

*THE MISPURSUIT OF HAPPINESS:  
DIVORCING NORMATIVE LEGAL THEORY FROM  
UTILITARIANISM\**

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### I. Introduction

Utilitarian analyses have considerable intuitive appeal and have been influential in legal circles. Dworkin describes utilitarianism as the “ruling” normative legal theory.<sup>1</sup> Supporters are more enthusiastic. For Lyon, utilitarianism is the “most important of all ethical theories.”<sup>2</sup> And Barrow, less modestly, declares that it is “the only satisfactory moral theory.”<sup>3</sup> But the empirical evidence suggests that strict utilitarianism may be the only completely unsatisfactory moral theory.

Utilitarianism does not lack critics and detractors. Strong anti-utilitarian views are expressed within the Kantian and Rawlsian traditions.<sup>4</sup> In addition, a new front has opened in the field of law and economics.<sup>5</sup> The battle there centres on Posner’s ethical thesis of wealth maximization: a hybrid utilitarian—Kantian scheme. The issue of wealth maximization’s ethical validity provides convenient focus because the debate has attracted the attention of many respected legal academics.<sup>6</sup> Those who enter the normative theoretical fray tend to share one important feature: their assertions and their critiques are non-empirical. Dworkin, for example, challenges Posner’s hypothesis by posing abstract fictions.<sup>7</sup> Similarly, utilitarian discourses are philosophical rather than empirical. From Plato through to Hume, Bentham, Mill, Sidgwick and Pareto, theorists have assumed without benefit of organized experiment that humans seek happiness and that net gains in happiness are possible. Critics of utilitarianism have not questioned the factual validity of these assertions. They have instead demonstrated that applied utility theory leads to unacceptable ethical results. While such demonstrations are convincing to many scholars, they have not sufficed to defeat utilitarianism. Avowed utilitarians do adopt rights-based views, but such compromises have not fostered consensus.<sup>8</sup> The wealth maximization debate illustrates the limitations.

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1. R. Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co. Ltd., 1977) at vii.

2. “Bentham is still the outstanding proponent of utilitarianism, the most important of all ethical theories.” D. Lyon, *In the Interests of the Governed* (Oxford: Clarendon Press, 1973) at 3. See also Lyon, *Ethics and the Rule of Law* (Cambridge, England: Cambridge University Press, 1984).

3. R. Barrow, *Injustice, Inequality and Ethics* (Brighton, Sussex: Wheatshet Books, 1982) at 19.

4. See J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971) and Immanuel Kant, *The Moral Law*, trans. H.J. Paton, (London: Hutchinson, 1972).

5. See R. Posner, *Economic Analysis of Law*, 20 ed. (Boston: Little, Brown, 1977).

6. See e.g. R.M. Dworkin, “Is Wealth a Value?” (1980) 9 J. Legal Studies 191; Anthony I. Kronman, “Wealth Maximization as a Normative Principle” Idem. 227; Jules L. Coleman, “Efficiency, Utility and Wealth Maximization” (1980) 8 Hofstra L. Rev. 509.

7. Dworkin, *supra*, note 6 at 195.

8. See Barrow, *supra*, note 3 at 20; see also R.M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Oxford University Press, 1981).

Until recently it was not really possible to take an empirical approach to utilitarian assumptions about happiness. Prior to 1945, evidence on the relation between income and happiness was extremely sparse.<sup>9</sup> Not until 1973 did the *Psychological-Abstract* list "Happiness" as an index term. However, in recent decades a substantial literature defining, measuring and analyzing happiness has appeared.<sup>10</sup> This paper's first section will examine this evidence as well as some non-utilitarian theories of happiness.

The second portion of this paper presents the case for asceticism as the preferable consequentialist ethical system. Bentham described asceticism as "exactly the rival, the antagonist" of utilitarianism because it advocated the restraint of happiness and approved of forces that thwarted pleasure seeking.<sup>11</sup> According to Bentham, asceticism constituted a perverted manifestation of the utility principle and was founded solely "through mistake." This article's thesis is that utilitarianism, not asceticism, is ill-founded and insupportable; that asceticism conforms to traditional legal and ethical practices, whereas utilitarianism does not; and that both utilitarians and intuitionists are covertly ascetic.

This paper's third section will analyze points of convergence and divergence between asceticism and Posner's wealth maximization thesis. Wealth maximization is an imperfect variant of asceticism and an inherently flawed attempt, in the neo-classical economic tradition, to effect a compromise between asceticism and utilitarianism.

## II. Happiness

### A. The Utilitarian Theory of Happiness

From Hobbes, Epicurus and others Bentham borrowed the notion that the pursuit of happiness and the avoidance of pain are the only agencies that move an organism to act.<sup>12</sup> Happiness, then, is life's ultimate goal. What did Bentham mean by happiness? His definition was broad. He spoke of pleasure with an explicit intention not to invent "any arbitrary definition" for the sake of excluding certain pleasures. With the same democratic spirit, he defined happiness in terms of "what everybody feels to be such."<sup>13</sup> Bentham's definition of happiness was also material. Although he did not

9. See e.g., R.A. Easterlin's "Does Money Buy Happiness?" (1973) 30 *The Public Interest*, Winter at 3. See also Easterlin's "Does Economic Growth Improve the Human Lot?" in P. David and M. Reder, eds., *Nations and Households in Economic Growth* (New York: Academic Press, 1974).

10. See e.g. Margaret W. Matlin and David J. Stang, *The Pollyanna Principle* (Cambridge, Mass.: Schenkman Pub. Co. 1978) at 145. See also H.M. Jones, *The Pursuit of Happiness* (Cambridge, Mass.: Harvard University Press, 1953); W. Ratar-kiewicz, in E. Rothbert and D. Zelinsky, trans., *Analysis of Happiness*, (Warsaw: Polish Scientific Publishers, 1976); F.A. Magoun, *Living a Happy Life* (New York: Harper, 1960); J. Morreall, *Taking Laughter Seriously* (Albany: State University of New York, 1983).

Economists have also returned to an investigation of happiness. See the sources cited in M. Ricketts' "Tax Theory and Tax Policy" in A. Peacock and F. Forte, eds., *The Political Economy of Taxation* (New York: St. Martin's Press, 1981) at 41.

11. See especially chapter 2 of Jeremy Bentham, "Principles of Legislation" in C.K. Ogden, ed., *The Theory of Legislations* (London: K. Paul, Trench, Trubner & Co. Ltd., 1931) at 2-3.

12. On Hobbes see R. Bolles, *Theory of Motivation*, 2d ed. (New York: Harper & Row, 1975) especially at 28. On Epicurus see A.H. Chroust, "The Philosophy of Law of Epicurus and the Epicureans" (1971) 16 *Am. J. Jurisprud.* at 36.

13. Bentham, *supra*, note 11 at 2. How do ordinary people define happiness? They employ synonyms. See J.L. Freedman, *Happy People* (New York: Harcourt Brace Jovanovich, 1978) at 30 and 31. Some authors attempt to draw meaningful distinctions between "pleasure", "happiness", "enjoyment" and so forth, but this is more by way of poetry than basic psychology. For examples of such quibbles, see J. Smart & B. Williams, *Utilitarianism—For and Against* (Cambridge, England: University Press, 1973) at 28. J. Nuttin, "Pleasure and Reward in Human Motivation and Learning" in D. Berlyne and K. Madsen, eds., *Pleasure, Reward, Preference* (New York: Academic Press, 1973) at 243. Witley, "Values and Social Change" in B. Strumpel, ed., *Subjective Elements of Well-Being* (Paris: Organization for Economic Co-operation & Development, 1972) at 23.

speculate on the biochemical processes, Bentham assumed pleasure and pain were material sensations with variations in frequency, duration and intensity of sensation accounting for all the nuances of feeling.<sup>14</sup> A number of critics, including Hart and Williams, object to this pure materialism. They argue that happiness is not always just a "sensation."<sup>15</sup> As I will explore in detail below, non-material or metaphysical definitions of happiness are proffered in order to permit self-declared utilitarians to promote unpleasant choices.<sup>16</sup>

A second part of the utilitarian thesis is that happiness, or the avoidance of unhappiness, is the sole human objective. People surveyed on this issue report that happiness is their goal.<sup>17</sup> When observed, people demonstrate a consistent bias toward pleasant inputs and, like other life forms, act in a goal-directed manner at all times.<sup>18</sup> The common objections against happiness being the universal goal can be noted and dismissed. First, non-refutable claims are made about some things having intrinsic value. Second, critics fail to grant "happiness" a sufficiently broad meaning and instead argue that it is not happiness alone but "something pleasant" that we seek.<sup>19</sup> Some fail to state the converse, that avoiding discomfort is equivalent to seeking comfort. Martyrs do not die for pleasure; they merely choose between the lesser of two displeasures. Or critics ignore long run objectives and expect that all acts must be immediately satisfying, noting that "a great many of the acts which man performs do not seem to be pleasurable."<sup>20</sup> But much of our behaviour is understandable only in light of overall objectives. What Nuttin calls "behavioural segments" derive their meaning and motivation from the molar unit of which they are an integral part.<sup>21</sup> Finally, critics think it significant that humans often act rashly instead of soberly and carefully seeking satisfaction. This claim is objectionable because no coherent theory is offered to explain why motives should be transformed as the actor moves from conscious judgment to intuitive calculation. Indeed, we should expect that impetuous decisions will be more purely hedonistic.

Bentham not only considered happiness to be our sole objective, he believed that it constituted the measure of ethical rightness and the determinant of all behaviour. In Bentham's opinion it is for pain and pleasure alone "to point out what we ought to do, as well as to determine what we shall do."<sup>22</sup> To reinforce the ethical point, Bentham defined the "good" as

14. Following Bentham's lead, Freud also adopted an entirely materialist definition of happiness. For Freud, happiness consisted of an organic energy flow, or, more precisely, of a release of energy made possible by an initial need which dammed up the flow and created an energy reserve. See A.A. Brill, *Freud's Contribution to Psychiatry* (New York: Norton, 1944) at 155; S. Freud, in James Strachey, trans. and ed., *Civilization and its Discontents* (New York: Norton, 1962) at 23.
15. See, for example, H.L.A. Hart's "Bentham" printed in Bhikhu Parekh, ed., *Jeremy Bentham: Ten Critical Essays* (London: Frank Cass and Company, 1974) at 78. See also Smart and Williams, *supra*, note 13 at 80 and 84.
16. Ideal utilitarians like Moore argued that an intellectual experience even when it was not pleasurable, was still "intrinsically good." On the liberating impact of such metaphysical reasoning see Bolles, *supra*, note 12 at 22-25.
17. Freedman, *supra*, note 13 at 29.
18. Matlin and Stang, *supra*, note 10 at 17-18. See also Matlin and Stang, "The Pollyanna Principle" printed in *Psychology Today*, March, 1978 at 56; M. Midgley, *Beast and Man—The Roots of Human Nature* (London: Methuen, 1978) at 27 and 43.
19. Parekh, "Bentham's Justification for the Principle of Utility" in *Jeremy Bentham*, *supra*, note 15 at 108.
20. Nuttin, *supra*, note 13 at 253.
21. *Ibid.*
22. Lyon (1973), *supra*, note 2 at 12.

“happiness or the cause of happiness.” Unfortunately, Bentham was either wrong or confused on both these points. His misunderstanding of determinism in psychology is the minor point and I will address it first. While happiness may be the only goal, a goal does not determine the means or strategies utilized to gain the end. This point is obvious when one regards the infinite variety of methods people employ to earn money. As for happiness, to say that the mystic, the hermit, the debauchee, the industrialist, the socialist, the thief and the saint all seek happiness is not to say very much. The far more important issue to investigate is whether any of these strategies are more productive of happiness than others. To answer, we can proceed from a causal theory of happiness which allows us to predict hedonic outcomes or we can measure happiness output directly. Both methods will be employed.

Bentham’s causal theory of happiness is foreshadowed in his definition of the good as happiness *or* the cause of happiness. He viewed happiness and its cause as interchangeable elements because he reasoned tautologically that happiness is caused by receiving or experiencing pleasant inputs. Thus for utilitarians, happiness-causing phenomena (“happinogens” for short) are themselves pleasant. Successful happiness seekers acquire a surplus of happy over unhappy experiences. This assumption is explicit in Russell’s definition of right conduct as action which will produce ‘the greatest balance of satisfaction over dissatisfaction.’<sup>23</sup> How does one acquire a surplus on the satisfaction side of the ledger? According to Bentham, one identifies happinogens such as “riches, piety, friendship, power and good reputation” and one then collects as many and as much of these as possible.<sup>24</sup> Yet a moment’s thought reveals two major problems with Bentham’s list. First, “piety” and “good reputation” are unlikely to fall into the possession of ardent pleasure seekers. Second, friendship and power are also sources of pain, anxiety and loss. Berlyne finds it “rather astonishing” how little attention is paid to the question of what factors have “hedonic value” but he accepts the existence of “agents of proven hedonic value such as food, water . . . and money.”<sup>25</sup> This mistaken idea of agents having objective existence as happinogens is central to the utilitarian theory of happiness.

The utilitarian conceives of happiness as something produced by humans just as a fruit tree bears fruit. The more the trees or people have what they prefer, the more fruit or happiness will be borne. By this theory, happiness flows from pleasant circumstances and favourable opportunities. Every person is viewed as a happiness producer with the quantity of happiness produced being dependent on the number and kind of happinogens encountered and the individual’s relative capacity to process these happinogens. This “commodity” analogy is a frequent feature of utilitarian discourse. As one theorist explains:

For if some men are better pleasure machines than others, then to maximize happiness more wealth—the most important raw material of pleasure—should be fed to the better machines

23. H. Hazlitt, *The Foundations of Morality* (New York: Green Hill, 1976) at 54.

24. Bentham, *supra*, note 11 at 145.

25. D. Berlyne, “The Vicissitudes of Aplopathematic and Thelematoscopic Pneumatology or the Hydrography of Hedonism” in *Pleasure, Reward, Preference*, *supra*, note 13 at 2.

than the poorer ones. Bentham did not like that course . . . he felt obliged to assume that men are substantially alike in their capacity for turning commodities into pleasure.<sup>26</sup>

And with commodities come storehouses: Raphael declares that everyone has a right "to an equal share of the store of happiness I have at my disposal."<sup>27</sup>

Standard utilitarian inquiries can be translated into "commodity" terms. For example, how may we maximize the yield of apples (as happiness)? By allotting each tree the best possible treatment so as to maximize the yield per tree or by cramming the most trees possible on to the available land to maximize total yield? For utilitarians, the happiness issue is equivalent to maximizing the yield of apples, the only difference being that no natural unit of happiness is currently available by which social "cultivation" experiments can be measured. This lack of a pleurometer is seen as a purely practical limitation. Philosophers transcend this problem by placing hypothetical decision makers in highly artificial circumstances where they make fictional choices that produce various arbitrary quantities of "utiles".<sup>28</sup>

If happiness is produced by the direct satisfaction of preferences then it follows that a person's consumptive potential is a proxy indicator of his happiness level. Bentham assumed that between two persons "possessed of unequal fortunes, he who possesses the greatest wealth will possess the greatest happiness."<sup>29</sup> Since wealth increases the opportunity to satisfy one's preferences, utilitarians assume that wealth is directly related to happiness. Historically, utility theorists thus embarked on a campaign to increase wealth and to redistribute wealth to the "better," more deserving, "pleasure machines".

The commodity theory of happiness naturally leads to money income being considered an indirect measure of satisfaction level. Bentham once declared that money "is the instrument for measuring the quantity of pain or pleasure."<sup>30</sup> However, Bentham was not fully convinced that money was a suitable gauge of happiness; he understood that increases in wealth were subject to "diminishing utility". Taking the case of a monarch with an income 50,000 times greater than a poor laborer, Bentham puzzled over how much happier was the richer man. He could not say with any certainty but he finally decided that five times happier "seems . . . an excessive allowance; even twice a liberal one." Bentham would not admit that diminishing utility could operate, as Rotwein puts it, "with such force as to destroy the value of substantial wealth."<sup>31</sup> Though he was doubtful, Bentham assumed that greater wealth had to have some positive relation with happiness. Current theorists stand by the same assumption and thus take money to have

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26. Mitchell, "Bentham's Felicific Calculus", *supra*, note 15 at 181.

27. D.D. Raphael, *Justice and Liberty* (London: Athlone, 1980) at 2.

28. D. Regan, *Utilitarianism and Co-Operation* (New York: Clarendon Press of Oxford University Press, 1980) at 4-5.

29. J. Bentham in J. Bowring, ed., *The Works of Jeremy Bentham* (New York: Russell & Russell, 1962) at 305.

30. Cited in Mitchell, *supra*, note 26 at 174.

31. Rotwein, "The Ideology of Wealth and the Liberal Economic Heritage: The Neglected View" (1973) 40 Soc. Res. 269 at 273.

“proven hedonic value.” Investigation can then focus on measuring and distributing money income and happiness itself can be ignored.<sup>32</sup>

The utilitarian causal theory of happiness predicts that increased wealth, higher income and better standards of living will result in net gains in happiness. It also predicts that some people will be, in net terms, happier or unhappier than others. This utilitarian thesis parallels the orthodox psychiatric view which attributes unhappiness, depression and psychological disturbance to previous stress, trauma and dissatisfaction.<sup>33</sup> The essential equivalence of the two viewpoints is illustrated in their common approach to criminology and corrections. Virtually all psychiatric and criminological thinking about crime focuses on stress as the causative factor.<sup>34</sup> Both crime prevention and therapy seek to reduce the “stressful effects of life crises.”<sup>35</sup> Unpleasant inputs like prison and punishment are considered unhealthy and criminogenic. Bentham called punishment “an evil”. Psychiatrists likewise see punishment as a cause of mental illness. Rehabilitation and punishment are taken to be mutually exclusive.<sup>36</sup>

Depressed, anxious, suicidal persons are very unhappy. Depressed persons are found to have “an unrealistically negative attitude toward the future.”<sup>37</sup> According to the theory that such unhappiness is caused by previous stress, people’s level of anxiety should be decreased by alleviating pain, by teaching the avoidance of unpleasant thoughts and circumstances, by offering pleasant and supportive counselling, and by massive social assistance to counter harmful pressures. So just as utilitarians attribute happiness to previous pleasant experiences and inputs, the various schools of psychotherapy attribute depression to previous unpleasant experiences and inputs. Both hypotheses generate testable predictions concerning the incidence of happiness and depression relative to variations in income, wealth and other objective measures of well-being.

## B. The Incidence of Happiness and Depression

Surveying self-reports of happiness is fraught with difficulties of bias, definition and interpretation. Survey responses are known to be influenced by the perceived desirability of certain answers.<sup>38</sup> Respondents who accept as a common verity that economic prosperity causes happiness may exaggerate their own happiness in the face of increased wealth. Worse, surveys

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32. According to the Paretian framework, people’s bids in a market reveal their preferences, efficient preference satisfaction best guarantees maximum happiness production, thus increased bidding capacity (money) and efficient allocation (market) are a prescription for increased happiness. “If the utilitarian could devise a practical utility metric, he could dispense with the consensual or transactional method of determining whether an allocation of resources was Pareto superior—indeed, he could dispense with Pareto superiority itself.” R.A. Posner, *The Economics of Justice* (Cambridge, Massachusetts: Harvard University Press, 1981) at 89.
  33. Valenstein, “Causes and Treatments of Mental Disorders,” in E. Valenstein, ed., *The Psychosurgery Debate* (New York: W.H. Freeman, 1979).
  34. See, for example, S.A. Halleck, *Psychiatry and the Dilemmas of Crime* (New York: Harper and Row, 1967) c. 5, especially 53-61 and 265.
  35. M. Clinard, *Sociology of Deviant Behaviour* 4th ed. (New York: Holt, Rinehart and Winston, 1974) at 198 and 603.
  36. Gunn, Robertson, Dell & Nay, *Psychiatric Aspects of Imprisonment* (London: Institute of Psychiatry, 1978) at 16 and 18; Vandervoort, “Legal Aspects of the Medical Treatment of Penitentiary Inmates” (1977) 3 Queen’s L.J. 368; D. Abrahamson, *Who Are the Guilty?* (Westport, Connecticut: Greenwood Press, 1952) at 225.
  37. Matlin and Stang, *supra*, note 10 at 163.
  38. N. Bradburn, *The Structure of Psychological Well-Being* (Chicago: Aldine Pub. Co., 1969) at 38.

may confuse happiness and wealth because the survey designers implicitly assume that a direct correspondence exists between objective improvements and happiness. Such definitional confusion is apparent in Easterlin's work where "happiness" is variously translated as "satisfied with life's progress," "welfare," "material well being" and "emotional well being."<sup>39</sup> Similarly, Bradburn's survey equated "happiness" with "mental health."<sup>40</sup>

Researchers also make unwarranted assumptions based on utilitarian axioms. Besides claiming that some people are happier than others, Bradburn assumed that those who were unhappier were the "less fortunate."<sup>41</sup> This hypothesis is consistent with Matlin and Stang's observation that the "professional literature typically assumes that people who are disfigured or malformed are less happy with their lives than those who are normal."<sup>42</sup> Evidence supportive of this assumption is thin. Indeed, some studies come to the conclusion that the less fortunate are as happy and adjusted as the normal.<sup>43</sup> One research project designed to prove that the frustration levels of the disabled are higher than average failed to do so.<sup>44</sup>

In the orthodox utilitarian tradition, Freedman set out to identify the most successfully utilized happinesses in order to determine a recipe for gaining net happiness. However, after chronicling the relationship between happiness and alleged happinesses such as love, marriage, health and money, Freedman admitted that no simple formula for producing happiness could be found. Alleged happinesses did not seem to guarantee the presence of happiness. Even money was found not to be very important to happiness "if you have even a moderate amount of it," but the very poor "are generally not happy."<sup>45</sup> Egalitarians will be heartened by Freedman's tentative conclusions, but they should know that persons at different income levels are distinguishable on grounds other than income. Alternate determinants include education, upbringing, self-restraint and divergent happiness seeking strategies.<sup>46</sup> Furthermore, income level is only an approximate indicator of happiness. A number of persons at all income levels place themselves in the "not too happy" category. (The other two relevant standard designations are "fairly happy" and "very happy.") The more relevant question may be what do these self-described less happy people have in common? Income level alone is not the answer.

A noteworthy finding of the happiness surveys is the outstanding degree to which most respondents claim to be fairly or very happy. The demographic studies show a predominance of happiness for people in almost all categories.<sup>47</sup> Cultural relativism can explain why most people would classify themselves as "fairly" happy but relativism cannot explain the large proportion of "very happy" people, nor does it suggest why citizens of some

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39. Easterlin, *supra*, note 9 at 4-6.

40. Bradburn, *supra*, note 38 at 224-225.

41. *Ibid.* at 149.

42. Matlin and Stang, *supra*, note 10 at 149.

43. *Ibid.* at 150.

44. B.A. Wright, *Physical Disability—A Psychological Approach* (New York: Harper, 1960).

45. Freedman, *supra*, note 13 at 134-136 and 219.

46. Bradburn, *supra*, note 38 at 14.

47. Freedman, *supra*, note 13 at 136; Matlin and Stang, *supra*, note 10 at 152.

countries claim a higher level of happiness than others. Such disparities lend credence to the utilitarian thesis. We must take account, however, of the significant bias humans show in favour of the positive.<sup>48</sup> Pleasant stimuli evoke more responses and pleasant information is more readily understood. The importance of positive events is overestimated. Average persons rate themselves as "better than average." Conversely, unpleasant events are more readily forgotten and people revise their history to make past events more pleasant. This selective recall may seriously bias self-reports of happiness. If pleasant events are more easily recalled and if unpleasant events are revised and suppressed, respondents may entertain the illusion that in their lives pleasant events outnumber the unpleasant. Matlin and Stang call this bias the "Pollyanna principle" and attribute to it the average person's "unrealistic expectations of the future."<sup>49</sup> In tort law, Pierce identifies a similar phenomenon, a "Faust effect" whereby individuals and firms consistently underestimate long-term costs.<sup>50</sup> According to Tiger, such endemic optimism is genetically based and has evolved because of its survival value to human societies whose success depended on a high level of risk taking.<sup>51</sup>

According to the utilitarian thesis, a predominance of self-reported happiness in some societies must be due to their members' success as hedonists in gaining the pleasant and avoiding the unpleasant. Alternatively, the reported net felicific gain may be created by unconscious bias and selective recall; it may be an artifact of surveys which confuse happiness with prosperity or it may be the result of different cultural responses to American-style social surveys. Weighing in against utilitarian expectations are reports that assumed happiness, such as income and health, fit very imperfectly with individual happiness levels.

The parallel psychiatric predictions of greater comfort and wealth bringing improved mental health are also problematic. Stress reducing strategies have been instituted and implemented but results have not been consistent with predictions.<sup>52</sup> Since 1955 the number of all mental patients has increased fourfold.<sup>53</sup> Psychotherapies have proven to be of dubious therapeutic value.<sup>54</sup> Suicide and depression are most prevalent in countries

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48. Matlin and Stang, *supra*, note 10 at 141-147.

49. *Ibid.* at 161.

50. R.J. Pierce, "Encouraging Safety: The Limits of Tort Law and Government Regulation" (1980) 33 *Vanc. L. Rev.* 1281 at 1297.

51. L. Tiger, *Optimism: The Biology of Hope* (New York: Simon & Shuster, 1979); see also Tiger, (January 1979) *Psychology Today*, 18. Psychiatrically, the Pollyanna effect is evidenced in its extreme form in hysteric and dissociative responses where painful events, like battle trauma, are unconsciously repressed. Such inadvertent self-hypnosis allows the amnesiac to totally underreport painful experiences whereas in normal circumstances this revisionist process merely results in a detectable bias against negativity.

52. A leading survey of treatment outcome studies found that encouraging assessments of psychotherapies are overshadowed by a "flow of dismal findings, in which the effects of psychotherapy barely exceed or even failed to exceed the beneficial changes observed in a control group." See S. Rachman and G. Wilson, *The Effects of Psychological Therapy*, 2d ed. (Oxford: Pergamon Press, 1980) at 4 and 51.

53. Peter Schrag, *Mind Control* (New York: Pantheon Books, 1978) at 38.

54. His survey of treatment outcomes led Zilbergeld to conclude that no initial claims of psychotherapy "have stood the test of time." B. Zilbergeld, *The Shrinking of America-Myths of Psychological Change* (Boston: Little, Brown, 1983) at 102. Clyne suggests that "psychiatrists do not yet understand the causes of psychopath behaviour [and] have evolved no effective treatment for it." P. Clyne, *Guiltily But Insane* (London: Thomas Nelson, 1973) at 147. To paraphrase Clyne, utilitarian philosophers do not yet understand the causes of happiness and they have evolved no effective program for promoting it.



with extensive welfare systems and high living standards.<sup>55</sup> Suicide prevention centres have failed to lower suicide rates and in the U.S.A. depression is so widespread that it is now called the "common cold of mental illness."<sup>56</sup>

This puzzling increase in chronic unhappiness and suicide despite unprecedented economic advances and valiant therapeutic efforts is not readily explained within the utilitarian or psychiatric frameworks. J.S. Mill expected that affluence would usher in a millennium of contentment but net contentment does not appear to have increased with the marked escalation in affluence since 1945 or, indeed, since Mill first published *On Utilitarianism*.<sup>57</sup> Instead, a paradoxical conflict emerges between utilitarians predicting that added wealth is raising net satisfaction levels and psychiatrists explaining that the increased incidence of depression and emotional negativity is due to the greater stress found in affluent consumer societies. Although both views are the logical complement of one another, one claims clear success in meeting people's needs while the other believes people are being denied their "true" needs.<sup>58</sup> Both sides reject the possibility that direct and efficient preference satisfaction may be a counter-productive and depression-inducing strategy. However, that possibility has the advantage of explaining how greater affluence and greater emotional disturbance can coincide.

### C. Alternate Causal Theories of Happiness

Since practically every event can be endowed with pleasantness depending on the actor's behavioral context there appears to be no objective happenogens.<sup>59</sup> Taking food as an example, Syngg argues that it may have negative or positive value depending entirely on the actor's background state. If a person is forced to eat under duress, food will become increasingly less enjoyable until, eventually, it is tasteless, unpleasant and even torturous. Food's "proven" hedonic value can therefore diminish to less than nothing. Syngg concludes that value depends on "the psychological field of the individual," and thus concepts of true or objective value are "psychologically unreal."<sup>60</sup>

This argument is different than the utilitarian concession that persons will derive varying amounts of happiness from the same happenogen. Instead, it makes the entire existence of a happenogen dependent on the person's

55. Zilbergeld, *supra*, note 54 at 140 and 249. Psychiatrists themselves have a higher suicide rate than other groups. A. Malleon, *Need Your Doctor Be So Useless* (London: George Allen & Unwin Ltd., 1973) at 58.

56. See Bennett's article, "Depression: The Common Cold of Mental Illness" in (Fall 1983) *Housecall* at 1.

57. J.S. Mill, in Sir W.J. Ashley, ed., *Principles of Political Economy* (New York: Longmans, Green & Co., 1909). Silver argues that both Mill and later, Keynes, believed that economic growth "would lead to a utopian finale in which individuals would cultivate the art of life. I shall suggest the dystopia will be the more likely outcome of economic abundance and the search for 'finer things.'" M. Silver, *Affluence, Altruism and Atrophy* (New York: New York University Press, 1980) at xii. See also Easterlin, *supra*, note 9 at 7.

58. Scitovsky, one of the few economists to address this paradox realizes that "our economic welfare is forever rising but we are no happier as a result" and wonders whether "too much comfort may preclude pleasure." T. Scitovsky, *The Joyless Economy* (New York: Oxford University Press, 1976) at 9 and 130-131. The dilemma on the psychiatric side is that stress is blamed for increased rates of depression, and so forth, but objective therapists are forced to grant that there is "not a shred of evidence that we are under more psychological stress than were our ancestors." Zilbergeld, *supra*, note 54 at 252.

59. See Nuttin, *supra*, note 13 at 254-256.

60. Syngg, "The Psychological Basis of Human Values," in A. Dudley Ward, ed., *The Goals of Economic Life* (New York: Harper & Bros., 1953) at 238 and 351.

subjective state or background. If there is no objective relationship between stimuli and their role as happiness generators then the Benthamite compilation of sources of happiness is a futile endeavour. Indeed, Nuttin does dismiss such compilations because "everything real or imagined could be mentioned somewhere."<sup>61</sup>

A recognition of the contextual nature of happiness leads one to ask what subjective background factors are the causal agents generating happiness? The answers generally given center on the presence of needs. Pugh's theory of the biological origins of value, for example, attributes value to preceding physical and social needs.<sup>62</sup> Psychologists broaden the needs analysis through equilibrium theories that emphasize the pervasive need for every organism to "maintain its organization."<sup>63</sup> Counteracting needs as dissatisfying deviations from equilibrium motivates organisms to seek the most food for the least effort just as it motivates persons to interpret new ideas and events in a manner that necessitates the least change in their conceptual framework.<sup>64</sup> Apter argues that the entire study of social norms and controls is based on homeostatic theories which assume that human purposefulness stems from needs.<sup>65</sup> Even some utilitarians recognize that "desire precedes pleasure" and that gaining an objective "gives us pleasure . . . because we desire it."<sup>66</sup> Parekh, though, does not vigorously pursue the nature of "desire"; thus, he avoids recognizing that desire involves need, longing, deprivation, alienation and dissatisfaction—all of which are forms of unhappiness.

An interesting explanation of the paradoxical relationship between need and satisfaction has been developed by D.G. Garan, a lawyer-psychologist.<sup>67</sup> Garan contends that happiness exists only in relation to its opposite counterpart. That is, happiness causes or is caused by unhappiness. In Garan's model, happiness is an expenditure of biological reserve or energy. The model, much like Freud's model of happiness, is limiting because expenditure is possible only if there is a preceding accumulation of need. Or, if expenditure is stimulated directly, by an intoxicating drug for example, then equilibrium is restored by subsequent needs in the form of hangover, depression and the like. As a result of this process of "opposite causation," a person's inner economy is necessarily fair—no more happiness is experienced than equally opposite need is accumulated or stimulated. No person is therefore happier than another in net terms. Individuals, however, vary in two important respects. First, people live through far different quantities of restrictive and relieving experiences. Second, people engage in endless strategic variations as to how happiness is pursued and "paid for".

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61. See Nuttin, *supra*, note 13 at 257.

62. G.E. Pugh, *The Biological Origin of Human Values* (New York: Basic Books, 1977) at 374-376; see Midgley, *supra*, note 18 at 119 ff.

63. Syngg, *supra*, note 60 at 242.

64. S. Randor, "Hedonic Self-Regulation of the Organism" in R. Heath, ed., *The Role of Pleasure in Behaviour* (New York: Harper & Row, Hoeber Medical Division, 1964) 257 at 259-261.

65. M. Apter, *The Experience of Motivation: The Theory of Psychological Reversals* (London: Academic Press, 1982) at 20.

66. Parekh, *supra*, note 19 at 108.

67. D.G. Garan, *Against Ourselves: Disorders from Improvements Under the Organic Limitedness of Man* (New York: Philosophy Library, 1979) at 10.

Garan's hypothesis generates certain implications relevant to this inquiry. Perhaps the primary implication is that by ruling out net pleasure gains and costless pursuits of happiness the theory negates the utilitarian thesis and the issues it raises. If there can be no excess satisfaction over dissatisfaction then we need not agonize over whether to increase the average or total surplus. Opposite causation theory predicts that in any felicific calculus the final total of happiness and unhappiness is always zero. The hypothesis also negates the fairness problem with respect to happiness. Rawls advises that happiness should be maximized only if we do so in a fair way.<sup>68</sup> However, if happiness is gained only at the cost of experiencing its equal opposite then its maximization is unavoidably fair. Wealth, on the other hand, is not equivalent to happiness, and the wealth problem is properly dominated by issues of fairness and justice.

The causal relationship between needs and satisfactions presents a dilemma to most eudaemonic ethicists. If need is the cause of happiness then logically a hedonistic creed bids them to promote need. But need is everything that is unhappy. Two ways of avoiding this conundrum are resorted to. First, needs, especially subtle wants or desires, can be misrepresented as painful. This is Parekh's solution. Second, needs can be assumed as a given, leaving one the task of devising methods for efficient need satisfaction. Most economists follow this line of reasoning. People are rightly assumed to be the best judges of how to satisfy the needs they happen to have, and the economist merely strives to minimize impediments to satisfaction. The difficulty ignored is that meeting needs extinguishes the cause of further satisfaction.<sup>69</sup>

The hedonistic futility of pursuing happiness is readily observed. The human need for security, which includes the need for social distinction, is impossible to permanently meet because one person's gain increases the needs of others. An ambitious round of one-upmanship leads to a futile effort to outstrip a generally increasing level of competition. In terms of productivity, this process is a vicious circle. Adam Smith, in his *Theory of Moral Sentiments*, argued that riches are not a direct determinant of happiness. He also dismissed the man of "ambition" as a fool who in his vain quest discovers that "wealth and greatness are mere trinkets of frivolous utility" for which he sacrifices "a real tranquility that is at all times in his power."<sup>70</sup> Smith believed that only modest creature comforts were required. Senior likewise disparaged the "love of distinction," noting that for its sake people "undergo toil into which no slave could be lashed or bribed."<sup>71</sup> Marshall thought the desire for wealth as a means of social advancement and status display was "unwholesome" and J.S. Mill advocated a tax and ceiling on wealth to reduce wealth's importance as a symbol of social distinction.<sup>72</sup> In Mill's opinion the best state for humanity "is that in which, while no one

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68. J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 30.

69. Like food, sexual gratification is also considered a limitless source of proven "hedonic value" but that view developed during previous centuries when sexual release was strictly curtailed. Now that sexual satisfaction is promoted by experts and avidly pursued, there are more disorders related to sexual disinterest. See Garan, *supra*, note 67 at 182-184.

70. Adam Smith, *The Theory of Moral Sentiments* (New York: Augustus M. Kelly, 1966) at 260 ff.

71. N. Senior, *Industrial Efficiency and Social Economy* (New York: Henry Holt and Company, 1928) at 1.67.

72. Mill, *supra*, note 57 at 749.

is poor, no one desires to be richer . . .”<sup>73</sup> Ambition means being dissatisfied with what one is or has. As a promoter of happiness, Mill logically deplored the cause of ambition and, in the tradition of Oriental mystics, warned against the “futile” pursuit of more and more wealth. Easterlin also speaks of a “hedonic treadmill” because he realizes that social needs are culturally relative: as average income increases “no one, on the average, feels better off.”<sup>74</sup> Easterlin believes people are caught up in a “self-defeating process” because “affluence” will never be attained. Since affluence obviously has been attained relative to historic living standards what Easterlin means is that final, ultimate satisfaction will not be attained. The failure of affluence to deliver surplus happiness is only a problem in a normative system like utilitarianism that identifies happiness as the “good.” Asceticism does not base its normative judgments on happiness gains and so is not troubled by the exercise people undergo on the hedonic treadmill.

Another utilitarian concern ruled out by Garan’s thesis is the embarrassing “utility monster.” A “utility monster,” according to Nozick, is someone “who gets enormously greater gains in utility from any sacrifice of others than those others lose.”<sup>75</sup> To support the existence of the utility monster, one must view the ability to experience happiness as a skill that, like other skills, may vary “enormously” from person to person. The utility monster may be compared with an incredibly fecund fruit tree whose potential yield of apples is so tremendous that we must, as fruit yield maximizers, destroy all surrounding trees in order to provide the monster its lebensraum. But the flaw in this picture, as the needs theorists point out, is that experiencing happiness is not a skill. Those who experience the greatest happiness are those who experience the greatest dissatisfaction. A utility monster is an impossibility if humans do not vary in terms of net happiness. Then, irrespective of the joy sadists may gain, they can make no moral claims on strict utilitarians because they experience no more net happiness gain than anyone else. Obviously, this logic destroys all happiness-based normative judgments. The self-restrained, productive and altruistic person can also not make any claims for special attention on the basis of any net happiness gain.

Nozick’s hypothetical “experience machine,” which will produce any feeling one desires, also poses a challenge for utility theorists. Nozick believes plugging in to such a device would be a “kind of suicide” but his objections to that choice are unconvincing. Nozick counsels against plugging in because people want not just pleasure but to be a certain sort of person. I agree with Nozick, we do have moral scruples about opting for directly stimulated happiness. But that is not the issue. The issue is why should such scruples evolve and why, given no net pleasure gain either way, we should choose pleasure later over pleasure now? In fact, many people do make the choice

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73. *Ibid.*

74. Easterlin “Does Money Buy Happiness”, *supra*, note 9 at 9-10. Freedman speaks of “adaptation levels” whereby we grow accustomed to some stimulation and no longer notice or value it. The result is that no matter how much people acquire of what they want “they want more, because once they adapt to one level, it no longer brings happiness.” Freedman, *supra*, note 13 at 226-228.

75. R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 41-43.

Nozick warns against. This choice cannot be observed via perfect "experience machines" but it can be seen with the best devices yet created to serve the same purpose, namely chemical intoxicants, tranquilizers, and analgesics.<sup>76</sup> That drug use is wealth reducing does not mean hedonistic arguments against it can be raised. The same is true of Nozick's machine. Arguments against plugging in must be based on wealth not happiness because there will be no net happiness gain whether we plug in or not.<sup>77</sup>

### III. ASCETICISM

#### A. The Ascetic Principle

Bentham recognized in asceticism a position diametrically opposed to his own principle of utility. Modern writers blur these polar distinctions by defining utilitarian goals in terms of "social welfare, human pleasure, output or efficiency."<sup>78</sup> Such overly inclusive definitions misconstrue all consequentialist systems as being varieties of utilitarianism. Smart errs when he defines "utilitarianism" as a system where the "rightness of an action depends solely upon the state of affairs it brings about"<sup>79</sup> because asceticism is also such a system and so is intuitionism, though in a more subtle way.<sup>80</sup> Bentham reasoned that since humans like satisfaction and strive to achieve it, happiness is the "good." In contrast, asceticists reason that since we naturally prefer happiness, the only challenge possible is to resist that preference.<sup>81</sup> If happiness is the unavoidable end to which all our means eventually bow, then deferring the reaching of that goal is, paradoxically, the measure of moral rightness or worth. Ascetically then, the test for "rightness" is the extent to which we limit the direct pursuit of happiness. Since the inevitable can be resisted, whereas net happiness gain is impossible, asceticism provides what utilitarianism lacks—a functional basis for making objective normative evaluations.

Utilitarianism's lack of functional criteria is illustrated by Bentham's position that all motives are inherently good because all involve the pursuit of happiness which is *the* good. Bentham thus attributed badness to defects in understanding and calculation, defects that could be rectified by a demonstration of where a person's maximum happiness lay. Moral problems,

76. Over the past century, a powerful pain-killing ideology has evolved which holds that pain, whether in depression, childbirth, sickness, mourning or neurosis, is unnecessary and can be easily and costlessly eradicated. Anti-pain theorists rewrite history in order to deny our ancestors the possession of analgesics or to deny, if they had such drugs, that they understood their potential. Drugged relief is misrepresented as something new, like radio, because this avoids having to explain why previous cultures severely restricted use of drugs. W.C. Westman, *The Drug Epidemic* (New York: The Dial Press, 1970) at 76. R. W. Johnson, *Disease and Medicine* (London: Batsford, 1967) at 5. P. Smith, *Arrows of Mercy* (Toronto: Doubleday Canada Limited, 1969) at 12 and 15. J. Rublowsky, *The Stoned Age: A History of Drugs in America* (New York: G.P. Putnam's Sons, 1974).

77. Nozick's third objection to the machine, that it precludes the opportunity for contact with a "deeper reality," appeals self-consciously to non-refutable metaphysical claims. This argument overlooks the fact that drugs have traditionally helped to alter states of consciousness. It also ignores the possibility that all "transcendental experiences" are bio-chemical in nature regardless of whether they are achieved through drugs, machines or psychological means. A. Weil, *The Natural Mind: A New Way of Looking at Drugs and the Higher Consciousness* (Boston: Houghton Mifflin Co., 1972).

78. R.A. Epstein, Book Review (1977-78) 30 *Stan. L.R.* 635 and 641.

79. Smart and Williams, *supra*, note 13 at 13.

80. Sir R. Cross, "Blackstone V. Bentham" (1976) 92 *L.Q. Rev.* 516; R.A. Posner, Book Review (1982-1983) 20-21 *U.W. Ont. L. Rev.* 168.

81. I. Kant, in E. Ashton, trans., *On the Old Saw: That May be Right in Theory But It Won't Work in Practice*, (Philadelphia: University of Pennsylvania Press, 1974).

by this logic, are comparable to engineering or horticultural problems where higher fruit yield can be attained quite easily just by instructing the ignorant, superstitious farmer in new, scientific procedures.<sup>82</sup> For asceticists, in contrast, actions are judged according to whether self-gratification is deferred, which is good, or self-enjoyment is indulged, which is bad. Since people are naturally inclined to tread the shortest route to happiness, human moral failings are seen not as a problem of calculation but of will. Keeping promises and fulfilling obligations are typical moral imperatives because their implementation requires self-sacrifice and the deferment of satisfaction.

Obtaining a clear picture of asceticism is hindered by rivals misrepresenting the principle as an extremist and unreasonable thesis. Bentham declared that only foolish religious zealots and a few hypocritical philosophers advocated asceticism.<sup>83</sup> Dictionaries define "asceticism" as a "rigorous abstention from self-indulgence"; or speak of the "ascetic" as leading an "abstentious life" of "austerities" and "unduly strict religious exercises."<sup>84</sup> The juxtaposition of "extreme" and "undue" with asceticism is extraneous to an understanding of the principle's fundamental orientation which is to restrict self-indulgence by *some degree*. One need only refrain from spending a minute portion of income before one is entitled to identify that act as a "deferment of consumption" Bentham's characterization of the ascetic as someone who expects to totally censure happiness is utilitarian propaganda; as Watson says, it is "a mere caricature" of the ascetic position.<sup>85</sup> In the same tradition of excessive imprecation, Kretschner labelled asceticists "perverts . . . who derive pleasure not from the satisfaction of their appetites and urges, but rather from the denial of them."<sup>86</sup> Undergoing privation as in fasting, or denying urges is not a perversion but a common point of personal pride because it demonstrates some mastery of one's appetites.

Pleasure deferment is promoted by the ascetic and criticized by the logical utilitarian but in pursuing these divergent strategies neither party gains a net pleasure advantage. As a result, the only case for one principle over another must be built on the creation of objective gains or wealth. By "wealth" I mean all fiscal, industrial and human capital including science, wisdom, honesty, health, historic sense, friends, and ethics. Asceticism is synonymous with a program of wealth creation because it avoids the rapid satisfaction of needs. Effort directed toward a goal continues only so long as the goal remains unattained. The longer it takes to satisfy a psychological need such as insecurity, the more wealth will be produced because further goal-directed activities are instigated. When people are perfectly content with themselves, no development occurs.

82. Yet hedonists also claim that people are the best judges of their own preferences. Given this starting point, how could hedonist philosophers offer instruction to anyone but themselves? Kant apparently recognized this limitation and argued, as a result, that the "common man" needed no help from the philosopher as "empiricist". *Ibid.* at 19.

83. Parekh, *supra*, note 19 at 104 and 107.

84. C. L. Barnhart, ed., *The American College Dictionary* (New York: Random House, 1968) at 72; P. B. Grove, ed., *Webster's Third New International Dictionary* (Springfield, Massachusetts: G. & C. Meriam Co., 1965) at 126.

85. "That the end of life is to get as much pain as possible is a mere caricature of ascetic morality. What has given that mode of thought a peculiar fascination to many minds is that it opposes the higher or spiritual life to the lower, and maintains that the former can only be obtained by the *complete* sacrifice of the latter." (Emphasis added to point out Watson's own exaggeration.) Watson, "Bentham", *supra*, note 15 at 63.

86. J. Lindworsky, in E. Heiring, trans., *The Psychology of Asceticism* (London: H. W. Edwards, 1936) at 2.

Asceticism establishes a functional basis for moral judgments. According to MacIntyre, all classical moral arguments depended upon at least one central functional concept. That is, persons were judged in terms of practical considerations ("mores") about their fitness as farmer, poet, spouse, citizen or friend.<sup>87</sup> A "good" person was one who met the requirements dictated for his or her role. MacIntyre believes that nonfunctional morality developed late in the European period as a result of attempts to construct a philosophical justification of morality divorced from theological, legal and aesthetic needs. Utilitarianism destroys functionality because it portrays humans as being valuable "in themselves" as happiness producers. However, if no net gain in happiness is possible, utility provides no basis on which one person can be judged the moral superior or inferior of another. Asceticism, in contrast, reaffirms and reconstructs the classical reliance on strictly functional, objective and implicitly wealth promoting criteria. Drug habituation, for example, is a morally inferior choice not because it reduces happiness but because it impairs human capital development.<sup>88</sup>

One measure of a moral principle's plausibility is its convergence with traditional practice. Cultural traditions are generally inhibitory.<sup>89</sup> Customary ethics stress self-control and the submergence of self in familiar and civic duties. Social conventions and taboos restrict self-expression and hamper free choice in how one eats, dresses or speaks.<sup>90</sup> Numerous, plainly popular sources of satisfaction including gambling, masturbation, adultery, intoxication, indolence, profanity, and so forth are universally subject to social restriction. Perry notes that "many" moral rules seem to ignore happiness and in fact brand as "sins and crimes" what "many utilitarians would say cannot be rationally forbidden or blamed."<sup>91</sup> Anthropologically, an analysis of culture will reveal a vast, complex and usually unnoticed system of restraint.<sup>92</sup> For hedonists, the discovery that culture is repressive, that schools, parents, churches and legal structures are inhibiting, is usually greeted with surprise and outrage.<sup>93</sup> The hedonist then preaches liberation and is, to varying degrees, antagonistic toward traditional practice.<sup>94</sup> Asceticism, on the other hand, views the same restrictive elements as the intuitive development of wealth maximizing strategies. Rather than tear down such restrictions as base, needless and hypocritical, the asceticist seeks to rationalize and bolster inhibitory factors, including the law as the most formalized system of restrictions.

87. A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981) at 37 and 56.

88. Mitchell, "A Comparative Analysis of Cannabis Regulation" (1983) 9 Queen's L.J. 110.

89. In primitive societies the young are taught to be productive and are tested in rituals involving pain, terror or isolation. Gutmann writes, "In previous versions of morality, one was usually instructed to rise *above* the appetites; in the morality of the counterculture, appetite is the basis of morality." Gutmann, "The New Mythologies and Premature Aging in the Youth Culture" (1973) 40 Soc. Res. 248 at 250.

90. Even the term "happiness" was once encumbered by its association with legal and economic customs and practices. Only in the 19th century did "happiness" become primarily a psychological concept, a question of pure subjectivity. With this change, the "pursuit of happiness" became less the disciplined quest after wealth and social advancement imagined by American founders and more an indulgent process of direct self-gratification. See Bradburn, *supra*, note 38 at 7.

91. T. Perry, *Moral Reasoning and Truth* (Oxford: Clarendon Press, 1976) at 30.

92. A.L. Kroeber, *Anthropology—Race, Language, Culture, Psychology, Prehistory* (New York: Harcourt, Brace Jovanovich, 1969).

93. This reaction is required by the Romantic and utilitarian logic which decrees that punishment is evil and that social convention is deadening. The legacy of the past, our customs and traditions, then appear as hoaxes, terrible mistakes or conspiracies perpetrated by the Church, the "ruling class," the legal elite, and so on.

94. The same antagonism is noted among psychotherapists, which is to be expected given their quasi-utilitarian theoretical position. Psychotherapists have reportedly "spearheaded the drive away from traditional, restrictive practices." Zilbergeld, *supra*, note 54 at 13, 21 and 23.

## B. Intuitionists as Asceticists

By "intuitionism" Rawls means any theory that admits of a plurality of guiding principles of right action; however, I prefer Bentham's definition of "intuitionism" as a system where moral judgments are based on feelings, or moral "intuitions".<sup>95</sup> This lack of an objective consequentialist basis for normative judgments is intuitionism's central weakness: why should A's personal moral response be universalized? The answer is plain—because A's personal intuition is primarily a product of shared cultural conditioning. And culture, as noted, is ascetic. Take Kant as an intuitionist. He believed that people knew "in their hearts" what was right and wrong.<sup>96</sup> Kant rejected the idea that the moralist's job is to inform people of how best to attain happiness.<sup>97</sup> For Kant, moral value depended on the "fact of moral obligation." The ascetic basis of this philosophy is well illustrated by Kant's critics. They charged that his view was unacceptable because it required as a condition for acting morally that one renounce happiness.<sup>98</sup> This renunciation impelled action contrary to human nature. That is exactly what the asceticist believes should be the case, although happiness is not "renounced," merely delayed or postponed. Kant replied to the above criticism in a similar manner. Renouncing happiness is impossible, he said, but we must not make the "desire for happiness *the* or *a* condition for acting morally." Kant's position corresponds to asceticism's rejection of happiness as a relevant normative criterion. However, Kant's praise of intuitionism exaggerated its ability to produce certain results. According to Kant, when a person asks "where his duties lie . . . he is instantly certain what he must do."<sup>99</sup> Unfortunately, culturally conditioned norms cannot be taken for granted or assumed to operate with equal force in everyone.

Rights theorists are implicitly ascetic because "rights" only exist in relation to duties, obligations and restrained behaviour. Nozick, for example, argues in a Lockean tradition, that "rights" determine the limits of the state's legitimate interference with the individual.<sup>100</sup> Some of Nozick's critics may find his analysis excessively restrictive of government but their less libertarian use of rights still involves the same working elements. Indeed, while there are numerous "rights theories," each illustrates that "rights" refer to claims that someone or some group is obliged to fulfill.<sup>101</sup> A right to be told the truth is the receipt side of an obligation to tell the truth. Justice, therefore, involves balancing the rights demanded (hedonistic

95. Rawls, *supra*, note 4 at 34. See also, Smith, "Rawls and Intuitionism" in K. Nielsen & R.A. Shiner, eds., *New Essays on Contract Theory* (Guelph, Ont.: Canadian Association for Publishing in Philosophy, 1977); Bentham, *supra*, note 11 at 1; Urmsion, "A Defence of Intuitionism" (1975) 75 *Proceedings of the Aristotelian Society* III; R.M. Hare, *Moral Thinking* (Oxford: Oxford University Press, 1981) at 75-76.

96. I. Kant, in J. Ladd, trans. & intro., *The Metaphysical Elements of Justice; Part I of the Metaphysics of Morals* (Indianapolis: Bobbs-Merrill, 1965) at ix.

97. Kant, *supra*, note 81 at 18.

98. *Ibid.* at 19.

99. Kant, *supra*, note 95 at xi. Goodwin exaggerates in an opposite direction when he states that, "Some people actually internalize certain moral principles. For them, acting well is its own reward . . ." (emphasis added). Actually, every socialized human being is guided by internalized norms. And since these norms are taken for granted one gains little reward in following them. For example, how many adults gain satisfaction from adhering to their language's grammar? R.E. Goodin, *Political Theory and Public Policy* (Chicago: University of Chicago Press, 1982) at 95.

100. Hodson, "Nozick, Libertarianism, and Rights" (1977) 19 *Arizona L.R.* 212.

101. Raphael, *supra*, note 27 at 3.



objective) with the obligations honoured (ascetic duty). The constant obstacle to justice is the conflict inherent between self-seeking claims and other-regarding limitations. People try to maximize enjoyment of their rights (as demands) and to minimize the meeting of their obligations. To the extent this natural objective is achieved, injustice results. Justice requires that we rein in our self-interest and law promotes this project by penalizing those who avoid their obligations, and by protecting people from excessive demands particularly from governors.

Social contract theories of government are appealing to intuitionists because a negotiated public compact enhances the balance of demands and obligations. Another appealing feature of contract theories is that their quasi-market analysis is inherently ascetic. The fundamental ascetic feature of market transactions is that mutual demands are mutually off-setting and limiting.<sup>102</sup> Where each negotiating party is capable of making equivalent demands, stalemate results and justice is thereby assured. This analysis suggests that political justice will be maximized when the joint enterprises and institutions of the governors and the governed are fully capable of thwarting one another's natural inclinations.

This ascetic overview is broadly consistent with the methodology of contract theories. Rawls' "original position" renders his decision makers artificially powerless to express any personal bias. Each is reduced to naked, uninformed hedonic self-interest but, since each is reduced to the *same level*, their inclinations are in perfect counter-balance. What Rawls makes of this fiction depends on his own concerns which, as it turns out, tend to be utilitarian. However, one can adopt the original position without following Rawls in other respects.<sup>103</sup> Rawls prefers egalitarian distribution but one can argue with equal plausibility that his contractors would prefer a meritorious system.<sup>104</sup> To the degree a system does distribute meritoriously it is ascetic because its incentives impel work, effort and self-sacrifice.

Intuitionism in the critical legal studies school is also informed by ascetic principles. For Kennedy, law is dominated by two basic "rhetorical modes": individualism and altruism.<sup>105</sup> By "individualism" Kennedy means something close to rule utilitarianism, whereas by "altruism" he conveys a modified version of asceticism. This much is clear when Kennedy writes that the "essence of altruism is the belief that one ought *not* to indulge a sharp preference for one's own interests over those of others" and that

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102. Market "demand" is not desire, it is the capacity to pay and that presupposes productivity. Thus it is not the poorest countries that make the greatest demands on the international market. Similarly, in the political market, desires and vocal "demands" are largely weightless in themselves unless they are "registered" as influence, lobbying impact, organization, pressure, and vote delivery.

103. Pazner, however, seems to accept that "utility is implicitly assumed to depend solely on income" thus her focus also tends to be utilitarian and founded on the commodity theory of happiness. Pazner, "Entitlement Principles and the Original Position: A Rawlsian Interpretation of Nozick's Approach to Distributive Justice" (1977) 19 Arizona L.R. 169, 174.

104. Raphael, *supra*, note 27 at 107. The Rawlsian enterprise is reminiscent of earlier efforts by mathematicians such as Whitehead and Russell to develop a form of axiomatic discourse that could automatically generate theoretical or normative implications. Their effort failed because logic is merely a tool for confirming and testing existing hypothesis; it is not a generator of theory. This "scientific idealism" was expressed in law by positivists like Stammler and Kelsen, their objective being to distill "from legal material those elements of legal knowledge which are of universal validity, as a matter of logic." (emphasis added) W. Friedman, *Legal Theory* 4th ed. (Toronto: Carswell, 1953) at 99.

105. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685.

altruism “enjoins us to make sacrifices, to share and to be merciful.” Kennedy accepts the degree of legally enforced altruistic duty as a normative standard for legal change and consistently defines justice as being equivalent to that outcome that would be achieved “if everyone behaved altruistically.”

### C. Utilitarians as Asceticists

Asceticists explicitly reject the pursuit of happiness as a normative measure of “rightness”. Utilitarians also endorse ascetic standards, but in a covert, implicit and rather contradictory manner.<sup>106</sup> Critics quickly realized that Bentham’s felicific calculus was a “versatile instrument” capable of proving correct those assumptions “which seem natural to the utility theorists.”<sup>107</sup> Arguably, the source of these seemingly natural assumptions was the theorist’s intuitive and inculturated acceptance of asceticism. Bentham wanted to instill in the lower economic classes “a spirit of frugality and self-help”—an ascetic objective.<sup>108</sup> The organizing principle of Bentham’s society was fear, “fear of the law in the case of the ‘lower’ classes and fear of society . . . in the case of the middle class.” Bentham recognized that the impact of moral suasion depends on the degree to which a person needs other people. Needs are dissatisfying, they are what Bentham identified as “evil,” yet he attributed concern for the regard of others to needs.<sup>109</sup>

Bentham used creative accounting to achieve ascetic results. He assumed that the pains caused by malevolence “always far exceed the pleasures” gained, therefore, malevolence could never be justified by utilitarianism.<sup>110</sup> But the utility principle could as readily justify all sadistic pleasures as deny them. Bentham’s preference for benevolence, which is other-regarding and self-limiting, is an ascetic judgment. The same is true of the general principle, stressed by Mill, that one ought to be aiming at the happiness of everyone else. In practice, this rule will tend to restrict pursuit of one’s own happiness.<sup>111</sup>

An ancient device for generating ascetic results is the evaluative use of happiness whereby some satisfactions are portrayed as “high” and others as “low”.<sup>112</sup> One exponent of this practice argues that pleasure from poetry is better than pleasure from alcohol. Poetry is superior, he claims, because it is a means of further enjoyment whereas alcohol is not and because

106. Whewell, “Lectures on the History of Moral Philosophy,” in *Jeremy Bentham: Ten Critical Essays*, *supra*, note 15 at 55.

107. Mitchell, *supra*, note 26 at 180.

108. Parckh, “Introduction”, printed in *Jeremy Bentham*, *supra*, note 15 at xix.

109. *Ibid.* at xii and xxv.

110. Lyon, *supra*, note 2 at 25. While Bentham wanted all happiness to count, in practice his opinions largely coincided with those of Priestly and Hutcheson. Hutcheson, who invented the phrase “the greatest Happiness for the greatest numbers” believed the world was benevolent and that each creature naturally found satisfaction in promoting the happiness of all. For Priestly, “happiness” did not mean a surplus of pleasure over pain but a state of moral and spiritual perfection. See M. Canovan, “The Un-Benthamite Utilitarianism of Joseph Priestly” (1984) 45 *J. of the History of Ideas*, 435 at 435, 437 and 439.

111. Mill in *Utilitarianism* repeatedly introduced “elements alien to psychological hedonism.” G.F. Gaus, *The Modern Liberal Theory of Man* (London: Croom Helm, 1983) at 132-135.

112. Plato responded to Democritus, who thought that all pleasures were equally good, including those that sprang from “the exercise of the animal passions”, by simply declaring that “animal” pleasures were ethically inferior to those pleasures achieved through the “higher” human faculties. Other covertly ascetic hedonists have been making the same declaration for millennia. Bolles, *supra*, note 12 at 23.

alcoholic enjoyments cause eventual distress.<sup>113</sup> Smart does not explain why poetry entails a happiness “multiplier” effect leading to extra satisfaction. He also fails to prove that poetic pleasures do not stem from or eventually cause unpleasurable needs. Indeed, Smart says nothing whatsoever about why poetry is pleasurable.

Adler asserts that happiness is the proper normative standard but adds a major condition—only happiness that is “properly conceived” is to count. He then defines happiness as arising when one obtains “all the goods that everyone ought to want.”<sup>114</sup> By assuming that utilitarianism means seeking only what is “really good” for one, Adler is able to dismiss various unascetic pursuits. Vickrey makes the same ascetic concessions by first declaring that the economic goal is satisfaction of preferences and by then ruling out some preferences as being unworthy. The examples of preferences he feels are almost “universally dishonoured in most concepts of the good society” form the agenda for a massive interference with personal preferences.<sup>115</sup>

Apart from optional constraints grafted onto the theory, there is nothing in utilitarianism to distinguish between good and bad preferences because in terms of net pleasure gain pushpin is just as good as poetry. Indeed, pushpin is superior for short term happiness. In contrast, asceticism provides a very definite evaluative standard: the more effort required to attain an enjoyment, the higher or more worthy a pleasure it is. Intellectual pleasures are thus superior to alcoholic satisfactions because intellectual joys are possible only after years of preceding study, restraint and restriction.

Much of the tension between ascetic and utility principles in both law and economics is expressed in the word “rationality.” On the broadest level, “rational” denotes consistent, goal directed behaviour. Whether these goals are attractive or understandable to other persons, or even other species, is irrelevant because it is assumed that all goals are reducible to the satisfaction of needs. Hume, Bentham, and modern economists like Warren take this position.<sup>116</sup> Bentham argued that everyone calculated, “even madmen,” and that passion and calculation were not incompatible.<sup>117</sup> Going further, Hirschliefer notes that biologists analyzing lower life forms employ the same generalizing concepts and principles as do economists.<sup>118</sup> Here “rational” is synonymous with “purposeful”: an organism has reasons for its behaviour because it has goals. But to the opposing school, “rational” means conscious calculation. In Smart’s opinion rational decisions produce the “best results,” unlike spontaneous choices which are made “without calculation.”<sup>119</sup> Limiting “rational” to mean only consciously appreciated objectives accomplishes an important goal—it obscures the lack of connection between wealth and happiness. Harsanyi argues that “rational” goals

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113. Smart and Williams, *supra*, note 13 at 25.

114. M. Adler, *Six Great Ideas* (New York: Macmillan Pub. Co., 1981) at 92 and 98.

115. Vickrey, “Goals of Economic Life: An Exchange of Questions Between Economics and Philosophy” in *The Goals of Economic Life*, *supra*, note 60, 148 at 157.

116. Warren, “The Economic Approach to Crime” (1978) 20 Cdn. J. Crim. 437.

117. Bentham, Chapter IV, *supra*, note 11; See also Mitchell, *supra*, note 26 at 177.

118. Hirschliefer, “Economics from a Biological Viewpoint” (1977) 21 J. Law & Econ. 1.

119. Smart and Williams, *supra*, note 13 at 12. See also, Moore, “Some Myths About Mental Illness” (1975) 32 Archives of General Psychiatry 1483.

must be pursued according to "some well defined set of preferences."<sup>120</sup> But defined by whom—the individual or the external rulemaker? Harsanyi opts for the second choice because, as he puts it, "humans are not consistent enough to approach the ideal of full rationality." In his defence of "preference utilitarianism" Harsanyi explains that what is good or bad for X is ultimately decided by X's preferences, thus preferences should be honoured. But like Vickrey, Harsanyi employs sleight-of-hand to exclude an entire range of preferences. Excluded preferences are those based on "erroneous factual beliefs, or on careless logical analysis, or on strong emotions that . . . greatly hinder rational choice."<sup>121</sup> Factual error, bad logic and turbulent emotions interfere with wealth seeking decisions but Harsanyi's object is to make the same claim for happiness seeking choices. These too must be prudent and responsible since humans are alleged to pursue "irrational wants" that lack a "real ability to produce pleasure." Harsanyi denies the subjective integrity of hedonic pursuits in order to argue that a person's preferences, which he has promised to honour, can "at some deeper level [be] inconsistent with what he is now trying to achieve."<sup>122</sup> This claim is psychologically false. If happiness is the goal there can be no inconsistency in means, especially at our "deeper levels" which are most hedonistic. But when the goal is wealth, inconsistencies can thrive and multiply because our natural preferences can be wealth minimizing.<sup>123</sup> Harsanyi obscures this fact by defining "social utility" in terms of "true preferences" from which he excludes "all clearly antisocial preferences," thus arriving at an ascetic policy.

Harsanyi's convoluted reasoning is reminiscent of the intellectual framework erected for neoclassical economics by Marshall. Unlike classicists, Marshall explained economic value in terms of subjective happiness but this turn to hedonistic standards highlighted an embarrassing fact: short term hedonistic choices are incompatible with the type of conduct which the economic system requires.<sup>124</sup> Marshall's solution to this problem was further obfuscation accomplished by redefining "rational" to mean prudent, restrained and ascetic. Marshall's recommendations that people should subordinate their desire for transient luxuries and should sacrifice now for the sake of greater future returns, demonstrated that the Victorians "filled the rational maximizing framework with the substance of their values."<sup>125</sup> Fortunately, those "values" were ascetic. Unfortunately, economic "rationality" itself was empty of ascetic content.<sup>126</sup>

120. R. Harsanyi, "Morality and The Theory of Rational Behaviour" (1977) 44 Soc. Res. 622 at 623, 628, and 644. The point of "preference utility" is to disconnect policy making from strict psychological hedonism. Likewise, much of the appeal of "rule utilitarianism" is that "the moral rightness of an act is much less directly related to utilities." R. B. Brandt, "Utilitarianism and Moral Rights" (1984) 14 Can. J. of Phil. 1 at 1 and 4.

121. Harsanyi, *ibid.* at 646.

122. *Ibid.* at 645-647.

123. If "rational" simply means consistent happiness seeking then pure, unfettered "rationalism" is inimical to economic development. Thus, economists change "rational" to mean behaviour "consistent with ends conducive to the individual's welfare," whereby "welfare" is meant wealth. Rotwein, *supra* - note 31 at 270, footnote 1.

124. Weiskopf, "The Image of Man in Economics" (1973) 40 Soc. Res. 547 at 557.

125. *Ibid.*

126. Weiskopf argues that with the liberation of subjective impulses and the "general disintegration of restraints and inner controls in Western civilization . . . economics became increasingly value-empty." *Ibid.*, at 559. Weiskopf concludes that the "stress on spontaneity, immediacy, and direct, momentary experience is the consequence of subjectivistic economic utilitarianism." *Ibid.* at 560. Scitovsky argues along similar lines that economists presume that consumers not only pursue their own preference satisfaction, but they do so in a reasonable way that promotes their wealth and welfare. Having made what Scitovsky considers is a fictitious and unwarranted assumption, economists then feel free to ignore ethical judgments and to focus on efficiency problems with a clear or "empty" conscience.

#### IV. Wealth Maximization

##### A. Posner's Ethical Theory

Asceticism rejects net happiness as a normative standard and offers instead a measure of moral "rightness" based on the degree to which self-satisfaction is resisted. Furthermore, asceticism connects ethics and economics because the deferment of consumption as satisfaction is submitted to be the causal source of wealth. Posner's presentation of wealth maximization as an ethical theory corresponds, at some points, with the ascetic thesis just summarized. In comparing asceticism with wealth maximization, those criticisms of Posner's work that are applicable to both arguments will be distinguished from those unique to wealth maximization. The major difference between the two positions is that Posner views the ethical component of wealth maximization as a blend between the rival traditions of Kantianism and utilitarianism.<sup>127</sup> Insofar as Kantianism is an intuitionistic form of asceticism, Posner's "blend" of two mutually exclusive doctrines must fail for want of consistency.

Generally, Posner is critical of utilitarianism and supportive of ascetic policies. He dislikes utilitarianism because it counts asocial traits. Conversely, he values wealth maximization because it yokes "selfish desires . . . to the service of other people," because it reaffirms the "conventional pieties," and because it rewards the Calvinist virtues.<sup>128</sup> Posner, however, fails to sharply distinguish wealth maximization and utilitarianism because he does not separate wealth and happiness. He begins well enough by defining "economic value" to mean what people are willing to pay for something rather than how much happiness they would derive from having it. But "wealth" is defined as the aggregate *satisfaction* of those preferences that are "registered" in a market. Happiness, according to Posner, is "one of the ultimate goods to which wealth maximization is conducive."<sup>129</sup> Posner likens happiness to a commodity and he accepts that the contemplative, withdrawn rural philosopher "may be happier than the captain of industry, but he will also produce a smaller surplus for the rest of society to enjoy."<sup>130</sup> This needless concession on Posner's part in favour of the philosopher weakens his own case for wealth maximization.

Posner is less than clear about why a willingness to pay, which "registers" one's preferences in a market, has moral worth. He argues that the pursuit of wealth respects individual choice because wealth maximization is based on the model of the voluntary market transaction.<sup>131</sup> Posner's use of the market implicitly imports ascetic values into his thesis because an impersonal, competitive market accomplishes a pervasive curtailment of self-indulgence. Consistent with this analysis, Posner praises the market for

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127. Posner, *supra*, note 32 at 66.

128. *Ibid.*, at 113.

129. *Ibid.*, at 108; Posner places Pareto squarely in the utilitarian camp. In turn, Sager describes Posner's thesis as an imperfect variant of Pareto superiority. See Sager, "Pareto Superiority, Consent and Justice" (1981) 8 Hofstra L.R. 913 at 914. K. Veljanovski develops a similar argument in "Wealth Maximization, Law and Ethics—On the Limits of Economic Efficiency" (1981) 1 Int. Rev. Law & Econ. 5.

130. Posner, *supra*, note 32 at 83, footnote 62.

131. *Ibid.*, at 66.

channeling selfish desires to the service of other people.<sup>132</sup> Service is part of a market because A transacts with B only if both have produced something, or possess someone else's production. Production and discovery entail work, effort, and the deferral of gratification, thus willingness to pay is ultimately linked to ascetic choices. The link is too indirect, however, to provide an unqualified measure of personal moral worthiness. A's production may be given to B, stolen by C or legally confiscated by government and transferred to D thus allowing non-ascetic actors (B, C, and D) to have their preferences registered. Posner's ethical test is also deficient because it ignores the nature of the preferences being registered.

### B. Critical Views of Wealth Maximization

Weinrib's analysis properly focuses on Posner's failure to disassociate his principle from utilitarianism. Both these take personal preferences as given without measuring them against some "ideal" of human action. How can wealth by itself constitute what is morally good?<sup>133</sup> Posner answers by referring to the compatibility between wealth maximization and widely shared ethical intuitions. This answer obscures the fact that it is not wealth but its production that can be ethical. Posner's ethical conclusions are intuitively acceptable because his maximand is an indirect measure of sacrifice and self-restraint. But on its face, Posner's thesis recalls the contradictions of Rotwein's "ideology of wealth" and of Marshall's attempt to erect a wealth maximizing economics on a base of subjective hedonism.<sup>134</sup>

Kornhauser's criticism is confused from the outset because he assumes that "as wealth increases so does the individual's utility."<sup>135</sup> Kornhauser objects to functional moral judgments whereby A is valued according to his fulfillment of a role, like wealth producer, rather than "just for himself".<sup>136</sup> However, valuing persons "in themselves" actually means an evaluation based on production of net happiness, which being a zero-sum process is no evaluation at all. Kornhauser claims that switching from happiness to wealth does not enable Posner to solve the average/total distribution problem. For example, Kornhauser suggests that "making a society as wealthy as possible may require making many people poor . . . total wealth may be highest if vast numbers of individuals are living at subsistence."<sup>137</sup> This criticism misses the distinction between wealth and happiness. Since happiness is subjective and relative it cannot be distributed. In contrast, wealth is objective, thus policies seeking to increase average or total wealth can be assessed. I predict that wealth's development depends on the average level of human

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132. *Ibid.* at 113; Legal reformers like Bentham anticipated Marxian economics by struggling to throw off the revolution-thwarting features of the common law. Bentham rightly assumed that conscious application of principle can be more efficacious than uncritical adherence to tradition. But Bentham overlooked quite a serious danger, namely that conscious theory is far more likely than tradition to be completely wrong. Theories, after all, need not be realistic. Bentham's theory is a case in point. And because bad theories are not limited by reality they can proliferate wildly and attract ill-considered zeal.

133. Weinrib suggests that wealth is "morally indifferent" and that a theory based on the "single preference for wealth" is far too limited to account for the "complexity of ethical experience." Weinrib, "Utilitarianism, Economics and Legal Theory" (1980) 30 U. of T. L.J. 307 at 309 and 311.

134. Rotwein, *supra*, note 31.

135. Kornhauser, "A Guide to the Perplexed Claims of Efficiency in the Law" (1980) 8 Hofstra L.R. 591 at 598.

136. *Ibid.* at 600.

137. *Ibid.* at 602.

capital achieved in a society because the general standard establishes the background against which individuals measure their security, morality, and need for wealth. A society with a narrow elite and a broad, exploited mass will not possess very dense cultural averages and total wealth will be accordingly limited.

Wealth maximization, according to Kornhauser, permits us to slaughter the unproductive and to force everyone into their most productive roles. This criticism is a standard misrepresentation of asceticism. Asceticism predicts the wealth increasing effects of restriction while recognizing, as an inevitable side constraint, that people will reject any restrictive element they notice or feel to be an unwarranted imposition. The extreme and very visible types of coercion suggested by Kornhauser are the least wealth maximizing forms of preference distortion. I think what most offends Kornhauser is that Posner's thesis indirectly denies the value of happiness as a normative criterion. By that measure, he will dislike asceticism as well. This is clear from his complaint that wealth maximization is not egalitarian because it values something not inherently distributed among people on a one-to-one basis. But that will be true of any consequentialist moral theory that actually permits moral judgment because judgment presumes that some acts can be praised above others.

England faults Posner for not clearly defining such key terms as "wealth" and "rational".<sup>138</sup> Posner is guilty of inconsistently defining "rational" both as hedonistic satisfaction seeking and as wealth maximizing self-sacrifice.<sup>139</sup> Posner does not expound on these conflicting elements because the contradiction is central to his attempt to create a compromise solution. England also develops Weinrib's case that an ethical norm should be "an end in itself." England complains that if keeping promises is only good because it increases wealth, it loses its own ethical significance.<sup>140</sup> Asceticism avoids this objection because it measures ethical significance directly in terms of degree of hedonic resistance. By this standard, keeping promises is of moral value because it is generally self-restricting. But ascetic theory goes on to recognize that moral worthiness causes wealth and thus has survival value. Cultural restraints evolved not because our ancestors consciously philosophized about ethical values but because ascetic practices lead to adaptability, wealth, power and cultural hegemony.

England worries that wealth maximization is an overly commercial "coldly intellectual" vision that will reduce life to "accounting difficulties easily mastered by clever and rational people trained in the logic of economic analysis."<sup>141</sup> Posner leaves himself open to such criticism because his ties to utilitarianism and the commodity theory of happiness resurrect Bentham's view that all ethical errors are merely miscalculations.<sup>142</sup> In contrast,

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138. England, Book Review (1982) 95 Harv. L.R. 1162.

139. *Ibid.* at 1163.

140. *Ibid.* at 1167. McPherson considers Posner's doctrine "shocking" for the same reason. See McPherson, Book Review, (1983) 2 Law & Phil. 129 at 130.

141. England, *supra*, note 138 at 1176.

142. The same can generally be said of Posner's critics. With a few exceptions, such as England, critics of wealth maximization argue like accountants. See, for example, Dworkin, Kronman and Coleman, *supra*, note 6. On the contrast between legal and economic sensitivities in this area, see B.A. Ackerman, *Reconstructing American Law* (Cambridge, Massachusetts: Harvard University Press, 1984).

asceticism dismisses hedonic calculation as a moral program and focuses instead on the degree to which hedonic pursuits are resisted. But this call for restraint does not imply, as England suggests, that there will be no "room for indulgence." Satisfaction is inevitable; asceticism merely seeks to prolong the search for satisfaction and to channel the outlets of indulgence.

On a pessimistic note, England dismisses Posner's work as ideology, noting that there "exists no objective criterion for evaluating a personal philosophy of life." He claims that a moral conception cannot be ethical and scientific. Like Kelsen, England believes that sciences "must be positive and descriptive . . . Can one properly speak of 'bad' causation, 'good' gravitation, or 'just' energy?"<sup>143</sup> Clearly, moral value plays no direct role in physics, the field from which England draws the above examples, because physics concerns inanimate matter only. However, when we turn to psychology, a field whose subject matter *is* human value, England's objections become nonsensical; they amount to asking 'can one properly speak of good goodness, just justice or moral morality?'

According to Kronman, Posner blends together the worst of Kantian and utilitarian elements.<sup>144</sup> However, Kronman's vision as a critic is limited because he supports as ideal a combination of utilitarian and "voluntarist" principles. His ethical recipe uses the same basic ingredients as wealth maximization. The goal for Kronman is to increase net happiness.<sup>145</sup> He dubiously assumes a Kantian can grant the ethical significance of happiness and so reject Posner's thesis because increases in wealth "do not necessarily mean increases in utility." True, wealth does not equal happiness but that is irrelevant if happiness has no direct ethical significance.

Dworkin, again like Weinrib and England, asks why wealth should have any social value and he defines "social value" to mean "something worth having for its own sake."<sup>146</sup> This question gets at the root of the matter. The psychological hypothesis I describe above suggests that nothing is worth having for its own sake; that there is no absolute "social value." In this view, values exist relative to their opposites. Freedom, for example, is felt and perceived because of a background of restraint. Paradoxically, freedom is most valued in a society where people are, objectively, most self-restrained. Truly free people, like feral children, notice only restraints; they cannot value or even conceptualize "freedom."

Posner answers Dworkin differently and, I think, less comprehensively. He argues that wealth is conducive to happiness, freedom and self-expression.<sup>147</sup> Posner self-consciously hitches his system to happiness maximization yet, at the same time, he pleads the superiority of wealth maximization on the grounds that it *limits* the pursuit of happiness.<sup>148</sup> This contradiction

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143. England, *supra*, note 138 at 1163.

144. Kronman, *supra*, note 6 at 228.

145. *Ibid.* at 229.

146. *Ibid.* at 239.

147. Dworkin, *supra*, note 6 at 194.

148. Posner, "The Value of Wealth: A Comment on Dworkin and Kronman," (1980) *J. Legal Stud.* 243 at 245.



enjoys wide currency. Rule and preference utilitarians as well as intuitionists strive to rationalize why the pursuit of self-gratification should be restricted. Asceticism, in contrast, forthrightly promotes restraint of self-indulgence as the basis of ethical and economic value.

### V. CONCLUSION

The philosophical case for asceticism is that it is consistent with traditional ethical and legal practices, that it avoids the contradictions and counter-intuitive prescriptions found in utilitarianism, and that intuitionists and utilitarians both implicitly argue in favour of ascetic policies. The scientific case for asceticism stands on the evidence concerning the incidence of happiness and depression, and on psychological theories linking the etiology of happiness with opposing needs and dissatisfactions.

