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PROBLEMS IN THE APPLICATION OF POLITICAL PHILOSOPHY TO LAW

Christopher T. Wonnell*

I. PURE NORMATIVE PHILOSOPHY, APPLIED POLITICAL PHILOSOPHY, AND THE LAW

At least since the 1971 publication of John Rawls' book *A Theory of Justice*, the discipline of political philosophy has had considerable effect upon legal scholarship.¹ In private law, for example, the influence of political philosophy has been pervasive, significantly affecting theories of contracts,² torts,³ and property.⁴ But perhaps the most important influence has been in the area of constitutional law, a legal realm that explicitly presents the question of classes of judgments that ought not to be made by majoritarian political institutions.⁵

The transition from abstract political philosophy to concrete legal application is, however, not a simple one, and it is these transition problems that this article seeks to explore. At least since the time of Immanuel Kant, political philosophers have been taunted⁶ with the

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1. Buchanan, *A Critical Introduction to Rawls' Theory of Justice*, in JOHN RAWLS' THEORY OF SOCIAL JUSTICE: AN INTRODUCTION 5 (1980) [hereinafter SOCIAL JUSTICE] (Rawls has inspired "a renaissance in political philosophy in America and the English-speaking world generally.").

2. See, e.g., Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (libertarian consent theory supports freedom of contract); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717-21 (1976) (altruistic political philosophy supports compulsory terms in certain contracts).

3. See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (libertarian defense of causality-based tort liability); Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495 (1986) (utilitarian and rights-based approaches to risky conduct opposed in favor of approach accommodating both concerns).

4. See, e.g., R. NOZICK, ANARCHY, STATE, AND UTOPIA 150-53 (1974) (political philosophy defense of private property acquisition); R. DWORKIN, *Liberalism*, in A MATTER OF PRINCIPLE 181, 200 (1985) (Liberalism opposes broad property rights over acquired objects but favors "some right to property" over "a range of personal possessions essential to dignity.").

5. See, e.g., Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517 (1981); Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830 (1974).

6. See I. KANT, *Theory and Practice Concerning the Common Saying: This May Be True in Theory But Does Not Apply to Practice*, in THE PHILOSOPHY OF KANT 412 (C. Friedrich trans. 1949).

cliché that their philosophies might “sound good in theory but won’t work in practice.” As a general critique of abstract theory, this time-honored phrase is objectionable, for it insulates the implicit theories that underlie present practices from theoretical criticism.⁷ Nevertheless, this article takes the position that the cliché crudely and imperfectly states a very important truth: Some political philosophies that may be unobjectionable as pure normative systems are nevertheless likely to produce systematically objectionable results when they are concretely applied. Stated another way, this article seeks to construct a theory of the problems likely to be encountered in the application of political philosophies to legal practice.

It is useful to begin the analysis by exploring an ambiguity in the function that the discipline of political philosophy seeks to fulfill. To keep the discussion as concrete as possible, let us use as an example the legal and political question of whether the confiscation of private property to benefit the needy is proper.⁸ Different political philosophies have presented varying answers to this question, ranging from the staunchly pro-property stance of the libertarian Robert Nozick⁹ to the ambivalent positions of Rawls¹⁰ or the utilitarians¹¹ to the firmly anti-property views of the Critical Legal Studies movement.¹² Despite this race to discover the proper answer, however, it is rarely noticed that the question itself is ambiguous. On the one hand, political philosophers might be trying to determine whether the confiscation of property would be justified *if it does* benefit the needy. More generally, this conception of political philosophy would entail hypothetically assuming factual arguments to be true and assessing the

7. See J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 383-84 (1936).

8. This question is posed explicitly, for example, in R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 306-29 (1985).

9. See R. NOZICK, *supra* note 4, at 26-35, 150-64. Not all libertarians agree with Nozick that moral rights extend to basic resources; it is the right in one’s own person and talents that unites them. See Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 *UCLA L. REV.* 816, 816-17 (1981) (arguing that “the question that most seriously divides liberals and separates the welfare-statists from the libertarians” is “the question of whether one is morally entitled to the fruits of one’s good fortune in life’s natural lottery of endowments and opportunities in the face of claims of superior need due to misfortune”).

10. See J. RAWLS, *A THEORY OF JUSTICE* 265-74 (1971). Rawls’ theory of justice is concerned with the “basic structure” of society, *i.e.*, its “principal economic and social arrangements” in which Rawls expressly includes the institution of “private property in the means of production.” *Id.* at 7. He concludes that his theory is compatible with capitalism or socialism.

11. See Harsanyi, *Morality and the Theory of Rational Behavior*, in *UTILITARIANISM AND BEYOND* 39, 41 (A. Sen & B. Williams eds. 1982).

12. See, *e.g.*, Kennedy, *supra* note 2, at 1713-21 (contrasting the “ideal of individualism” which “provides a justification for the fundamental legal institutions of criminal law, property, tort, and contract” with a competing “ideal of altruism”).

normative sufficiency of those factual contentions as justifications for legal rules. Alternatively, political philosophers might be seeking to inform courts (and other political actors) as to whether they should allow the taking of private property *if they perceive* that such action would benefit the needy. This alternative conception of political philosophy identifies a set of moral norms that judges and legislators should personally embrace and apply to the factual world as they perceive it.

In short, there are two distinct conceptions of the function that political philosophy seeks to perform, *i.e.*, the questions it attempts to answer. For the sake of easy reference, I will call the conception of political philosophy as passing normative judgment upon factual theses assumed to be true "pure normative philosophy," and the alternative conception of a set of values to be internalized and applied by judges, legislators, and other political actors "applied political philosophy."

The contention to be advanced is that these two conceptions are indeed distinct, and that only a remarkable coincidence could make the same political philosophy ideal for both functions. The problem is that modern political philosophers are never clear about which of the two functions they want their philosophy to fulfill, and as a result they strain mightily to make the same philosophical concepts satisfy two fundamentally distinct goals. At best, this neglect of the distinction results in confusion; at worst, it overlooks the serious consequence that a particular philosophy might be quite appropriate for one function and yet grossly inadequate for the other. And it is in the area of law, where theories are applied by real human actors employing tools of vast coercive power, that the difficulties of overlooking the distinction are most directly manifested.

In what ways might pure normative philosophy (PNP) and applied political philosophy (APP) differ? Let us begin with a statement of the purpose of political philosophy in these two conceptions:

PNP: Political philosophy seeks to identify the types of arguments which, if true, would morally justify particular types of legal rules and political actions.

APP: Political philosophy seeks to identify a set of values that would produce morally appropriate results if the values identified by the philosophy were sincerely held by judges, legislators, and other political actors.

This difference in purpose suggests the possibility that in certain circumstances the two ideals might diverge. For example, suppose that a political actor was tempted to placate a particular special interest in a way that could not *in fact* be philosophically justified, *i.e.*, an omniscient observer would say it did not promote maximum happi-

ness, justice, etc. The possibility would still remain that the political actor might be able to convince herself that the action in question *did* promote the philosophical ideal. If a particular philosophical ideal was especially susceptible to such efforts at rationalization, would that argue that there was something wrong with the ideal itself or simply that it was not being followed? Surely that answer would depend upon *what function* the ideal was seeking to fulfill. Thus the first concrete distinction emerges:

1. PNP: The temptation of public officials to rationalize narrow ends as being consistent with the philosophy is outside the scope of political philosophy, which is concerned with assessing the normative status of the successful implementation of alternative governing philosophies. Rationalization is simply one of many reasons why real world actors may fall short of a particular philosophical ideal; it does not discredit the ideal itself.

APP: Political philosophy is concerned with the values legal and political actors hold, so it is important to know how easy it will be for power holders to rationalize and psychologically harmonize the temptations of power with a sincere commitment to a particular philosophy. If such rationalization is extremely easy with a particular philosophy, this may be a good argument against that philosophy.

A related and more general problem is that legal and political actors often have imperfect information. Political philosophies do not speak for themselves; they must be interpreted and applied. As a result, legal actors are likely to pass some laws or issue some decisions in the hope of vindicating a specific philosophical ideal when in fact they are hindering that ideal. If a political philosophy is susceptible to especially grievous mistakes based upon limited knowledge, does this argue against the philosophy or simply that it will often be unintentionally violated? Again, this may depend upon whether one wants a philosophy that produces good results when it is internalized and consciously applied by judges and legislators or simply a normative standard with which to evaluate results. A second distinction is thus apparent:

2. PNP: The fact that different people in the real world of limited knowledge may be likely to interpret and apply a given philosophy differently is outside the scope of political philosophy, which is concerned with the philosophy correctly interpreted and applied. Thus, a defense of a given political philosophy is not a defense of every judge's or politician's sincere interpretation thereof and may indeed be a criticism of some predictable interpretations.

APP: The fact that some political philosophies will lead sincere adherents who hold legal and political power to reach conflicting and unpredictable interpretations and applications more frequently than other philosophies is relevant in deciding among political philosophies, given the harmful effects of instability and unpredictability as well as the

harmful effects of the incorrect interpretations and applications themselves.

Applied political philosophy inquires into the values one would want legal actors to hold and apply. However, the stability of an initially sincere commitment to a philosophy cannot be assumed; some institutions may weaken a previously sincere value commitment over time, or may attract opportunists to positions of power who have no such sincere commitment.¹³ Problems arise if the political philosophy in question induces its initially sincere adherents to create those institutions which eventually undermine the commitment. Would such a tendency be an argument against that political philosophy? The answer depends upon the conception of political philosophy's role and is much the same as before:

3. PNP: Political philosophy does not pass on the truth of the underlying causal hypotheses, so the discipline itself is not charged with calculating the likelihood that the powers which were justified while the causal claims were true might attract other people to office who would make such claims even when they were untrue. Such opportunists simply are not following the philosophy, which reflects badly on them, not the philosophy.

APP: Political philosophy is concerned not only with a first generation of sincere followers of the philosophy, but also with the question of whether similarly motivated people will continue to be attracted to the positions of power that the initially sincere followers created. Other things equal, a philosophy is better if the positions of power its adherents will sanction continue to be filled over time by people who accept its tenets.

Finally, the two conceptions of political philosophy can differ in their concern for the visibility of abuses of a particular philosophy. If a court, for example, were abusing its power by making philosophically unjustified or biased decisions, the philosophy in question might have sufficiently malleable concepts that a plausible opinion disguising the abuse could be readily produced. As always, pure normative philosophy has no trouble with this problem. The insincere abuse of philosophical concepts cannot discredit the normative ideal itself; it is the ideal that allows us to call the action an insincere abuse. By contrast, if one wants to identify a political philosophy that will hold together an initial commitment by legal and political actors, the ability to institutionally check abuses of a particular philosophy may be of the greatest importance:

4. PNP: The fact that some political philosophies are more susceptible to insincere misuse than others because the violations of the philosophy are easy to camouflage is irrelevant in deciding among philosophies,

13. See F. HAYEK, *THE ROAD TO SERFDOM* (1944).

just as a murderer's ability to falsely represent his aggressive act as self-defense is irrelevant to the morality of killing in genuine self-defense. Indeed, it is precisely the correct political philosophy that allows us to condemn the political action as an "insincere misuse."

APP: The visibility of violations of a given philosophy is an important virtue of the philosophy, since it is an essential precondition to the creation of effective institutional checks on the insincere manipulation of philosophical concepts.

To summarize the argument thus far, there are at least four reasons why one might expect differences between the philosophies one would want to serve the pure normative philosophy function and the applied political philosophy function. The problems of rationalization and limited knowledge suggest that sincere commitment to and successful application of a philosophy cannot be equated; the problems of attraction of the insincere and the lack of institutional checks on the abuse of philosophical concepts suggest that even a sincere commitment may not remain stable.

Of course, the two functions of political philosophy are linked, since the applied political philosophy ideal seeks to identify values that, if sincerely held and consistently preserved by legal and political institutions, would produce "desirable" results. Which results are "desirable" is presumably a question of pure normative philosophy. The fact that the two functions are linked, however, does not mean that they are the same or that the same political philosophy must be able to serve both functions. Only the most rarified of pure normative philosophies, in which nothing at all mattered except the Pure Will of the judge and politician, could make the two functions identical.¹⁴

The closest that political philosophers have come to recognizing this distinction is the division sometimes drawn between "first best" and "second best" political principles.¹⁵ "First best" principles correspond roughly with the ideal of pure normative philosophy, while any factual "imperfections" in the world such as incomplete information or incentives to misuse power generally are accommodated by more or less ad hoc modifications of the first best principles.¹⁶ This conceptual scheme is analytically flawed and misleading. Incomplete information

14. Despite his deontological and Kantian moorings, Rawls himself certainly does not fit this description. See J. RAWLS, *supra* note 10, at 30 ("All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.").

15. See Philips, *Reflections on the Transition from Ideal to Non-Ideal Theory*, 19 Noûs 551 (1985) (indicating the serious difficulties of trying to derive historically appropriate principles from those that would govern in a first best world).

16. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 234 (1980) ("Second-best theory does not displace ideal theory; rather, it continues the *same* conversation, correcting earlier conclusions only when this can be justified by Neutral argument.") (emphasis in original).

and diverse incentive structures are not minor appendages upon a first best vision, but on the contrary are the very essence of legal reality,¹⁷ and no “technology of justice”¹⁸ is likely to remove them from that central position. As a result, the *ideal* political philosophy to govern the values and institutions of legal action is likely to look nothing like the Goods and Rights defended by normative philosophers, although complex causal analysis could show the two to be linked.¹⁹

The principal problem with the “second best” designation is conceptual. The ideal applied political philosophy — whatever it may prove to be — is by definition the very best within its sphere. A judge or legislator who regarded herself as wise and good enough to disregard its tenets and directly pursue (or create institutions that would allow her to directly pursue) the first best pure normative philosophy would be making matters worse; that is the cumulative tendency of the four identified distinctions. Stated another way, the applied political philosophy ideal seeks a philosophy that produces good results when the fallible political human mind consciously interacts with it; it is not second best because there is no alternative philosophy that could produce better *interactions*. To personify the ideals, the pure normative philosophy vision is not directly asking legal actors to believe in it or act upon it, but to participate in a system that *satisfies* it, while the applied political philosophy vision is indeed asking for action-motivating belief.²⁰ A judge or legislator who took the plausible step of assuming that a first best normative philosophy, to deserve its name, must be more worthy of action-motivating belief than a second best applied political philosophy would be committing a category mistake. That mistake can best be avoided by abandoning the concept of second best in this context, and acknowledging that there are two separate spheres of philosophical outlook, each having a particular political philosophy that is ideal within its sphere.

The remainder of this article seeks to substantiate the thesis that modern political philosophies suffer from insufficient attention to the distinction between the two ideals of political philosophy as a discipline. Part II considers the philosophy of the Critical Legal Studies movement, with particular emphasis upon the writings of Duncan Kennedy. Part III considers act and rule utilitarianism. Part IV ex-

17. See, e.g., Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

18. This phrase is employed by Ackerman, B. ACKERMAN, *supra* note 16, at 21.

19. See, e.g., R. EPSTEIN, *supra* note 8, at 344-45 (arguing that civic virtue and happiness are best obtained through such “[d]iscreet indirection”).

20. The idea of personifying theories to determine whether it is appropriate to say the “goal” of a theory is to compel belief in itself is taken from D. PARFIT, *REASONS AND PERSONS* 11-12 (1984).

amines the philosophy of John Rawls and others who have followed him. Part V treats the libertarian analysis of Robert Nozick. Part VI concludes that the difficulties these philosophies have encountered are indeed symptomatic of the broader problem of the two distinct functions that political philosophies have sought to perform.

II. KENNEDY AND THE CRITICAL LEGAL SCHOLARS

Critical Legal Studies (CLS) is perhaps less of a unified school than the other philosophies to be examined, and it may therefore be somewhat hazardous to focus attention upon any single individual's works.²¹ Nevertheless, Duncan Kennedy's writings do seem to be representative of the movement on the specific points to be considered here — the need for altruism, sharing, and the values of community.²² In any event, the writings of other CLS members are no clearer than Kennedy's on the relationship between the two distinct functions of political philosophy.²³

Kennedy seeks to contrast the political philosophies of "individualism" and "altruism," arguing that the former improperly dominates legal discourse at the present time. Kennedy describes these competing visions as follows:

The essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. . . .

. . . .

The essence of altruism is the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful.²⁴

Kennedy has used these competing ideals to discuss a variety of

21. See, e.g., Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 248-49 (1974) (noting the argument that CLS is too fragmented to constitute a coherent body of thought but concluding that "enough common elements exist to permit intelligent discussion of the movement as a whole").

22. See *id.* at 249 (also focussing upon Kennedy's views as representative).

23. The closest I have found to recognition of the distinction is a two-sentence passage in Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 641 (1983):

The higher standard of solidarity — the one that gives primacy to the other party's interests — is necessarily exceptional. Any attempt to insist upon it in the generality of dealings would depart so radically from the standards by which people ordinarily deal with each other that it would merely encourage massive circumvention and hypocrisy coupled with a stifling despotism of virtue.

And yet even here Unger can be read as seeing the problem of "circumvention and hypocrisy" only in the attitudes of the regulated, not the regulators.

24. Kennedy, *supra* note 2, at 1713, 1717 (emphasis in original).

political and legal institutions,²⁵ including the question of whether a legal system should be characterized principally by rules or standards. Preferring the altruistic vision of standards, Kennedy argues that his casual conversations on the issue have indicated that the proponents of rules and standards possess fundamentally different values. Specifically, he offers the following catalog of the value terms most frequently employed by proponents of rules and standards:²⁶

| <u>Rules</u> | | <u>Standards</u> | |
|------------------|------------------|------------------|-------------------|
| <u>[A:] Good</u> | <u>[B:] Bad</u> | <u>[C:] Bad</u> | <u>[D:] Good</u> |
| Neutrality | Rigidity | Bias | Flexibility |
| Uniformity | Conformity | Favoritism | Individualization |
| Precision | Analogy | Sloppiness | Creativity |
| Certainty | Compulsiveness | Uncertainty | Spontaneity |
| Autonomy | Alienation | Totalitarianism | Participation |
| Rights | Vested Interests | Tyranny | Community |
| Privacy | Isolation | Intrusiveness | Concern |
| Efficiency | Indifference | Sentimentality | Equity |
| Order | Reaction | Chaos | Evolution |
| Exactingness | Punitiveness | Permissiveness | Tolerance |
| Self-reliance | Stinginess | Romanticism | Generosity |
| Boundaries | Walls | Invasion | Empathy |
| Stability | Sclerosis | Disintegration | Progress |
| Security | Threatenedness | Dependence | Trust |

This fascinating value chart deserves careful consideration in light of the categories identified in this article. For example, it is interesting to compare Columns *A* and *D* as if they both purported to be comprehensive pure normative philosophies, *i.e.*, the highest first best values of the normative universe. It seems clear that Column *A* would depict a deeply impoverished world, and that Column *D*, whatever its defects, would be far preferable. Kennedy struggles to consider how individualism and rules could strike anyone as plausible rather than as "absurd or obviously evil."²⁷ This language strongly suggests that Kennedy is indeed comparing Columns *A* and *D* as pure normative philosophy, where Column *A*, if it purported to be complete, would fully deserve Kennedy's description.

25. For example, Kennedy criticizes the ideal of freedom of contract from an altruistic perspective, arguing that judges who refuse to enforce unfair contracts are "at work on the indispensable task of imagining an altruistic order." *Id.* at 1778.

26. *Id.* at 1710.

27. *See id.* at 1746 ("It is not easy to reconstruct the Classical individualist economic vision, especially if we want to understand it from the inside as plausible, rather than absurd or obviously evil.").

As for the “vice words”²⁸ in Columns *B* and *C*, the striking feature of these terms is the difference in the settings in which one would be likely to hear most of the words. Although some of the terms in Column *B* are obviously governmental, many of the terms seem to fit more plausibly as a list of human traits that might undermine the ability of an individual or small group to be spontaneous, loving, trusting friends. Column *D* appears to be roughly the opposite of Column *B*, with many of its terms clearly constituting values that would further such close relationships. By contrast, Column *C* seems to resonate with distrust of strangers — people with excessive confidence in their own objectivity and images of the world, described by Brandeis as “men of zeal, well-meaning but without understanding.”²⁹ Similarly, Column *A* represents the kinds of moral values one would probably hear in an individual citizen’s defense against the men of zeal.

If these Gestalt-like reactions to Kennedy’s chart are widely shared, they appear to suggest a paradoxical feature of moral intuitions. The set of values that strike us as plausible candidates for first best pure normative philosophy (Column *D*) are also the values one would like to see among the small or intimate group. Nevertheless, one preserves a set of values that are distinctly inferior as pure normative philosophy (Column *A*) as a defense against the “men of zeal” who, “without understanding,” seek the political promotion of their own interpretation of Column *D*. One also preserves two sets of vice terms, one for those traits that directly deprive us of the possibility of the first best small group ideals (Column *B*) and another for those traits that threaten to invoke unreliable political institutions in an effort to bring those ideals about (Column *C*).

The philosopher who has seen these paradoxes most clearly is Friedrich Hayek. According to Hayek, societal evolution has produced a set of large-scale institutions that proved capable of preserving life, but the values that sustain those institutions are not the values of the small group.³⁰ In Hayek’s view, this is particularly insidious because human beings have evolved biologically for literally millions of years in small hunter-and-gatherer groups, and are, therefore, proba-

28. See generally Westen, “Freedom” and “Coercion” — *Virtue Words and Vice Words*, 1985 DUKE L.J. 541.

29. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

30. See F. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* 90 (1976):

In the small group the individual can know the effects of his actions on his several fellows, and the rules may effectively forbid him to harm them in any manner and even require him to assist them in specific ways. In the Great Society many of the effects of a person’s actions on various fellows must be unknown to him. It can, therefore, not be the specific effects in the particular case, but only rules which define kinds of actions as prohibited or required, which must serve as guides to the individual.

bly genetically predisposed to embrace such small group values and to resist the restraints of the open society.³¹ And even if this sociobiological thesis is incorrect, it is undoubtedly the case that most people developed their values among small groups of family and friends, and therefore may be predisposed to apply those values of sharing and sacrifice when they consider political questions.³²

Of course there is no reason in the abstract why the things one most values in the small group could not serve as first principles to govern the institutions of political society. But Hayek's writings stand as a warning of the causal consequences of doing so. He suggests that the deliberate pursuit of small group values by the larger society ironically would frustrate the spontaneous societal order necessarily presupposed by small groups in their own goals.³³ In the language of this article, *Kennedy's Columns A and C are the virtue and vice terms at the level of applied political philosophy, while Columns B and D are the vice and virtue terms at the level of pure normative philosophy.* If Hayek's causal thesis is correct, Kennedy is committing a category mistake when he concludes that Columns *B* and *D*, because they are intuitively more compelling, should therefore be enshrined in the values and institutions of political society.³⁴

To summarize the argument, one who tries to apply normative first principles directly to political institutions will undoubtedly find "absurd or obviously evil" a political system with "neutrality" and "rights" as its highest governing maxims.³⁵ Any sensible normative philosophy would place many values higher than these, especially the values of community, and most of the rest of Kennedy's Column *D*. But as Robert Nozick, whose philosophy is itself criticized in Part IV of this article, has quite correctly observed, "Utopia is *not* just a society in which the [neutral, rights-based] framework is realized. . . . We *live* in particular communities. It is here that one's nonimperialistic vision of the ideal or good society is to be propounded and realized. Allowing us to do that is what the framework is *for*."³⁶ Allowing us to

31. See E. BUTLER, HAYEK: HIS CONTRIBUTION TO THE POLITICAL AND ECONOMIC THOUGHT OF OUR TIME 37 (1983) ("In a sense, man was civilised against his wishes. The old morality was deeply embedded in human instincts as a result of the hundreds of millenia which men spent in tribal groups.").

32. Cf. *id.* at 33-34.

33. See *id.* at 34-36.

34. See e.g., Kennedy, *supra* note 2, at 1719 (arguing that an altruist would view law's effect upon the previously wicked man as one that "provides him a conscience").

35. See *id.* at 1715 (arguing that individualism responds to "the political rhetoric of free will, autonomy, and natural rights").

36. R. NOZICK, *supra* note 4, at 332 (emphasis in original).

pursue Column *D* is what the “applied political philosophy” Columns *A* and *C* are for.

Does this framework really require rules rather than standards?³⁷ Many who have had a thorough exposure to American legal education will doubt this claim. And it is undoubtedly this shared skepticism about the possibility or desirability of rigid rules that Kennedy is seeking to tap in order to enlist support for CLS “altruistic” political philosophy. The views one develops about rules versus standards from reviewing legal materials, and especially standard casebooks, are intuitions that can mislead; a broader view shows how completely Western society is and ought to be dependent upon rigid rules. Consider any standard casebook illustration.³⁸ It is likely to seem that the judge could justify accepting either the plaintiff’s or the defendant’s argument; the rule does not unambiguously determine the result and some resort to vaguer standards may be necessary. Four considerations suggest, however, that this perspective on the question of rules and standards is misleading. First, the parties to the case are perhaps two or three out of billions of people on earth; almost all of the rest, if they had appeared in the case, would have had their claim resolved by a flat rule. Second, the positions taken by the plaintiff and defendant are only two of an almost infinite number of theoretically possible results of the case; the overwhelming bulk of possible outcomes would be barred by a flat rule. Third, casebook illustrations are but a tiny percentage of the cases that arise, and they are studied because they seemed to the parties to have legal issues worth appealing and to the casebook authors to present interesting legal questions. Fourth, the legal system as a whole tends to operate when rights are in dispute; in the bulk of social situations, the rules are sufficiently clear that no one seriously contemplates a lawsuit. Thus, while dependence of legal education upon standard casebook illustrations has many virtues, it is

37. Hayek of course has argued that the rule of law is central to a liberal society, although standards to handle hard cases are inevitable. See E. BUTLER, *supra* note 31, at 32:

Complete certainty of the law is, of course, an ideal which we can never attain, since we are constantly refining the verbal formulations of law which we make in our continuing attempts to discover the rules of true justice. These formulations, however, must always be consistent with accepted notions of the ‘sense of justice’ and thus make it possible to predict with some accuracy the outcome of any court case in which they are tested. . . .

The rule of law therefore ensures that decisions are made according to known and general rules and not according to the apparent desirability of particular outcomes.

38. “Any” illustration is no doubt an overstatement; some, perhaps many, standard casebook illustrations are resolvable by flat rules. See R. EPSTEIN, *supra* note 8, at 24 (“Yet through all the doctrinal murkiness, the settled legal rules make perfectly clear, more than 99.9 percent of the time, who, if anyone, possesses and owns anything.”). This article does not take a position on how many of the cases law students deal with are truly “hard cases”; the point of the discussion in the text is to place the entire enterprise in a larger context.

worth asking what subliminal message about political philosophy, including the rules versus standards debate, it is creating in those who experience such an education.

In many respects, the political philosophy of CLS is simply sad because, if implemented, it would produce not only unintended consequences, but consequences directly opposite to those intended. Kennedy hopes that altruism and empathy will be encouraged by political actors who set aside rigid entitlements to enforce concrete, shared community values.³⁹ Roberto Unger hopes that a spiral of increasing community will progressively improve human beings in their desire to fulfill their nature.⁴⁰ But these claims entail *factual* as well as normative views, and the unproven character of such factual assertions at the applied political philosophy level is concealed by including them within a political philosophy that clearly purports to be a normative theory of first principles.⁴¹

Now it may be the case that most people would prefer to see a public commitment to concrete economic justice rather than to abstract entitlements, *i.e.*, to a world in which those who have more than they socially deserve will share and be altruistic with those who have less than they socially deserve. The problem, however, is that they are likely to favor such a goal for different and often contradictory reasons,⁴² each economic group believing that the trait in which it excels is most socially relevant.⁴³ Most people probably believe that they are entitled to their current income and, if true social justice prevailed, to a fair amount more as well.⁴⁴ Most individuals would be violently

39. See notes 35-36 *supra* and accompanying text.

40. R. UNGER, *KNOWLEDGE AND POLITICS* 239 (1975) ("[B]oth human nature and our understanding of it can progress through a spiral of increasing community and diminishing domination.").

41. See generally Kennedy, *supra* note 2, at 1710 ("The different values that people commonly associate with the formal modes of rule and standard are conveyed by the emotive or judgmental words that the advocates of the two positions use in the course of debate about a particular issue.").

42. See F. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 242-43 (1967) ("[T]he word 'social' presupposes the existence of known and common aims behind the activities of a community, but does not define them.") (emphasis in original).

43. See F. HAYEK, *supra* note 30, at 77-78:

[W]hen we ask what ought to be the relative remunerations of a nurse and a butcher, of a coal miner and a judge at a high court, of the deep sea diver or the cleaner of sewers, of the organizer of a new industry and a jockey, of the inspector of taxes and the inventor of a life-saving drug, of the jet pilot or the professor of mathematics, the appeal to "social justice" does not give us the slightest help in deciding

44. See E. BUTLER, *supra* note 31, at 95:

Once a government takes upon itself the task of redistributing incomes on the basis of some measure of merit or "social justice" . . . [a]ll will claim that their efforts are more meritorious than others, and that their share should be increased. Because there are no agreed rules which help to decide who should get what, the decisions of the government will be arbitrary and unpredictable.

incensed if some altruistic planner told them that their income must be reduced by forty percent because, after the planner's empathy for all was balanced, their position in the community made them worth only that lower figure.

The problem is evident enough; there may be a shared desire for concrete as opposed to abstract economic fairness, but the perceptions of concrete fairness held by individuals are incompatible with even the present amount of wealth, much less with the far smaller pie that would be available under such a scheme.⁴⁵ No group will believe that an honest and impartial judge could assess their fundamental worth within the community very far from where they themselves place it, with the result that *almost everyone will come to believe the government must be partial toward someone else*. Groups would respond to an adverse assessment by accelerating their political activity to correct an obvious (to them) injustice, but this acceleration would only lead to further decreases in overall income⁴⁶ and more extreme anger at both the unjust system and their enemies' competing conceptions of concrete justice.⁴⁷

The essential problem is that concrete economic or social justice is a "mirage"⁴⁸ produced by each individual's correct view that the political authorities have the power to eliminate *for any given individual* any scarcity barrier between that individual's income and her conception of her own worth. It is a mirage because the government does not have that power for all individuals taken together.⁴⁹ That is especially true when one considers that a public declaration that henceforth the government will not respect abstract rights but will promote concrete economic fairness would significantly *increase* expectations, because each group would feel sincerely that concrete fairness would more generously reward its own best trait.⁵⁰

It is not obvious where this scenario — community infighting over affirmation of fundamentals by individuals enraged by their relative shares of a declining pie — would end. Certainly it would not end

45. See F. HAYEK, *THE POLITICAL ORDER OF A FREE PEOPLE* 150 (1979) ("Once politics becomes a tug-of-war for shares in the income pie, decent government is impossible.").

46. See E. BUTLER, *supra* note 31, at 97-102.

47. The governmental paralysis at this point is likely to inspire a demand for "strong leadership," and in a society in which power means so much, true socialists will be deterred by their principles to do what it takes to obtain power, leaving the worst on top. Hayek's analysis of this dynamic remains one of the best. See F. HAYEK, *supra* note 13, at 134-52.

48. See note 30 *supra*.

49. See F. HAYEK, *supra* note 45, at 103 ("[I]t soon ceases to be the 'deserts' but becomes exclusively the 'political necessity' which determines which groups are to be favoured at general expense.").

50. See note 44 *supra* and accompanying text.

with agreement as to the "community good"; in fact, it is difficult to see how the poisonous public discourse of groups denying each other's public claims to worth and wealth could keep from *accelerating* in a declining and politicized society.⁵¹ With most convinced that the government must be partial to someone else in order to explain a public declaration that their concrete worth in the community is so different from their own self-perception, scapegoating might be the only shared desire remaining.⁵²

It is probably inevitable that the wealth wanted by all individuals in any society, added together, will total more than the wealth available. But a society is far healthier when the wealth that all individuals believe they must be given, added together, is only 105 percent of the available wealth rather than 405 percent.⁵³ Of course, none of this is to say that the government should not help those in society who cannot help themselves; the wealthy may complain, but justice is worth certain costs in disharmony. Nevertheless, there is simply no parallel between modest sacrifices demanded to help the poor and a system that chooses to make the whole society serve a concrete communitarian end over which everyone must fight to dominate or be dominated. The last trait such a system would further is human empathy.

This pessimistic scenario certainly has not been proven conclusively, and perhaps some modest communitarian values would not generate anything like such a reverse spiral of negative sentiment. The point is, however, that CLS has chosen to embrace a political philosophy that does not take factual scenarios of this nature seriously, but contents itself with the obvious normative point that rights and neutrality cannot be the highest moral values.⁵⁴ Obvious normative points are not enough to satisfy the demands of an applied political philosophy. In order to be persuasive, CLS representatives must advance a *causal* thesis that political actors who consciously seek to require "altruism" and the "community good" will actually have that effect in a world of unintended consequences.

51. See E. BUTLER, *supra* note 31, at 81 (discussing the inherent "conflicts when the valuations of the planners disagree with the valuations which people have of themselves").

52. As Hayek notes, the easiest shared concrete end is usually a negative one, such as a virulent nationalism or shared hatred of an ethnic minority. See F. HAYEK, *supra* note 13, at 139.

53. See E. BUTLER, *supra* note 31, at 80 (arguing that the perceived unfairness of one's income can be more easily borne "[w]here the hazards of skill and luck and impersonal market forces determine income" than where incomes are perceived to be the product of a consciously planned decision).

54. See notes 34-35 & 39-40 *supra* and accompanying text.

III. ACT AND RULE UTILITARIANISM

Utilitarianism nicely illustrates the confusion generated by the attempt to use the same political philosophy to serve both the pure normative philosophy and applied political philosophy functions. Abstracting from complexities of the doctrine not pertinent here, utilitarianism as a pure normative philosophy asserts that the ideal state of affairs is one which maximizes happiness.⁵⁵ Utilitarians are often pressed to justify their view in the face of hypotheticals such as: "Suppose many people derived tremendous pleasure from watching the suffering of a few. Would you nevertheless affirm the value of maximum happiness?"⁵⁶

The purpose of this article is not to assess whether utilitarianism can be defended in the face of this and other hypotheticals. The point is rather that this is a perfectly proper question to ask from the perspective of pure normative philosophy. Moreover, the common utilitarian attempts to escape such dilemmas by "changing the hypothetical" must be rejected as illegitimate. For example, utilitarians might object that "people could not derive enough pleasure to outweigh the suffering" or "a system that allowed such spectacles of cruelty would be uncontrollable and would eventually generate net disutility."⁵⁷ These responses are simply irrelevant from the perspective of normative philosophy. The question can simply be rephrased: "Would you favor such spectacles of suffering *if* they did maximize happiness and *if* they would not be uncontrollable?" Pure normative philosophy should in principle be able to answer this question even if this state of affairs could never obtain in the real world.⁵⁸

55. See Smart, *An Outline of a System of Utilitarian Ethics*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 1 (1973) [hereinafter *UTILITARIANISM: FOR AND AGAINST*]. One of the key complexities is whether the ideal state of affairs is one that maximizes average utility or total utility. The two theories differ when issues of population size are treated as variable, *i.e.*, should one seek to increase the size of the population to increase total utility even if average utility is decreased? Smart appears to favor the classical utilitarian position of maximizing total utility. *Id.* at 27-28.

56. See Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST*, *supra* note 55, at 105 (utilitarianism might sanction persecution of intensely hated minorities).

57. See, *e.g.*, Smart, *supra* note 55, at 70-71 (responding to a similar hypothetical by saying "[l]et us hope that this is a logical possibility and not a factual one").

58. It has been persuasively argued that our moral institutions have evolved to enable us to handle the kinds of facts that are actually likely to arise, rather than bizarre counterfactual hypotheticals. See Hare, *Ethical Theory and Utilitarianism*, in *UTILITARIANISM AND BEYOND* *supra* note 11, at 23, 30-36. Some anti-utilitarian hypothetical cases are not so clearly bizarre, however, and the possibility must be entertained that it is the maximum utility principle that has evolved because in our actual world its implications are not too bad. In any event, the epistemological difficulty of knowing the proper principles to govern in counterfactual worlds does not mean that there are no such principles, and since many worlds once believed to be counterfactual have become real, it is better to have some moral beliefs about counterfactual cases rather than none.

Since this point is plausible enough, why might a utilitarian nevertheless consider her response legitimate? The answer seems to be that she has in mind the conscious implementation of utilitarian principles by the legal process, and she wants to argue that such a deliberate policy would not produce unfortunate spectacles.⁵⁹ In other words, the utilitarian is responding to a critique of the utilitarian doctrine's ability to serve as a pure normative philosophy by asserting its ability to serve the separate applied political philosophy function. The problem is that this shift is nowhere acknowledged. Of course it is true that in designing legal institutions one can safely neglect consequences that could not occur in the real world. But notice two effects of the utilitarian's grasping for a utilitarian applied political philosophy as an argument that also purports to defend utilitarianism as a normative philosophy. The first effect is that the normative philosopher is now *philosophically predisposed* to accept certain causal theses and to reject others, *i.e.*, to prefer the thesis that public spectacles cannot maximize utility. The second effect is to leave a *gap* in the normative system, so that if it should prove to be true that spectacles of suffering do increase utility, one has said nothing to oppose or support such spectacles.

Stated another way, attempting to answer arguments addressed at the pure normative philosophy level with responses at the applied political philosophy level tends to warp or artificially distort both factual inquiry and normative philosophy. It distorts factual inquiry by predisposing people to prefer one factual thesis over another for normative reasons, a practice with deleterious consequences sufficiently clear that the Lysenko experience should suffice as a warning.⁶⁰ It also tends to distort normative philosophy by arguing that since certain states of the world are not possible, there is no need to construct a normative philosophy that evaluates their relative desirability.

Suppose, however, that the utilitarian does not take this step, but chooses to defend public utility-maximizing spectacles. Again, the question here is not whether this response is correct as a matter of normative philosophy; it is at least working consistently within the same discipline. The utilitarian may now be asked whether she is an "act utilitarian," arguing that each actor should seek to maximize utility with each act, or a "rule utilitarian" who argues that actors should

59. *See id.* at 30 ("[T]hat no *actual* Nazis had such intense desires [to outweigh the harm they caused] is, I think, obvious . . .") (emphasis in original).

60. I have discussed the problem of value predispositions to accept factual propositions in Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 696-709 (1986) (Soviet geneticist Lysenko's erroneous scientific theories were widely accepted in the Soviet Union long after they had been rejected by the scientific community elsewhere because the theories were in agreement with Stalin's Marxist ideology.)

comply with rules and that rulemakers should seek to maximize utility.⁶¹

The problem here is that the utilitarian is being *asked* to step out of normative philosophy into applied political philosophy. As a normative philosophy, utilitarianism praises a state of affairs and says nothing directly about maxims of conduct that individual actors or rulemakers should personally embrace. Perhaps if each actor tried to maximize utility as she saw it with each act, total utility would be less than if each actor had a different motivation.⁶² It might also be true that if each rulemaker tried to maximize utility as she saw it, and other actors complied with such rules, total utility would be less than if the rulemaker and/or the rule followers had a different motivation.

These problems are inevitable when normative philosophy seeks to pronounce that judges and legislators ought to consciously follow a conduct rule without any attempt to identify scientifically the actual consequences that might follow.⁶³ However, whether the unintended consequences of converting a normative philosophy into an applied political philosophy are mere matters of second best housekeeping or whether they fundamentally warp the political philosophy in question depends upon just what those consequences are.

In the case of utilitarianism as an applied political philosophy, the neglected consequences indeed seem to be grave. While an enormous amount has been written against utilitarian political philosophy, by and large the critique has been wide of the mark. The criticism typically focuses upon the legitimate problems of utilitarianism as a normative philosophy, *i.e.*, that restrictions on the liberty of a hated minority might increase total happiness. As a practical matter in political theory, these anomalies in utilitarianism as a normative philosophy seem relatively minor. Trampling important civil liberties rarely *satisfies* the maximum happiness criterion;⁶⁴ German society under Hitler was not a joyful one. Of course, to whatever extent utili-

61. For a defense of rule utilitarianism, see Harsanyi, *Rule Utilitarianism, Equality and Justice*, 2 SOC. PHIL. & POLY. 115 (1985).

62. See *id.* at 127 ("[R]ule utilitarianism will yield a higher level of social utility [than act utilitarianism] because it requires wider respect for other people's rights and for our own special obligations.").

63. See D. PARFIT, *supra* note 20, at 45-49 (arguing that a consequentialist could consider acting morally to be a good in itself).

64. See Goldman, *Rawls and Utilitarianism*, in SOCIAL JUSTICE, *supra* note 1, at 360 ("[A]t least if Rawls' own empirical assumptions are true . . . the contrast between utilitarianism and Rawls' principles of justice with respect to treatment of basic liberties is far less dramatic than much of Rawls' discussion would suggest."). On the idea of the indirect pursuit of utility through respecting liberty, see Gray, *Indirect Utility and Fundamental Rights*, 1 SOC. PHIL. & POLY. 73 (1984).

tarianism is defective as a normative philosophy, a political system that satisfied its tenets would make some improper decisions. But a society that actually adopted every policy that truly maximized happiness would probably be such a delightful society that people today could not begin to imagine it; the few philosophically mistaken policies probably would be seen as a trivial price to pay for such a society. This of course does not justify the philosophical mistakes; it simply suggests that the critique of utilitarianism as an applied political philosophy should not focus primarily upon its legitimate defects as a normative philosophy.

Rather, the principal defects with utilitarianism as an applied political philosophy relate to the structural differences between the two ideals of political philosophy identified in Part I. A governing body might be instructed to satisfy the maximum utility goal. But would such a body actually satisfy the goal? The temptation to pass special interest legislation and rationalize it as being utility-maximizing is clear enough. Utilitarianism in itself does not make any class of actions categorically wrong; everything depends upon one's guess about the effects of a policy upon the psychic state of millions of individuals.⁶⁵ The guess a political actor makes will be heavily influenced by the information and incentive structure facing her. Public choice theory⁶⁶ documents the fact that the information reaching legislators is starkly distorted; subtleties of detail are lost in statistical aggregates,⁶⁷ and concentrated interests lobby heroically.⁶⁸ As for incentives, the democratic process creates an incentive to pass a continuous stream of laws with visible, concentrated benefits and invisible, diffuse harms.⁶⁹ And of course without such democratic checks human actors are likely to have their own set of differential sympathies,⁷⁰ whether as a result of their biological nature⁷¹ or their socialization.⁷² Without a sense that certain kinds of actions are per se improper, *i.e.*,

65. See note 56 *supra* and accompanying text.

66. The pioneering work of this discipline is Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

67. See D. LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? 104 (1985) ("Armed only with these aggregative models of the economy, it is hardly surprising that government policy has been completely impotent in the face of the severe and worsening problems of the contemporary world.").

68. See Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91, 107-08 (1983).

69. *Id.* at 100-11.

70. See D. FREEDMAN, HUMAN SOCIOBIOLOGY: A HOLISTIC APPROACH (1979).

71. *Id.* For a critique of these sociobiological claims for a biological basis behind human action, see P. KITCHER, VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE (1985).

72. There is considerable literature on the question of reference groups and their effect on the

without any sense that individuals have certain categorical rights, it would take an almost superhuman person to keep her guess about utility effects from being influenced by these persistent pressures. And since different legislators will assess the imponderable of the utility calculation differently, uncertain and unpredictable legislation will surely be the rule.

These abstract difficulties have assumed tangible form in the area of constitutional law, particularly in the sphere of economic liberties. For many years, the Supreme Court took the position that legislation could be invalidated under the due process clause if it unreasonably limited freedom of contracting by private parties. This approach led of course to decisions such as *Lochner v. New York*,⁷³ invalidating maximum hours legislation for bakers, that numerous commentators attacked as shielding the oppression of the poor.⁷⁴ Since the New Deal, the Court has indicated that legislatures have essentially free rein to pass economic regulations enhancing the utility of society, uninhibited by notions of liberty of contract.⁷⁵

Unfortunately, contemporary experience with the unleashing of an applied political philosophy of utilitarianism in economic affairs, unconstrained by alternative conceptions of economic liberties, has been quite sobering. In numerous cases, legislators apparently convinced themselves that statutes conferring the narrowest of special interest privileges — for optometrists,⁷⁶ attorneys,⁷⁷ and other occupational groups⁷⁸ — promoted the general welfare. Despite the restrictions on occupational and contractual freedom that these statutes entailed, the Court felt obliged to defer, adding the faint hope that isolated and diffuse consumers and would-be producers had an adequate remedy through the political process.⁷⁹ Utilitarianism in economic affairs has thus served to unleash a negative sum game of perpetual rent seeking, a process that ironically has in all probability significantly reduced aggregate utility.⁸⁰ Some due process limitation on the applied political

formation and alteration of attitudes. For a review of that literature, see M. SMITH, PERSUASION AND HUMAN ACTION 164-90 (1982).

73. 198 U.S. 45 (1905).

74. See, e.g., Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 280-85 (1973); J. ELY, *DEMOCRACY AND DISTRUST* 14-15 (1980).

75. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

76. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

77. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

78. The problems were presaged in the *Slaughter-House Cases*, 83 U.S. 36 (1872).

79. See, e.g., *Lee Optical*, 348 U.S. at 486-88; *Skrupa*, 372 U.S. at 728-33.

80. See, e.g., Rottenberg, *Introduction*, in *OCCUPATIONAL LICENSURE AND REGULATION* 1, 6-9 (S. Rottenberg ed. 1980).

philosophy of utilitarianism may be necessary to promote utility after all.

IV. RAWLS' THEORY OF JUSTICE

Professor John Rawls' famous theory of justice expressly seeks to improve upon utilitarianism.⁸¹ What is not at all clear is whether Rawls perceives the problem to be with utilitarianism as a normative philosophy or as an applied political philosophy, or even that he perceives the two to be distinct. His well-known conclusion is that the proper moral principles to govern the basic structure⁸² of society are those that people would choose behind a veil of ignorance concerning their own particular interests and conceptions of the Good. He argues that such depersonalized contractors would choose to secure equal liberties and to permit only those economic and social inequalities that would operate to the benefit of the least well-off, by providing the better-off with necessary incentives.⁸³ Rawls argues that the parties in the original position would not seek to maximize utility, but would instead acknowledge that every person possesses an inviolability based on justice that not even the welfare of the society as a whole can override.⁸⁴

There is no question that Rawls successfully taps many of the moral intuitions of modern man, and his accomplishments at the pure normative philosophy level cannot be denied. The religious dissident or racial minority group member does seem entitled to moral protection even against the occasional act of persecution that does maximize utility.⁸⁵ The person born blind and handicapped does seem entitled to coerced transfer payments from the more fortunate without regard to any utilitarian calculus.⁸⁶ Moreover, the reason for these intuitions

81. J. RAWLS, *supra* note 10, at 14.

82. Rawls says that the basic structure of society is the primary subject of justice, and he defines the basic structure as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements." *Id.* at 7.

83. *Id.* at 60-61.

84. *Id.* at 167-92.

85. Actually, Rawls continues to make the liberties of these individuals contingent upon empirical facts, since the liberties are to be protected only if, given knowledge of the general facts of society, the parties in the original position would choose them. *Id.* at 159-60. However, it does seem plausible that individuals who wanted to make a compact they could willingly keep would see to it that these liberties were protected.

86. Obviously, the description of the individual as "blind and handicapped" is intended to distinguish this intuition from the case of an individual who is poor as a result of personal choices — leisure over work, spending over savings, etc. — where the moral problems are much harder. Clearly, these choices are heavily influenced in fact by the general culture in which the individual is raised, and it is hard to expect people to transcend their environment readily. On the other

does seem to be a sense that "there but for the Grace of God go I" and that we ought not to exploit unfairly our good fortune in life's lottery.

On the other hand, it appears at times that Rawls is seeking to develop his own applied political philosophy that will improve upon utilitarian applied political philosophy. Unfortunately, Rawls seems no more aware than the utilitarians that the two functions of political philosophy are distinct, and that only a remarkable coincidence could make the same philosophy ideal for each function. Instead, Rawls' book oscillates confusingly between the pure normative philosophy and the applied political philosophy functions — a confusion with detrimental effects on both disciplines.

The first example of this confusion is Rawls' emphasis upon the *stability* of his conception.⁸⁷ Rawls is disturbed by the fact that utilitarianism is willing to justify extreme unhappiness for some by arguments about the average or aggregate happiness.⁸⁸ For Rawls, this conception is unstable because people are separate beings; the worst-off cannot be expected to have such complete empathy for their fellow human beings that they will see their utilitarian society as optimally just.⁸⁹ And Rawls clearly wants a philosophy that all people can bring themselves to accept and act upon, a philosophy that expresses their nature as free and equal moral beings.⁹⁰

Is Rawls' "stability" argument made at the level of pure normative philosophy or at the level of applied political philosophy? Rawls clearly defends a basic structure of society that will consciously seek to maximize the "primary goods" of the class of society with the smallest quantum of such goods.⁹¹ "Primary goods" are things that people

hand, personal responsibility for these choices may be the only way to change that culture over the long run.

Rawls himself does not draw this distinction sharply, noting: "The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is . . . problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit." *Id.* at 104. On the other hand, Dworkin stresses the distinction between wealth differences that flow from differences in personal choices and wealth differences that flow from differences in innate ability or initial entitlements. R. DWORKIN, *Why Liberals Should Care About Equality*, in *A MATTER OF PRINCIPLE*, *supra* note 4, at 205.

87. *See* J. RAWLS, *supra* note 10, at 496-504.

88. *Id.* at 500.

89. *See id.*:

It is evident why the utilitarian stresses the capacity for sympathy. Those who do not benefit from the better situation of others must identify with the greater sum (or average) of satisfaction else they will not desire to follow the utility criterion. . . . [A] marked capacity for sympathetic identification seems relatively rare.

90. *See id.* at 251-57, 587 (presenting this Kantian conception of the original position and suggesting that its adoption by each person demonstrates that person's "purity of heart").

91. *See id.* at 95 ("On this conception of social justice, then, expectations are defined as the index of primary goods that a representative man can reasonably look forward to. A person's prospects are improved when he can anticipate a preferred collection of these goods.").

presumably want no matter what concrete ends they have; liberty and income are examples.⁹² The bottom representative person thus has a moral "lien" of sorts on everyone above her; the proceeds of the activities of all belong as of right to the bottom person except those proceeds which are necessary to induce the activities themselves.⁹³ Is Rawls offering a political thesis, that such a structure of society will indeed be stable and capable of generating its own support? Or is he offering a metaethical thesis, that a philosophy which some people cannot bring themselves to accept is for that reason an objectionable normative philosophy?

The truth seems to be that Rawls is making both the political and metaethical claims.⁹⁴ But surely this attempt to ride two horses cannot succeed. At the metaethical level, Rawls wants a pure normative philosophy that one hundred percent of the citizenry theoretically ought to be able to bring themselves to accept. In order to accomplish this goal, however, Rawls is forced to construct a philosophy that requires extraordinary good will of the majority; individuals in the majority are urged that on issues of society's structure they ought to forget entirely who they are and what they have.⁹⁵ The majority is also told that justice requires that the position of the worst-off representative person be *maximized* without *any* regard to the effect of such actions on the total wealth or total utility of the majority.⁹⁶

Rawls notes the central importance of stability in political institutions, but his stability analysis is concerned with the need to avoid crime, civil disturbances, and other problems that arise when small groups are disaffected from the dominant philosophy and choose not to obey it.⁹⁷ As a result, Rawls misses the critical significance of securing a stable commitment to a philosophy (or its results) from the majority, since without their reliable assent the philosophy cannot be implemented *through legitimate institutions*. Rawls' philosophy is starkly countermajoritarian in urging that everything possible must be done to maximize the position of the worst-off class at any cost before the majority can pay any attention to its own interests. This is quite a

92. Rawls lists as primary goods "the bases of self-respect" as well as "rights and liberties, powers and opportunities, income and wealth." These are goods that "normally have a use whatever a person's rational plan of life." *Id.* at 62.

93. For a similar characterization of Rawls' position, see R. EPSTEIN, *supra* note 8, at 341.

94. For a view that Rawls embraces the metaethical claim, see D. PARFIT, *supra* note 20, at 43. On the other hand, Rawls stresses that the lack of stability caused by inconsistency between one's conception of the Good and the public definition of the Right would mean that "penal devices will play a much larger role in the social system." J. RAWLS, *supra* note 10, at 576.

95. See J. RAWLS, *supra* note 10, at 136-42.

96. See *id.* at 152-57.

97. See *id.* at 240-41.

different thing from urging a majority to incur modest sacrifices for a minority or to respect "minority" rights that might benefit any one of their number at a later time.

At the applied political philosophy level, the problem is not that Rawls' philosophy might fall on deaf ears. Rather, the problem is that the predictable majoritarian hostility to a starkly countermajoritarian philosophy is quite likely to lead those who *are* persuaded by that philosophy to conclude that majoritarian institutions themselves have lost some of their philosophical legitimacy and may be inherently unjust. If long experience shows that majorities simply will not make decisions without regard to their own interests, the attractiveness of alternative institutions such as the courts that do not depend upon majoritarian consent is certain to increase.⁹⁸ Predictably, numerous commentators have proposed precisely this constitutional role for the judiciary, *i.e.*, the protection of values that are so important that they cannot be left to the valuations of elected majorities. A leading example is Professor Michelman's argument that courts should secure affirmative claims for the poor under the fourteenth amendment, a position he defends on explicitly Rawlsian grounds.⁹⁹

The problem once again comes in the transition from a pure normative philosophy to direct legal applications. Through what *institutional* process are these sharply countermajoritarian normative ideals to be implemented? Constitutions are drafted and amended through majoritarian or even supermajoritarian processes. Once drafted, of course, constitutions can be interpreted in countermajoritarian ways, making it possible to implement certain ideals to which the drafting majorities might not have assented. The problem, however, is that the interpreting judiciary tends to lack effective feedback to force judges to reconsider their mistakes; the natural human tendency to imagine that most of one's prior actions produced good results is unchecked.¹⁰⁰

98. Numerous legal commentators sympathetic to Rawls have proposed precisely such a role for the courts. See, e.g., Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14-16 (1969) (relying upon Rawls' theory of justice as fairness as articulated in journal articles that preceded Rawls' book). For a view that the Court should identify and protect widely shared ideals, see Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1216-19 (1978). Dworkin's view is that the very idea of regarding a constitution as binding presupposes a prior commitment to pre-political rights which courts properly consider in interpreting the constitutional text. See R. DWORKIN, *The Forum of Principle*, in A MATTER OF PRINCIPLE, *supra* note 4, at 33, 34-38.

99. Michelman, *supra* note 98, at 13-16.

100. See T. SOWELL, KNOWLEDGE AND DECISIONS 39 (1980):

Where political decision making is broadly defined to include judicial decision making, feedback from those affected is even less effective. Moreover, the cost of a court's monitoring the consequences of its own decisions could easily be prohibitive, and especially where the

Over time, the opportunity to rationalize the temptations of power with the guide to "adopt policies people would favor if they did not know who they were" would be almost as great as that under utilitarianism. The poor are undoubtedly the intended beneficiaries of academic versions of Rawlsian judging, but in a world of unintended consequences they need not be its actual beneficiaries.

In addition to Rawls' position on the stability issue, there is a second important feature of his theory where an ambiguity arises between the pure normative philosophy and the applied political philosophy visions. Rawls states that other things being equal, a principle is to be preferred if it is simple and if its lexical position with respect to other principles is clear.¹⁰¹ As one such instance, Rawls holds that at least in modern Western societies, no violation of equal liberties can be justified by any socioeconomic gain for the poor (or the nonpoor).¹⁰² Is this argument made at the level of pure normative philosophy or at the level of applied political philosophy?

The answer again appears to be that Rawls wants the same ideas to serve both functions,¹⁰³ and again such an attempt to ride two horses is problematic. Indeed, at the level of pure normative philosophy, it is not at all clear that first best moral principles would be either simple or lexically ordered.¹⁰⁴ What is the lexical ordering of truth, love, friendship, beauty, autonomy, average human welfare, total human welfare, animal welfare, equality of opportunity, freedom of speech, freedom of religion, equality of political power, and satisfaction of basic needs? Even if some of these values seem intuitively much more important than others, it would not follow that *every increment* of improvement in the preferred value would be more important than *any possible* improvement in the lesser value.¹⁰⁵ As one example, it seems unlikely that many nonintellectuals would regard every increment of

consequences include effects on people not party to the legal action, but whose whole constellation of expectations have been changed.

101. See J. RAWLS, *supra* note 10, at 320-21.

102. *Id.* at 542-43:

Now the basis for the priority of liberty is roughly as follows: as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which became stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office.

103. See, e.g., *id.* at 324 (competing principles are ultimately less clear for ethical reasons).

104. See Alexander & Schwarzschild, *Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources*, 16 PHIL. & PUB. AFF. 85 (1987) (arguing for such a plural conception of the Good).

105. See T. SOWELL, *supra* note 100, at 118.

freedom of speech gained as more important than any improvement in the economic problems still facing modern Western societies.

At the level of applied political philosophy, however, Rawls' strong commitment to simple, clear, lexically ranked principles fares much better. The political temptation to restrict the true sources of the opposition's power — free thought, free speech, voting, the right to hold office — and to justify such action with *noblesse oblige* principles is great.¹⁰⁶ Rawls' prescription here is sufficiently clear that a political actor whose power was legitimized by Rawlsian principles but who was tempted to stray from them under the new incentives of power would find it extremely difficult to do so in the case of the basic liberties. Rawls repeatedly stresses that he wants to identify political principles that will take hold of the mind in such a way as to secure their faithful implementation, and he correctly holds that simplicity is an important virtue in a theory's ability to perform that applied political philosophy function.¹⁰⁷

Once again, these abstract points take on concrete significance in actual cases, including decisions under the freedom of speech clause of the first amendment. For example, in *Communist Party v. Subversive Activities Control Board*,¹⁰⁸ the Court sustained an order requiring the Communist Party to register with the Subversive Activities Control Board of the Attorney General's office. The Court emphasized the detailed legislative findings regarding the problem of possible Communist subversion. Speaking for the majority, Justice Frankfurter saw the question in pure normative philosophy terms, *i.e.*, the importance as values of liberty and the preservation of the nation:

[W]here the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as [here], . . . the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods.¹⁰⁹

Stating the issue as Justice Frankfurter does, it may be difficult to disagree, since the preservation of the nation is a precondition to all of the liberties protected by that nation. Unfortunately, Justice Frankfurter failed to see the issue from the perspective of applied political philosophy, with its central concern for the corruptible empirical judgment of the powerful regarding criticism of government policy. In this

106. See J. RAWLS, *supra* note 10, at 544 (trading off liberty for welfare would ultimately be poor strategy for those in the original position).

107. See *id.* at 320-21.

108. 367 U.S. 1 (1961).

109. 367 U.S. at 96-97.

respect, *New York Times Co. v. United States*,¹¹⁰ the Pentagon Papers case, represents the contrary perspective of applied political philosophy. The government argued that publication of the Pentagon Papers would seriously damage national security and should be enjoined. In a per curiam opinion, the Court held that the injunction violated the first amendment. Justice Douglas' concurring opinion stated: "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information."¹¹¹ The issue was not the pure normative question of national security versus press liberty; it was the applied political philosophy question of restrictions on press liberty that purport, perhaps quite sincerely, to serve the national security in a context where the state's incentive to see such dangers in any embarrassing disclosures is extraordinarily powerful.

V. NOZICK AND THE LIBERTARIANS

Robert Nozick's book *Anarchy, State, and Utopia* is yet another attempt to straddle pure normative philosophy and applied political philosophy with one set of concepts.¹¹² Nozick argues for a minimal state that enforces preexisting rights to one's own body and talents as well as rights to acquire and transfer property in external resources. He argues that further actions by the state violate people's rights and are therefore morally unjustified.¹¹³

As with all such attempts to fulfill both functions of political philosophy with the same philosophical ideal, tensions between the functions are likely to arise, and it is interesting to see exactly where that schism occurs in yet another context. The problems with Nozick's philosophy are almost the polar opposite of the utilitarian's problems. As noted earlier, utilitarianism as a pure normative philosophy is imperfect but probably not so seriously wrong that one would not greatly appreciate a chance to live in a world in which policies actually *satisfied* its requirements.¹¹⁴ However, utilitarianism makes a poor applied political philosophy that would leave no meaningful check on the temptations arising from the Leviathan state.

By contrast, Nozick's position represents a poor first best pure nor-

110. 403 U.S. 713 (1971).

111. 403 U.S. at 723-24.

112. R. NOZICK, *supra* note 4, at 6 ("Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.").

113. *Id.* at 149.

114. See text following note 64 *supra*.

mative philosophy but a much better applied political philosophy. The fact that Nozick's philosophy, like utilitarianism, purports to serve both functions is, I believe, the source of the ambivalence many people feel about these ideas. Indeed, it is hard to read either philosophy without experiencing an alternating attraction and repulsion, a paradoxical reaction that suggests a deep distinction is being smoothed over.

Consider first Nozick's theory as a pure normative philosophy that explicitly contrasts itself with utilitarianism as a normative philosophy.¹¹⁵ It is certainly true that utilitarianism justifies some unfortunate results, such as the coercive use of individuals for the amusement of others. As such, it seems perfectly appropriate to acknowledge moral rights that trump utility maximization in some instances along the lines of Rawls' theory, or at least presumptive moral rights that can be outweighed only when the balance of utility strongly favors the coercive exaction. But it is one thing to recognize a minimum inviolability of persons that must be respected in any endeavor to maximize happiness; it is quite another to make those moral rights or entitlements so extensive that happiness is virtually banished as a morally legitimate end of the state. Are property rights so important that *successful* attempts to minimize widespread misery and suffering by limiting such rights would be *morally* illegitimate? Such a view simply drains rights of their moral significance.¹¹⁶

Of course, Nozick is aware of the philosophical importance of human happiness, but his idea is that there ought to be moral side constraints on a human actor's ability to pursue those good ends.¹¹⁷ It simply is not right, Nozick holds, to use a human being without her consent as if she were an inanimate object even for the purpose of increasing happiness.¹¹⁸ Nor is it right to use property that a person created or was purposely given as if it were manna from heaven.¹¹⁹ In short, Nozick seeks to make his vision intuitively attractive by directing attention away from the end states in question and toward the propriety of particular human actions.

115. R. NOZICK, *supra* note 4, at 35-53 (arguing for moral side constraints on actions affecting humans that utilitarianism lacks; also arguing that we care about more than conscious experiences, as is shown by imagining an "experience machine").

116. See Scheffler, *Natural Rights, Equality, and the Minimal State*, in *READING NOZICK* 148, 160 (J. Paul ed. 1981).

117. See R. NOZICK, *supra* note 4, at 26-35.

118. *Id.* at 32.

119. Thus Nozick criticizes Rawls' position for creating a philosophical system that makes the failure to take such action appear irrational. "[P]eople meeting together behind a veil of ignorance to decide who gets what, knowing nothing about any special entitlements people may have, will treat anything to be distributed as manna from heaven." *Id.* at 199.

Although these arguments about right and wrong conduct are not without some intuitive force, the stronger intuitions of modern man are drawn to the tangible evil of human suffering and the felt need for purposeful human action rationally calculated to alleviate that suffering. At the pure normative philosophy level, the idea of an *absolute* side constraint upon the abridgement of minor values even for the purpose of furthering major values seems irrational.¹²⁰ Nozick poses a similar question explicitly:

Isn't it *irrational* to accept a side constraint *C*, rather than a view that directs minimizing the violations of *C*? (The latter view treats *C* as a condition rather than a constraint.) If nonviolation of *C* is so important, shouldn't that be the goal? How can a concern for the nonviolation of *C* lead to a refusal to violate *C* even when this would prevent other more extensive violations of *C*? What is the rationale for placing the nonviolation of rights as a side constraint upon action instead of including it solely as a goal of one's actions?¹²¹

Nozick is not alone in concluding that side constraints upon wrong actions do indeed apply even if the action would prevent even more wrong actions. Charles Fried also defends categorical theses such as "Do not intentionally kill innocent people" even where such an action would spare the lives of many.¹²² The Ten Commandments and other religious sources seem to prohibit certain kinds of actions without inquiry into their noble purposes. Immanuel Kant warned that one must not use a person solely as a means, presumably including as a means toward otherwise highly valuable ends.¹²³ No one who was raised in Western culture can be totally lacking in sympathy for the idea of categorically wrong action. And yet the mind rebels against the irrationality of not recognizing twice *E* to be a more serious evil than *E*.

Once again, the writer who has seen these paradoxes most clearly is Friedrich Hayek. Hayek argues that many of our moral intuitions are the product of biological and especially social evolution, in that peoples who held such views were generally more successful in advancing their purposes and taming natural hazards than others.¹²⁴ As

120. See note 116 *supra* and accompanying text.

121. R. NOZICK, *supra* note 4, at 30 (emphasis in original).

122. C. FRIED, *RIGHT AND WRONG* (1978).

123. See I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 96 (H. Paton trans. 1964).

124. See F. HAYEK, *The Origins and Effects of Our Morals: A Problem for Science*, in *THE ESSENCE OF HAYEK* 318, 320 (1984) (arguing that "Social Darwinism" was a mistake because social evolution operates "through a different mechanism" than biological evolution, although both historical processes "relie[d] on the same principles of selection, namely the multiplication of individual lives").

such, Hayek, following Hume, argues that such moral intuitions are not the outcome of our reason and are quite likely to strike our conscious intellect as irrational.¹²⁵ Nevertheless, Hayek defends such morals as having a more secure foundation in proven success than an alternative moral system we might mentally construct from our views about first principles.¹²⁶ He too reaches the libertarian conclusion that all actors, including the state, ought to feel constrained to respect the rules and principles that define and circumscribe both personal freedom and property rights.¹²⁷

Since Hayek's views played an important role in the prior section's analysis of Critical Legal Studies as well, it is important to be clear about the limitations as well as the merits of his perspective. From an intellectual point of view, Hayek's thesis is disturbing because it seems to advocate a form of self-hypnosis, *i.e.*, that our moral intuitions are only instruments directed toward higher goals such as survival and utility, but we should quickly forget that linkage and convince ourselves that the morality itself is in fact more important than those higher goals.¹²⁸ This article has taken a different approach, seeking to rationalize these paradoxes — to explain them in a way the rational mind will not rebel against. There *is a reason* why the applied political philosophy that a political actor should consciously strive to advance differs from the first principles of pure normative philosophy. Indeed, there are at least the four reasons that were identified in the introductory section of the article. There is no need to hide the true first best values from political actors out of fear that they will seek to pursue them directly; what is needed is for political actors themselves to realize that some moral standards require factual assessments that are systematically untrustworthy, and therefore that arguments directly addressed to such broader values ought not to be politically entertained.¹²⁹

125. *See id.* at 318-19:

[I]n some respects our morals endow us with capacities greater than our reason could do, namely the ability to adapt to conditions of which the individual mind could never be aware. . . . It is the reason why, as David Hume so clearly understood, "the rules of morality are not the conclusions of our reason."

126. *Id.* at 324-25. Hayek argues that the benefits of the process of social evolution apply only to the grown morals of tradition and not to morals which have been invented to serve the satisfaction of human desires. . . . Hedonistic, utilitarian, or egalitarian morals, or conceptions like distributive justice, are all intellectual inventions which have never been tested and have never been shown that they improve, or even could secure, the preservation of the group.

127. *See generally* F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

128. *Id.* at 68 ("Like all moral principles, [liberty] demands that it be accepted as a value in itself. . . . We shall not achieve the results we want if we do not accept it as a creed or presumption so strong that no considerations of expediency can be allowed to limit it.").

129. On the general structure of arguments for the indirect pursuit of ethical goals, see Alex-

When one moves from the level of pure normative philosophy to the level of applied political philosophy, the verdict upon Nozick's book improves substantially. Nozick is, of course, greatly concerned with avoiding the horrors of twentieth-century experiences with totalitarianism and its characteristic institutions such as compulsory labor,¹³⁰ restrictions on emigration,¹³¹ and "reeducation camps."¹³² Nozick's contribution is to explain how these horrible institutions can come to seem logical to one who begins with the humanitarian desire to enforce a distributional pattern of the form "to each according to his _____."¹³³ For liberty of any sort — purposely acting on the basis of principles different from the principles of the pattern — will persistently frustrate and anger the government official who accepts the idea that deviations from the pattern are *injustices*.¹³⁴

This argument of Nozick's also does not succeed at the level of pure normative philosophy, where one could simply advocate an optimal mix of liberty and distributional pattern.¹³⁵ But Nozick is again persuasive in explaining the naïveté of seeking to transfer this "optimality" insight to the level of applied political philosophy where the initial restrictions of liberty generate their own dynamic that is driven by symbiosis between the growing state and economic power holders:

To strengthen the state and extend the range of its functions as a way of preventing it from being used by some portion of the populace makes it a more valuable prize and a more alluring target for corrupting by anyone able to offer an officeholder something desirable; it is, to put it gently, a poor strategy.¹³⁶

By contrast, Nozick observes that the institution of private property sets in motion a different dynamic. Nozick rejects the idea that the institution of private property represents the taking of value from a preexisting common pool, since the informational and incentive effects

ander, *Pursuing the Good — Indirectly*, 95 ETHICS 315 (1985). Alexander does note that one way of resolving the general paradox is to refuse to publicize the fact that one is advocating the first best goals, but at the level of *political* philosophy such secrecy is both difficult and dangerous. See *id.* at 325-29.

130. See R. NOZICK, *supra* note 4, at 169-72.

131. See *id.* at 173-74.

132. See *id.* at 163.

133. See *id.* at 159-64.

134. See *id.*

135. See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 506-07 (1980). [I]f we value individual liberty, we are bound to reach a point at which further restrictions on conduct cannot be justified by the additional increment of distributive fairness that they yield. . . .

This conflict does not, however, provide a reason for abandoning liberalism altogether since it is not a crushing objection to a theory of society that it values two different things which conflict even across a wide range of cases.

136. R. NOZICK, *supra* note 4, at 272.

of property expand that pool many orders of magnitude.¹³⁷ The key point for Nozick is not that property might produce utilitarian gains but rather that a state official can act to protect property *without accepting any vision* that calls for the purposeful state preference of particular people over others, *i.e.*, without accepting a vision that generates the dynamic of an increasingly corruptible rent-seeking state.¹³⁸

Unfortunately, Nozick is no clearer than Rawls or the utilitarians about whether his theory is offered at the level of pure normative philosophy or at the level of applied political philosophy. Is he saying that there is no moral balancing that can take place between individuals or that a government official ought not to believe she should be conducting such a balancing? Again, the truth seems to be that Nozick is making both claims.¹³⁹ But surely this attempt to hold together two discrete disciplines severely strains one's intuitions at the level of pure normative philosophy; a person born blind and disabled ought not to have to beg for charity to lead a decent life. The problem is to find a way to enshrine the most urgent comparative claims in political institutions without state officials' coming to accept the corruptible general vision of coercive moral balancing between individuals or a just distributional pattern. Focusing upon the distinction between pure normative philosophy and applied political philosophy may not supply the answer to this problem, but it at least directs attention to the relevant question.

To the extent that Nozick is aware of the distinction between the two functions of political philosophy, it does appear that it is the applied political philosophy function he most wants his theory to fulfill. This is displayed most clearly in Nozick's vision of Utopia, where he plainly indicates that his libertarian applied political philosophy is ultimately *instrumentally* justified by its contribution to values other than (or in addition to) liberty and property.¹⁴⁰ Nozick imagines someone's saying "So is this all it comes to: Utopia is a free society?" and Nozick responds:

Utopia is *not* just a society in which the framework is realized. For who could believe that ten minutes after the framework was established, we would have utopia? Things would be no different than now. It is what grows spontaneously from the individual choices of many people over a

137. *Id.* at 177.

138. *Id.* at 272-73.

139. The rent-seeking problem is discussed by Nozick, *id.* at 272-73. However, Nozick also clearly states, "Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. . . . Talk of an overall social good covers this up." *Id.* at 33.

140. *Id.* at 297-334.

long period of time that will be worth speaking eloquently about.¹⁴¹

To summarize the argument, Nozick's philosophy suffers from a problem that is almost the direct opposite of the utilitarian's problems. Utilitarianism makes a tolerable, if imperfect, pure normative philosophy, but any failing to see the distinction between disciplines is likely to favor utilitarianism also as an applied political philosophy, where it fails badly. Nozick's vision makes a tolerable if imperfect applied political philosophy, but one who sees its political wisdom may also be tempted to embrace its harsh normative philosophy, where it surely ought to be rejected. Or, alternatively, one who sees Nozick's serious shortcomings at the pure normative philosophy level may overlook the book's great merit of the level of applied political philosophy. These are the recurring problems of failing to recognize the two functions of political philosophy as distinct.

VI. CONCLUSION: NORMATIVE AND POSITIVE ANALYSIS IN POLITICAL PHILOSOPHY

This article has sought to establish the thesis that political philosophy can be clarified and ultimately improved by focusing attention upon the two distinct functions such a philosophy can serve. Greater analytical clarity in turn makes it appear that at least one part of political philosophy — the sphere of applied political philosophy — cannot be separated from factual theories of cause-and-effect in the area of social phenomena. For the questions of how legal actors will interact with a philosophy, whether their adherence to the philosophy will remain stable, and what unintended consequences will follow from the interactions that arise, are factual questions in need of scientific investigation. More particularly, the microeconomic discipline of public choice theory, which directs attention explicitly to the information and incentives facing public decisionmakers, ought to be integrated fully with normative analysis in arriving at a sensible applied political philosophy.¹⁴² The question of what values actual legal actors ought to hold in a world that is causally connected in particular ways must be seen as a complex question requiring positive as well as normative analysis.

141. *Id.* at 332 (emphasis in original).

142. See, e.g., Goldin, *Price Externalities Influence Public Policy*, 23 *PUB. CHOICE* 1, 5-6 (1975); M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 36 (1965); J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 36-39 (1962).