supra notes 26-28, 111-12, 129 and accompanying text.
254. See supra text accompanying notes 127-35.
Discrimination, slavery, torture, and genocide, common in totalitarian countries, are there supported not by a utilitarian-majoritarian concern with long-run per capita fulfillment but by physical force exerted to increase fulfillment for a controlling minority. A majority may sometimes condone monstrous practices, but such practices do not on that account enhance per capita fulfillment in the long run.\textsuperscript{255}

Despite the assumption that right and goodness are implicit in the human neural structure or derived from God, a priori moral standards differ substantially, each group convinced that its own are superior. And there is no nonutilitarian basis for choice between them.\textsuperscript{256} Evolutionary utilitarianism, on the other hand, can condemn immoral conduct by showing that it will in the long run defeat goals common to almost all communities, usually including the ones that condone it.

The similarities in a priori moralities reveal common concerns with earthly need/want fulfillment and common perceptions of methods to enhance it. No moral standard, whether utilitarian or a priori, can prevent monstrous majoritarian conduct. But recognition of those common concerns can modify it. Such conduct is inhibited by community awareness that the ultimate result may well be impaired need/want fulfillment for the majority.

\section*{XII. Conclusion}

Classical utilitarianism identified “the greatest happiness for the greatest number” as the goal of moral conduct, but did not clarify the ambiguities of happiness nor suggest effective methods of evaluating and maximizing it. As a consequence, critics attack utilitarianism as incapable of distinguishing “good” happiness from “bad” happiness and urge a priori or innate “rights,” intuitively perceived, as the only source of moral values.

Evolutionary utilitarianism links utilitarian morality with sociobiological evolution, the Darwinian process of natural selection that winnows both physical and social traits. Long-run human survival, a consequence of that process, provides an empirical measure of moral behavior. As products of the process, most humans pursue the need/want fulfillments that facilitate such survival. Survival-enhancing behavior results from both genetic structure and learned response. The

\begin{itemize}
\item \textsuperscript{255} See supra text accompanying notes 136-43.
\item \textsuperscript{256} See supra text accompanying note 144.
\end{itemize}
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"is" of evolved structure and function shapes the "ought" of human need/want fulfillment. Compliance with that "ought" is a condition to the existence of humans and of human "oughts."

Need fulfillment sustains life. Want fulfillment, which is derived from need fulfillment, expands such fulfillment beyond its survival value and sometimes impairs that value. But all fulfillment is accompanied by pleasure, which aids survival by stimulating the quest for fulfillment. And some want fulfillments contribute to need fulfillment by reducing anxiety and increasing self esteem.

Long-run survival is facilitated by fulfillment of needs, as well as need-consistent wants, and nonfulfillment of countersurvival wants. Evolutionary utilitarianism identifies individual happiness as personal need/want fulfillment, social happiness (or the general welfare) as per capita need/want fulfillment, and the utilitarian goal as enhanced per capita need/want fulfillment.

Long-run group survival facilitates long-run individual survival. Group survival depends on reciprocity, i.e., on cooperative endeavor. Thus, both individual autonomy and reciprocity have survival value. The tension between them is alleviated by the evolved function of social organization to resolve competing claims to need/want fulfillment. Autonomy and reciprocity are accommodated by social controls, i.e., by resource allocations and behavior constraints, that promote for most individuals first long-run survival and then long-run enjoyment.

Communities that discern the evolutionary utilitarian process can more effectively enhance per capita fulfillment. Social controls that reflect the input of community members best implement the need/want fulfillment preferences of those members. Consequently, a self constrained majoritarianism is the evolving political counterpart of utilitarianism.

Majoritarian decisionmakers choose (subject to community supervision) the allocations and constraints likely to enhance per capita fulfillment. The choice is made without a mechanism that can reliably identify either comparative fulfillment intensities or particular majoritarian preferences, which, if ascertainable, would assist, though not control, the choice. Voting cannot designate a definitive majoritarian choice between plurality preferences, and market exchanges, which usually reflect the fulfillment preferences of the transacting parties, do not reflect those of adversely affected nonparties nor those that would result from a different wealth distribution. Fulfillment priorities, however, can be derived from the evolutionary
process without tabulating specific intensities or current preferences.

The long-run survival goal confirms a generic preference for fulfillment of more vital before less vital needs and of needs before wants. The few who apparently subordinate long-run survival to fulfillment of countersurvival wants may reverse this priority. But all humans who prefer survival reject the priority reversal.

The diminishing marginal utility of wealth, and its corollary, the graduated income tax, reflect and confirm the utilitarian fulfillment priorities. But the increase in productivity induced by wealth incentives indicates that in the long run greater per capita need fulfillment may result from productivity-stimulating wealth allocations than from an invariable priority distribution for poorer claimants.

Solutions that accommodate competing fulfillment claims ameliorate the complexities of priority assignment, which are particularly acute when a choice is required between vital need fulfillment for some and less vital fulfillment for many or between long-run productivity and short-run need fulfillment. Thus, market exchange provides an effective accommodation mechanism when augmented by regulation that adjusts for market imperfections and constrains need-impairing activity. And the survival costs of inter-nation violence have induced a balance-of-power accommodation pending reciprocity resolution.

Some form of private ordering is necessarily the accommodation for need versus need or want versus want fulfillment when no priority, more effective accommodation, or apparent majoritarian preference is discerned. The priority-accommodation process is experimental. The problems are so complex and the data so diffuse that survival solutions emerge only after trial and error testing.

Because evolutionary utilitarianism is concerned with long-run human survival, depends on evolved human response, both physical and social, and strives for enhanced per capita need/want fulfillment rather than "happiness," it:

(a) vitiates the definitional objections (evoked by classical-utilitarian ambiguities) that "maximized happiness" fails to distinguish between the happiness of humans and animals, of existing and future persons, of family or friends and strangers, of those with more intense and those with less intense desires, of the individual and the group, of an expanded and a limited population;

(b) dispels the fear of utilitarian justification for "monstrous" conduct that is apparently majoritarian, enjoyable, or socially useful, by emphasizing that the implications of "monstrous" are inconsistent
with the general welfare because the socially disruptive consequences of such conduct inhibit long-run survival;

(c) refutes the alleged inconsistency of utilitarian retribution by identifying retribution as an evolved self defense response that has enduring survival value;

(d) minimizes the conflict between rule utilitarianism (which requires adherence to rules that increase per capita fulfillment in most cases, even though the individual believes that adherence in a particular case will reduce such fulfillment) and act utilitarianism (which views rules as guides, rather than inflexible controls, and allows individuals to act in each case in accordance with their own estimate of the utilitarian consequences) by recognizing that per capita fulfillment is enhanced both by adhering to community rules and by applying them only in accordance with their per capita fulfillment purposes;

(e) reconciles individual self interest, the ultimate determinant of all behavior, with altruism and group welfare;

(f) confirms self interest as the source of a priori as well as utilitarian morality;

(g) identifies intuition as a product of experience and all morality as part of the evolutionary learning process, thereby coalescing transcendental with general-welfare morality and dissipating the nonutilitarian veil of mysticism;

(h) exposes the intuitive a priori rights of John Rawls, Ronald Dworkin, Richard Posner, and others, along with theistic morality, as reflections of the utilitarian need/want fulfillment goal; and

(i) suggests that a utilitarian imperative, derived from the evolved structure and function of humans, underlies all human "rights."