

## COST-BENEFIT ANALYSIS, ENVIRONMENTALISM, AND RIGHTS

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*People today are therefore far less divided than one imagines; they argue incessantly to know into which hands power will be placed; but they content themselves calmly with the duties and rights of that power.*

—de Tocqueville<sup>1</sup>

**T**o the practical mind, particularly one trained in economics, it might sound a trifle paradoxical to suggest that the truly important issues in a public policy debate have nothing to do with the relative efficacy of the policy options. Paradoxical or not, this is very often the case. And there is no better illustration than the ongoing — and heated — debate over alternative approaches to pollution control. Issues of workability and economic efficiency are certainly prominent in this policy discussion. But, as with many political questions, the more important issues lie at a deeper, or at any rate a less visible, level.

In political terms, this debate has lately come to be portrayed as a bipolar struggle. On one side stand economically minded Reaganites, who favor applying the test of cost-benefit analysis to all administrative regulations put forth by the government and who support "economic" approaches to pollution control. On the other side are environmental, "consumer," and other groups, who oppose the use of cost-benefit analysis and who are suspicious of any

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<sup>1</sup>Alexis de Tocqueville, in J.P. Mayer, ed., *De la Démocratie en Amérique: Les Grands Thèmes* (Paris: Gallimard, 1968), p. 315 (translation mine).

"economic" approaches. The dialectic between the two points of view came to some national attention this past summer when the Supreme Court barred one federal agency from employing cost-benefit analysis in formulating its regulations.<sup>2</sup>

One consequence of this controversy is that the ethical and philosophical underpinnings of cost-benefit analysis and "economic" regulatory techniques have come increasingly under fire from environmentalists and others. Most critics have taken the moral high-road, charging that utilitarianism — the doctrine underlying cost-benefit analysis — is ethically flawed and morally inferior. In so arguing, most critics have also insisted upon berating utilitarianism for its inattention to basic human rights and for its willingness to "tradeoff" values that should be considered absolute.

My intention in this paper is not to defend utilitarianism or cost-benefit analysis. It seems to me that the critique of utilitarianism offered by environmentalists (and others) is very often on target. Rather, my point is that a critique of utilitarian moral philosophy is not by itself a critique of the use of cost-benefit analysis in regulatory decision-making. What is universally overlooked, I contend, is that the latter necessarily involves a *joint* critique, a simultaneous critique of both cost-benefit analysis (or utilitarianism) and the institutional structure of regulation to which that approach is applied.

One implication is that — perhaps surprisingly — the ethical case for utilitarian behavior by an agent (or agency) acting for a political collective can be strong even when the ethical case for utilitarian behavior by an individual is weak. This does not mean that centralized administration using cost-benefit analysis is desirable. There are good reasons for wishing to rid social governance of the technocratic. But an ethics of basic rights and absolute claims requires an institutional structure appropriate to such rights and claims.

There do exist rights-based regulatory alternatives, some based on historic conceptions of rights in common law and some based on government-granted "pollution rights." One might thus expect that, whatever pragmatic reservations they might have, opponents of cost-benefit analysis would be somewhat sympathetic to such rights-based schemes on philosophical grounds. In fact, quite the opposite is the case. Environmentalists, for example, bristle at the

<sup>2</sup>See, e.g., Philip Shabecoff, "Safety Agency to Forgo 'Cost-Benefit Analysis,'" *New York Times*, 13 July 1981.

very mention of rights-based pollution regulation, and insist on maintaining centralized administrative control. The reason for this, I will be forced to conclude, is that, in the end, the environmentalist is concerned with basic human rights to no greater extent than is the utilitarian economist. And recognizing this is the key to understanding what the debate over pollution policy is really all about.

It is fairly easy to demonstrate, I believe, that, in one sense at least, this policy debate is *not* ultimately a battle between groups with radically different philosophies. The argument between Reaganites and environmentalists, I will suggest, is ultimately a tussle between formally identical political philosophies — both of which are “conservative” in a well-defined sense — that disagree only about the specific constellation of personal virtues each wishes regulation to promote.

### The Critique of Cost-Benefit Analysis

One of the most persistent beliefs about cost-benefit analysis and related disciplines, writes Laurence Tribe, “is a conviction of their transparency to considerations of value and their neutrality with respect to fundamental world-wide views and to more-or-less ultimate ends.”<sup>3</sup> This, says Tribe, is much mistaken. Such techniques necessarily imply a world-view of their own — the world-view of economic utilitarianism.

Modern policy-analytic techniques, he argues, are wedded to an “instrumental” conception of rationality. Also referred to as “means/ends” rationality, this conception defines the rationality of a policy or action in terms of its efficacy — or, indeed, its optimality — in achieving a stated goal.

In a typical cost-benefit analysis, the social questions are framed in terms of a “social decision” — whether to institute a regulation, how much pollution to allow, whether to lease certain offshore oil tracts — understood in strict analogy with an individual decision. The relevant structure of means is established by the analyst, in the service of the (often hypothetical) “decision-maker,” and the objective is to choose the best social policy in light of “social” costs and benefits, of the somehow aggregated preferences of the many individuals who would be affected.<sup>4</sup>

<sup>3</sup>Laurence H. Tribe, “Policy Science: Analysis or Ideology?” *Philosophy and Public Affairs* (1972), p. 75.

<sup>4</sup>In simple terms, one chooses the option with the highest net “social benefit” over “social cost.” More formally, though, one is normally concerned with picking a

There are two closely related considerations that Tribe and like-minded critics adduce against this approach: reductionism and collapsing process into result. Cost-benefit techniques operate by disassembling the effects of a "social decision" into its component parts, ascertaining the benefit or cost of each part, and then totaling up the results. This procedure obscures and does violence to the very complex and not fully measurable web of social valuation that actually underlies the problem. In particular, the cost-benefit technique is *ad hoc* and ahistoric; it is concerned only with the goal of maximization, relegating all else — including human rights — to the derivative status of means toward that end.<sup>5</sup>

Interestingly, Tribe illustrates his complaint by reference to the literature of law and economics. In the dominant form of the economic approach to law, which Tribe traces to Ronald Coase and Guido Calabresi,<sup>6</sup> and which we would now associate with the name of Richard Posner,<sup>7</sup> the assignment of rights for purposes of tort law is conceived, as both a descriptive and a normative matter, in terms of the "efficiency" of the allocation.

In the classic example analyzed by Coase,<sup>8</sup> a train passing through farmland emits sparks that set afire and destroy the wheat growing on a farmer's land near the tracks. The efficiency approach to law asks: Does the farmer have a right to grow wheat unmolested (and therefore a claim against the railroad) or does the railroad have a right to emit sparks? The answer, according to the efficiency view, should depend — and in fact has depended — upon which assignment of rights maximizes net wealth, that is, upon which assignment minimizes the sum of wheat-destruction and fire-avoidance costs.<sup>9</sup> Indeed, when there are no transactions costs (like the costs

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"Pareto-improving" choice, i.e., a choice that makes at least one person better off without making anyone worse off. In circumstances in which income redistribution is possible, this criterion reduces to the excess-social-benefits-over-social-cost criterion. Indeed, under the so-called Kaldor-Hicks criterion, one need show only that the best choice is a *potential* Pareto improvement — that the winners could in principle (or in the absence of transactions costs) compensate the losers, even though the losers need never actually be compensated. See generally E.J. Mishan, *Cost-Benefit Analysis*, 2d ed. (New York: Praeger Publishers, 1976).

<sup>5</sup>Tribe, "Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality," *Southern California Law Review*, 46 (1973): 627-631. Readers of Robert Nozick (whom Tribe cites) will recognize an affinity to the arguments in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), esp. chap. 7.

<sup>6</sup>Tribe, "Technology Assessment," notes 37 and 38.

<sup>7</sup>See generally Posner, *Economic Analysis of Law* (Boston: Little, Brown & Co., 1972).

<sup>8</sup>"The Problem of Social Cost," *Journal of Law and Economics* 3 (October 1960): 1.

<sup>9</sup>As I will suggest below, maximizing wealth is not the same as maximizing utility. Posner makes this distinction and defends the wealth-maximization approach in

of organizing dozens of farmers to bargain with the railroad), the initial assignment of rights is irrelevant, since, through bargaining, the right would ultimately be acquired by the party whose exercise of it maximizes net wealth. When there are transactions costs, it is the job of the court to undertake a wealth-maximization calculation and to assign the right to the party who would ultimately have possessed it had there been no transactions costs.

To Tribe, this attempt to analyze the assignment of rights from the common-denominator of wealth obscures the complex socio-cultural role that rights play in a person's structure of preferences; "for to be 'assigned' a right on efficiency grounds fails to satisfy the particular needs that can be met only by a shared social and legal understanding that the right belongs to the individual because the capacity and opportunity it embodies is organically and historically a part of the person that he is and not for any purely contingent and essentially managerial reason."<sup>10</sup>

Reading Tribe and other critics, one is left with a strong sense that utilitarianism and cost-benefit analysis are flawed — and are to be rejected — because of their callousness towards the individual, his rights, and the processes by which those rights are exercised. "The notion of human rights," as Steven Kelman puts it in his recent "ethical critique" of cost-benefit analysis, "involves the idea that people may make certain claims to be allowed to act in certain ways or to be treated in certain ways, even if the sum of benefits achieved thereby does not outweigh the sum of costs."<sup>11</sup> A right is not something that can be assigned on "efficiency" grounds; a right is precisely an individual's "trump"<sup>12</sup> against the claims of efficiency, his protection against social "utility monsters" like the one that recently devoured the Poletown section of Detroit.<sup>13</sup> The problem

<sup>9</sup> "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies* VIII (January 1979), p. 103.

<sup>10</sup> Tribe, "Technology Assessment," p. 629, *emphasis original*. This quotation may perhaps paint the argument as rather vague and emotional. But other philosophers have argued a similar point on logical grounds. See, for example, Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978), esp. pp. 102-104.

<sup>11</sup> Steven Kelman, "Cost-Benefit Analysis: An Ethical Critique," *Regulation*, January/February 1981, p. 36.

<sup>12</sup> "Trump" is a term favored by Ronald Dworkin. See his *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

<sup>13</sup> For a coherent account, see William Safire, "Poletown Wrecker's Ball," *New York Times*, 30 April 1981, p. A31. I should note that it seems unlikely that Detroit's abuse of eminent domain powers was a real utility monster in the sense that the sum of benefits actually outweighed costs. To the contrary, it strikes me as likely that the project was, by most standards, a big utility loser. This underscores a point I will

with cost-benefit analysis, we are encouraged to believe, is that, in reducing social questions to the common metric of a homogenized utility, it treats human beings — and their historically rich and idiosyncratic circumstances — with insufficient respect.

I'm inclined to agree. To a large extent, this is indeed the problem with cost-benefit and related approaches. But I'm also inclined to think that this line of criticism is neither central to, nor maintained consistently in, the thinking of Tribe, Kelman, or other environment-minded critics.

### Utilitarianism, Moral Theory, and Political Theory

Early on in his critique, Kelman marvels at the complacency of economists in using cost-benefit analysis uncritically at a time when that technique's philosophical underpinnings — utilitarianism — represent "a minority position among contemporary moral philosophers."<sup>14</sup> Controversiality, or even unfashionability, is never a very good argument against a philosophic doctrine. But it is certainly true that the recent trend in political philosophy (let alone moral philosophy) has been away from utilitarianism and toward theories of basic human rights. In chiding economists in this way, Kelman would seem to be allying himself with those he describes as the "non-utilitarian philosophers."<sup>15</sup> He is not entirely unjustified in allowing us to draw this inference; but, as I will eventually suggest, his reasons for objecting to utilitarianism are ultimately rather different from those of the more prominent of these philosophers.

#### *The Two Forms of Utilitarianism*

Let me begin with a not-so-minor quibble about Kelman's attack on utilitarianism.

Utilitarian doctrine comes in two basic flavors. The primary version, and the one Kelman implicitly means when he says "utilitarianism," is "act" (or sometimes "extreme") utilitarianism. As a moral theory, act-utilitarianism holds, roughly speaking, that a person's action is morally correct when the benefits to society of taking the action outweigh the costs to society. Given such a definition, it is quite easy to construct, as Kelman does, hypothetical situations in which the balance of costs and benefits makes it

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make below: It is not utility calculations so much as the notion of an overriding "social interest," however constructed, that causes "monsters."

<sup>14</sup>Kelman, p. 34.

<sup>15</sup>Ibid., p. 36.

morally correct (say) to lie, to break a sworn promise, or to frame an innocent man — and actually immoral by definition *not* to do so.

Rule-utilitarianism, advanced in large measures in reaction to act-utilitarianism's counter-intuitive quality, is quite a different matter. Here the cost-benefit test is applied not to an individual's actions directly but to a rule or system of rules. That system of rules is best which maximizes social utility; and the morality of an individual's conduct is measured by its conformance with the maximizing set of rules — not by its own costs and benefits measured in isolation.<sup>16</sup> Rule-utilitarianism is an institutional or, as they tend to say nowadays, a "systemic" notion.

This immediately points up a small flaw in Kelman's analysis. Are we not entitled to view pollution, health, and safety regulation as problems in the selection of systems of rules? To the extent that this is so, the application of cost-benefit analysis to regulatory decisions may very often be understood in rule-utilitarian — not act-utilitarian — terms. It may remain, as I am indeed inclined in part to agree, that such decisions should *not* in the end be made on utilitarian grounds; but this follows not at all from Kelman's arguments against "utilitarianism."<sup>17</sup>

Utilitarianism (of either sort) is a consequentialist or "teleological" form of moral theory: It postulates a conception of the good (in this case social utility) and deduces the right — the set of moral rules — using the logical procedures of maximization theory.<sup>18</sup> The good is prior to the right, and moral rules are but in-

<sup>16</sup>Modern discussions of rule-utilitarianism generally trace from John Rawls's seminal article, "Two Concepts of Rules," *The Philosophical Review* LXIV (1955), reprinted in (among other places) Michael D. Bayles, ed., *Contemporary Utilitarianism* (Garden City: Doubleday, 1968), p. 59. (Sir Roy Harrod's article "Utilitarianism Revised," *Mind* 45 [1936]: 137, seems to have attracted far less attention.) The concept probably goes back at least as far as Hume, though, and there is much discussion over whether John Stuart Mill was a rule-utilitarian. The terms "act" and "rule" themselves were not coined until 1959 by R.B. Brandt, *Ethical Theory* (Englewood Cliffs, N.J.: Prentice-Hall).

<sup>17</sup>Kelman notes that a sophisticated act-utilitarian will include in his calculation the effect his action might have on his own and other people's future propensity to follow utilitarian precepts, and he is careful in his own examples to construct situations in which the act in question has only negligible effects on the institutions of truth-telling, promise-keeping, law enforcement, etc. But this makes act-utilitarianism no less exclusively the focus of his arguments; rule-utilitarianism requires that one obey the institutional rule even when, as it were, the existential costs and benefits suggest otherwise. Of course, this is not to say that cost-benefit analysis is ever actually used in a rule-utilitarian way. But that is a different argument from the one Kelman makes, and it is not an indictment of utilitarianism in principle.

<sup>18</sup>See, for example, John Harsanyi, "Morality and the Theory of Rational Behavior," *Social Research* 44 (1977): 623; and "Rule Utilitarianism, Rights, Obligations, and the

struments for achieving the good. There is also a quite different kind of moral theory: non-consequentialist or "deontological" theory. And it is here we must look to find the center of gravity of modern "non-utilitarian" thought.<sup>19</sup>

### *Deontological Moral Theories*

A deontological theory turns the tables and gives priority to the right over the good. Instead of attempting to derive the appropriateness of a rule solely from a consideration of consequences, it seeks to deduce rules from more primitive postulates about rules themselves. This approach is no less "rational" than utilitarianism. But it may arguably be "rational" in a different sense; and if there is a distinction between instrumental and non-instrumental rationality, perhaps here is where that distinction is to be made.

Almost without exception, recent non-utilitarian theorists have chosen to associate themselves with the teachings of Kant and, in particular, with the notion that a theory of rights should derive from a consideration of the person and an analysis of the treatment appropriate to him. Philosophers have differed in their interpretations of Kant on this score, but all agree that moral behavior involves treating others with suitable respect. Some emphasize a respect for the historical uniqueness and particularity of the individual, while others stress not respect for its own sake but the equality with which an institutional structure displays such respect.<sup>20</sup>

To Charles Fried, for example, systems of rights must embody "a respect for persons as the ultimate moral particulars. . . ." <sup>21</sup> Robert Nozick holds that such a system must "reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their

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Theory of Rational Behavior," *Theory and Decision* 12 (June 1980).

<sup>19</sup>My own view is that rule-utilitarianism of a very sophisticated sort is not without merit — and, indeed, not entirely inconsistent with deontological theories. But this is not the place to elaborate this view. (I'm thinking here especially of the work of F.A. Hayek. See his "Notes on the Evolution of Systems of Rules of Conduct," in *Studies in Philosophy, Politics, and Economics* (Chicago: The University of Chicago Press, 1967); and generally *Law, Legislation, and Liberty*, vol. 1: *Rules and Order* (Chicago: The University of Chicago Press, 1973).) In examining deontological theories in this section, I mean primarily to contrast this important school of "non-utilitarian philosophers" with the ideas of Kelman, Tribe, and other pro-environment writers who attack utilitarianism.

<sup>20</sup>H.L.A. Hart, "Between Utility and Rights," in Alan Ryan, ed., *The Idea of Freedom, Essays in Honour of Sir Isaiah Berlin* (Oxford: Oxford University Press, 1979), p. 77.

<sup>21</sup>Fried, p. 20.

consent."<sup>22</sup> And Ronald Dworkin speaks of "the vague but powerful idea of human dignity," associated with Kant, which "supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community and holds that such treatment is profoundly unjust."<sup>23</sup>

Like utilitarian approaches, deontological theories are both moral theories and political-institutional theories. This is so not merely because their authors invariably jump back and forth between the two realms; rather, it is because the moral and the institutional cannot easily be separated. This is not therefore to say that a moral theory is immediately a political or institutional one; indeed, many of the difficulties that arise in trying to find moral foundations for social policy attend a careless transition from the level of personal morality to the level of social institutions.

The connection between the two levels is illuminated by casting moral prescriptions in the language of rights. A deontological moral theory yields a system of rules or, as Fried argues, of "moral absolutes"<sup>24</sup> that can be understood as moral rights. The problem, as we'll see, then becomes one of transforming into political or legal rights whichever moral rights emerge from one's moral theory.

### Ethics and Institutions

Those who criticize the use of cost-benefit analysis in regulatory decision-making are frequently quite anxious to talk in terms of rights and absolute claims and to deride utilitarianism for ignoring such claims. "We do not do cost-benefit analyses of freedom of speech or trial by jury," says Kelman. "The Bill of Rights was not RARGed. . . . [T]he Emancipation Proclamation was not subjected to an inflationary impact statement."<sup>25</sup> What this seems to imply is that administrative decisions by regulatory agencies are logically equivalent in form to the Bill of Rights or the Emancipation Proclamation, and that non-utilitarian regulation somehow involves

<sup>22</sup>Nozick, p. 30.

<sup>23</sup>Dworkin, pp. 198-199. Not content to stop here, though, Dworkin quickly adjoins this to the notion of political equality, which "supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves. . . ."

<sup>24</sup>Fried, p. 81.

<sup>25</sup>Kelman, pp. 35-36. The remark about the Emancipation Proclamation was evidently made by the United Steelworkers Union in a comment on an OSHA rule "to reduce worker exposure to carcinogenic coke-oven emissions." The acronym RARG refers to a risk-analysis procedure, I believe.

inserting absolute claims directly into the rule-making process as now constituted. But to believe this, as you might guess, is in fact to make a number of illegitimate leaps.

*Positive and Negative Rights*

Let's back up. On the level of moral theory, once again, it is possible to cast the imperatives of deontology in terms of rights. For example, a Kantian respect for the person dictates that one has an obligation not to harm someone else intentionally; another way to say this is that a person has a moral right not to be harmed intentionally by another. This right against harm is a *negative* right: it dictates what you may not do *to* me rather than what you must do *for* me. There are also positive rights, which do detail what you (or some specified persons or institutions) must do for me: a child, for example, may be viewed as having a positive right to proper care and feeding. This is a much-used distinction, and it is not, I think, controversial.

The important point is that the two types of rights are not symmetric. A negative moral right can carry over immediately into the institutional realm without much ado. If I have a moral right not to be harmed,<sup>26</sup> this can quite easily become a legal right not to be harmed. But if I have some kind of positive moral right, I cannot transform into the institutional realm without specifying the institutional mechanism that is to provide me with the content of my positive legal right. (Whom do I take to court if I don't get fed?)

Positive legal rights always make a claim on the resources of others. As Fried puts it, such rights "are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitations."<sup>27</sup> Moreover, some positive rights have more natural limits than others. For example, it is quite clear — to within fairly narrow limits — what it means to give someone a jury trial. But it is far less clear what it means to give someone "a clean environment" or "safety."

For the most part, the Emancipation Proclamation and the Bill of Rights guarantee *negative* rights. And there is no problem in deducing negative political rights of this sort directly from a deontological moral theory. (In fact, these particular rights accord extremely well

<sup>26</sup>Of course, *enforcing* that right may involve a positive right: The right to law-enforcement services; but that makes the right against harm itself no less negative.

<sup>27</sup>Fried, p. 110.

with Kantian theories.) But what about an Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) rule? Can such a rule be determined on deontological grounds?

The first thing to notice about an OSHA or similar ruling is that it is not easily cast in terms of rights at all. Such a rule is an administrative directive requiring specific people to do specific things; it accords relative privileges to some parties and imposes various obligations on others, but it does not grant anyone a right.<sup>28</sup> Secondly, and relatedly, an administrative regulatory directive is ahistoric and *ad hoc*; it quite literally collapses process into result. Administrative regulation takes a situation as given; it does not view that situation as the result of a historical process in which certain basic rights may have been violated. And it therefore sees its function as correcting the *ad hoc* situation by direct manipulation rather than as redressing historic violations of rights. The most egregious example of this adhocery is the "best available control technology" (or, invariably, "BACT") form of regulation ubiquitous in present-day U.S. pollution control policy.<sup>29</sup>

This immediately suggests that the administrative approach to regulation *qua* institutional mechanism bears a strong formal similarity to act-utilitarianism *qua* moral theory. To put it another way, the logic of conceiving the regulatory problem as an *ad hoc* "social decision" is very much refractory to the logic of rights. And herein lies a source of great intellectual confusion among those who wish to discuss regulation in the language of human rights while implicitly assuming the institutional structure of *ad hoc* administrative regulation.

Kelman once again provides an example. "When officials are deciding what level of pollution will harm certain vulnerable people — such as asthmatics or the elderly — while not harming others," he writes, "one issue involved may be the right of those people not to be sacrificed on the altar of somewhat higher living standards for the rest of us."<sup>30</sup> The message Kelman takes from this seems to be that officials should therefore decide the question of pollution level on other-than-utilitarian grounds.

In fact, it seems to me, the implication is far more radical than that.

<sup>28</sup>On the distinction between administrative or "public" law and rights-based or "private" law, see generally Hayek, *Law, Legislation, and Liberty*.

<sup>29</sup>A BACT rule specifies not merely an allowable level of pollution but the particular technology one must use in pollution control.

<sup>30</sup>Kelman, p. 36.

If an asthmatic has a right against being "sacrificed" on the altar of progress, it must mean that she actually has some more fundamental right against being harmed by pollution. Her fundamental right is directed against the polluters; and her "right" not to have her right overridden by the social decision-maker is only derivative of that more fundamental right. But if people have rights against polluters, then those rights will themselves serve to determine the appropriate level of pollution.<sup>31</sup> Therefore, to assert the existence of such moral or legal rights is not to suggest alternate criteria for central decision-making but to argue for what is at least in part an alternate *institutional arrangement*.

In fact, since a right against pollution is a negative right, deriving somehow from the negative moral obligation not to harm others, a scheme of pollution rights transform directly from the moral to the legal realm. There are a number of interesting issues involved in such a transition; many of these — particularly the "efficacy" issues — have been dealt with elsewhere during this symposium. The result seems fairly clearly to be that decentralized rights-based systems, whether founded entirely on historic conceptions of rights in common law or on the better-known "economic" approaches to pollution rights, present a far stronger case on efficacy grounds than do conventional administrative schemes (like BACT). I'll leave it to others to argue this position — not merely because to pursue that analysis would take me far afield but also because, as I will suggest again shortly, a dispute about efficacy is not wherein the opposition to such schemes lies.

My argument is more modest, though perhaps more important to understanding the philosophical — and ideological — structure of the debate over regulation. And the argument, once again, is this: An insistence upon absolute moral claims in regulatory matters is closely bound to a decentralized system of legal rights and antagonistic to a conception of centralized decision-making.

#### *Duties and Central Decisions*

Perhaps this can be seen more clearly by turning the problem around and looking at it from the other side. Consider a situation in which, for various irrelevant reasons, a person or government agency is forced to make a central decision that affects the allocation of

<sup>31</sup>That is to say, the process of adjudicating claims against polluters will determine the level of pollution. The "correct" level is the level at which no one's rights are found violated. This may be very little pollution in some cases and quite a lot in others.

resources among competing claims — and perhaps even the life and health of human beings. Should this decision be made on some sort of utilitarian grounds? I would argue that there is actually a good case for an affirmative answer.

Let's begin at the level of individual moral decision. Suppose you have at your command resources that could save the lives of a small number of people if used in one manner but could save the lives of a separate and much larger group if used in a different way. Which group should you save? If you are a non-utilitarian philosopher, the answer is not necessarily obvious.

In an intriguing and challenging article, John Taurek, for example, argues that the number of people involved should not be a factor in such a moral decision. The reason one wishes to save a human being from harm, he argues, is that one empathizes with him as a fellow human being — not because the individual has some objective value in the sense that an inanimate thing may have value. "The loss of an arm of the *Pietà* means something to me not because the *Pietà* will miss it. But the loss of an arm of a creature like me means something to me only because I know he will miss it, just as I would miss mine. It is the loss to *this person* that I focus on. I lose nothing of value to me should he lose his arm. But if I have a concern for him, I shall wish he might be spared his loss."<sup>32</sup>

To Taurek, there is thus no additivity — there is nothing to add up — in moral decisions of this sort. It is no greater loss to *any individual* because he perished with a larger rather than smaller number of others. And, therefore, one is morally justified in saving the smaller number if there are special considerations (e.g., friendship with particular individuals) involved — or indeed in flipping a coin to decide which group to save if there are no special considerations.

This analysis seems to me to capture some of the meaning behind the notion that we should value each life infinitely; but it also has some strongly counterintuitive implications seldom considered by those who trumpet the infinite value of life. My point here is that, however one feels about this analysis of individual moral choice, the logic of analysis in the case of a "collective" choice will be quite different.

Taurek analyzes the situation faced by a Coast Guard captain try-

<sup>32</sup>John M. Taurek, "Should the Numbers Count?" *Philosophy and Public Affairs* 6 (Summer 1977): 307. Taurek's analysis is not only Kantian but, it seems to me, arguably Smithian, in the sense of Adam Smith's *Theory of Moral Sentiments* (Indianapolis: Liberty Classics, 1976), which bases morality on what the eighteenth century called the sentiment of sympathy — what we would now call empathy — with one's fellow man.

ing to rescue the inhabitants of an island being engulfed by a volcanic eruption. One small group has congregated on the south side to await rescue, while a much larger group has assembled on the north side. The captain can save only one group before the island is destroyed. Which shall it be? If the captain were at the helm of his own ship, Taurek would be content to have him flip a coin; but, since he is a public official, the logic of the situation is entirely different. The reason people would instantly assert that the captain should head north, he says, is "that in the minds of those who are so quick to judge it is assumed that each of those in jeopardy has a citizen's equal claim to the use or benefit of that resource. For these reasons the Coast Guard captain is seen as *duty-bound* in the situation; duty-bound to behave in accordance with a policy for the use of that resource agreeable to those whose resource it is. Hence the considerations operative here are quite different from those relevant to the decision of a private citizen captaining his own ship or dispensing his own drug or reaching out his hand under no moral constraints but those that would fall on any man."<sup>33</sup>

The position of the "social decision-maker" at the EPA or OSHA is entirely analogous to that of the Coast Guard captain; his duties are public ones, and his decisions about pollution or worker safety affect the allocation of other people's resources. Thus it seems to me more than arguable that this decision-maker is morally duty-bound to balance competing claims, to make tradeoffs, to let the numbers count -- indeed, to undertake cost-benefit analysis.

## The Ideology of Regulation

We are left with a question. If the institutional structure of centralized administrative regulation is so antagonistic to the basic human rights and absolute claims so often cited by environmentalists, why do they and their allies so strongly support that form of regulation?

Intellectual confusion may be part of the answer. But a careful analysis of the environmentalist position suggests a better explanation.

### *Values as Outputs*

Let's return to the critique of cost-benefit analysis. Much of the complaint, you'll recall, rested on a rejection of "instrumental rationality." An equivalent way to look at the argument is to see it as

<sup>33</sup>Taurek, p. 311, emphasis original.

an attack on the "fact/value" distinction implicit in cost-benefit analysis.

The cost-benefit analyst implicitly cleaves to a particular form of the fact/value distinction in which people's preferences are taken as given, as unanalyzable primitives that cannot be derived from facts or even questioned "rationally." The critic invariably points out against this view that facts and values are actually closely intertwined: our tastes and values are influenced by our actions just as often as our actions are influenced by our tastes and values. So far so good; but it is not legitimate to conclude from this that the values and preferences of individuals should therefore be transformed in our thinking from an *input* of social decision-making to an *output* of that decision-making.

Tribe is not alone in being unable to avoid the temptation to make exactly this illegitimate leap: For "the whole point of personal or social choice in many situations," he writes, "is not to implement a given system of values in the light of perceived facts, but rather to define, and sometimes deliberately to reshape, the values — and hence the identity — of the individual or community that is engaged in the process of choosing."<sup>34</sup> For purposes of social decision-making, values do not come from people; they come, well, from somewhere else. And social policy should not only submit itself to these "higher" or transcendental values but should strive to instill these values in the populace.

That this is indeed the view of present-day environmentalists comes through clearly in Kelman's very useful recent survey of attitudes toward pollution control. Environmentalists, Kelman explains, neither share the economist's radically non-judgmental stance nor believe in economic theorems that "depend on the assumption that the individual is the best judge of his own welfare, and thus that individual preferences be recognized and left alone."<sup>35</sup>

"People should not pollute," opines one of Kelman's respondents. "It should not be up to them."<sup>36</sup>

The environmentalist is concerned not merely with controlling pollution but with controlling the motives and values of the citizenry. "Few environmentalists are willing to be non-judgmental — they condemn pollution. Indeed, that is at the heart of being an environmentalist — to believe, and to propagandize for the belief,

<sup>34</sup>Tribe, "Policy Science," p. 99, emphasis added.

<sup>35</sup>Kelman, "Economists and the Environmental Muddle," *The Public Interest*, Summer 1981, p. 114.

<sup>36</sup>*Ibid.*, p. 113.

that one ought to have preferences that give a clean environment a strong weight."<sup>37</sup> Thus, administrative-control approaches to pollution regulation are superior to rights-based or "economic" approaches because, in the view of environmentalists, administrative control makes a moral statement against pollution that encourages the development of appropriate preferences.

Kelman himself seems to sympathize with the environmentalist position, at least so far as its attitude toward cost-benefit analysis is concerned. He suggests, for instance, that people possess both "higher" and "lower" preferences. "The latter may come to the fore in private decisions, but people may want the former to come to the fore in public decisions."<sup>38</sup> Cost-benefit analysis, which totes up only these "lower" preferences (what the economist would call "revealed preferences"), thus militates against the expression of "higher" preferences in the "social decision." For example, the individual may well take daily risks that clearly demonstrate his implicit value of life to be rather less than infinity; yet, says Kelman, the same individual may want the political process somehow to value life infinitely — since we often "wish our social decisions to provide us the occasion to display the reverence for life that we espouse but do not always show."<sup>39</sup>

#### *Liberalism: A Definition*

This is a political philosophy very different in form from that of the "non-utilitarian philosophers." Despite their many differences, writers like Fried, Nozick, and Dworkin have constructed — on the political-institution level — what we might unambiguously describe as liberal theories.

According to Dworkin's very useful criterion, a liberal political theory is one that is "neutral on what might be called the question of the good life."<sup>40</sup>

What it means for an institutional structure to treat people with dignity or as free, independent, or equal can be understood in two fundamentally different ways. One view holds that "political decisions must be, so far as possible, independent of any particular con-

<sup>37</sup> *Ibid.*, p. 115.

<sup>38</sup> Kelman, "Cost-Benefit Analysis," p. 38.

<sup>39</sup> *Ibid.* More importantly, Kelman notes, to ascribe pricelessness to life or the environment serves a value-molding function. "Its value-affirming and value-protecting functions cannot be bestowed on expressions that merely denote a determinate, albeit high, valuation."

<sup>40</sup> Dworkin, "Liberalism," in Stuart Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), p. 127.

ception of the good life, or of what gives value to life." The second position "argues, on the contrary, that the content of equal treatment cannot be independent of some theory about the good for man or the good of life, because treating a person as an equal means treating him the way the good or truly wise person would wish to be treated."<sup>41</sup> Liberalism takes the first position; and the second is occupied by the various kinds of conservatism and most forms of socialism, which do not wish to be neutral with regard to the citizen's conceptions of value.

Dworkin implies that there is only one kind of liberalism by this definition; in fact, I would argue, there are at least two basic forms: the modern (i.e., "1960s") version Dworkin defends and the older or "classical" form.

The neutrality of an institutional system with respect to conceptions of the good is bound up with what Dworkin calls "external preferences" or what I prefer to call "transcendental externalities."<sup>42</sup> Such externalities arise when one person's actions enter into the "utility function" of a second person not because the first is physically or even economically affecting the second but because of what we might call "moralistic" connections.

Consider, for example, the archetypical little old lady in Boston who is offended (whose utility is diminished) by the thought of someone reading pornography in private in Kansas City. The porn reader offends against her "external" preferences, those which reflect her transcendental conception of the good; and if she and her like-minded compatriots happen to outnumber pornography lovers, a vote or cost-benefit analysis might well result in the outlawing of pornography — thus officially establishing one particular conception of the good.

Dworkin feels such situations should be prevented by a system of rights — which cost-benefit analysis or democratic votes cannot override — whenever it is "antecedently likely" that external preferences would otherwise win the day. "The conservative," by contrast, "will not aim to exclude moralistic or other external preferences from the democratic process by any scheme of civil rights; on the contrary, it is the pride of democracy, for him, that external preferences are legislated into public morality."<sup>43</sup>

The modern liberalism of Dworkin is distinguished from classical

<sup>41</sup> Ibid.

<sup>42</sup> See my "Knowledge, Order, and Technology" (Ph.D. dissertation, Stanford University, 1981), chap. 8.

<sup>43</sup> Dworkin, "Liberalism," p. 138.

liberalism in believing that such transcendental externalities interfere with institutional neutrality only in the area of "social" freedoms — freedom of speech, of sexual mores, of "lifestyle." Neutrality, he believes, does not demand any protections in the less-fashionable area of "economic" freedoms. This contrasts with the view of classical liberalism, which holds that there should be no such asymmetry — that institutions should not be empowered to interfere in "capitalist transactions between consenting adults" any more than to dictate sexual mores.

It is my view that, by Dworkin's own criteria, the asymmetry he argues for cannot in fact be maintained; but this is not the place to make that argument.<sup>44</sup> Indeed, it is significant that we do not have for present purposes to distinguish between the two liberal visions. Environmentalism and related doctrines qualify as neither form.

The liberal wishes political decision-making to be as neutral as possible toward the citizen's conception of the good. Thus, in the case of central decision-making about collective resources, he would be concerned with the idea — mentioned by Taurek and stressed by Dworkin — that each citizen has an equal claim to the benefits of the resource. Utilitarianism, with its classical maxim "everybody to count for one, nobody for more than one," arguably does not apply the principle of equal concern in one form.<sup>45</sup> And, as Dworkin suggests, the problems of non-neutrality in utilitarianism come precisely from *counting* "higher" (or "external") preferences — not from *failing* to employ them sufficiently. Indeed, it should be

<sup>44</sup>But let me try to sketch it. Consider in place of the little lady from Boston the socialist intellectual from Berkeley who is offended because a New York landlord charges a rent above the "just price"; or the unionist who is upset because workers in a distant industry are being paid "unfairly" low wages; or the planner in Philadelphia who is outraged because a developer has plunked a condominium complex on a California beach. In all these cases, external preferences are at work: preferences about what constitutes the good for someone else. And it is not at all unlikely that such preferences could be the cause of government interference with landlord, industry, or developer.

<sup>45</sup>Let me be clear that I'm not necessarily arguing in favor of utilitarianism (or cost-benefit analysis) applied to centralized regulatory decisions. Although utilitarianism may be neutral in the sense that it treats people as having equal worth, "it does this only by in effect treating individual persons as of no worth." (Hart, p. 79.) People are merely instrumental vessels for the aggregate happiness that is of real concern. Utilitarianism counts everyone — and everyone's conception of the good — equally; but it does so by mashing those conceptions into a formless pulp. What I *am* arguing is that, if we *must* make a centralized decision about "public" resources, then we should prefer something like utilitarianism to a criterion involving the decision-maker's perception of "social values" or of the "higher preferences" the citizen would like to see emphasized in public policy but which, alas, he is unable to incorporate into his own decisions.

obvious that counting "higher" preferences and protecting the claims of individuals are antagonistic notions. Utilitarianism may let loose the occasional "utility monster"; but social decision-making on the basis of "higher" preferences would make public policy look like a remake of *Forbidden Planet*.

### *Conservatives in Conflict*

In the end, environmentalism is a fully conservative political theory. It insists not that the government be neutral with respect to private virtue but that it actively promote a specific set of virtues.

For environmentalists, the relevant value-system is built around an understanding of the proper attitude one should take toward nature or "the environment." Policy should embody and enforce this "environmental ethic." It is for this reason that environmentalists "care about the motives of polluters and wish to stigmatize pollution."<sup>46</sup> One of Kelman's interviewees put it this way.

A crime against nature is a crime against society. I am part of a policy that has been adopted and that has an important goal. If I violate that policy, that's the same as if I rape, pillage, and burn. Society should be vengeful and punitive against violators of this policy.<sup>47</sup>

<sup>46</sup>Kelman, "Economists and the Environmental Muddle," p. 113. The environmentalists interviewed by Kelman complain that economists do not consider the intentions or motives of actors. This may be so. But deontological theorists do, and, significantly, intention enters in their theories (as far as pollution is concerned) in precisely the *opposite* way from that suggested by the environmentalists. In Fried's formulation, for example, moral force attaches most strongly when the harm is intentional. When a harm is inflicted accidentally or as an unintended byproduct of the agent's intention, compensation may certainly be in order — but the moral force is lessened. To the extent, then, that pollution is merely an unintended by-product of production, moral theory would suggest that such conduct not be subject to the same sanctions as malicious action. Indeed, this is precisely the distinction incorporated in the common law since the Middle Ages: Actions whose intention is malicious are the province of the criminal law, whereas pollution is relegated to the status of a tort under civil law — precisely on the grounds that the harm inflicted is not the primary intention of the agent. This is true even in the case of so-called "intentional torts," in which harm is inflicted deliberately but without malicious intent. (The oft-cited example is the case of a shipowner who deliberately tied his boat to a dock in the storm knowing that this would damage the dock; but his intention was not to harm the dock but to save his boat, so the moral — and legal — force of the action is lessened.) Indeed, environmentalists clearly recognize that this is precisely the nature of our moral intuition about the motives of polluters — it is precisely for this reason that they have so often felt it necessary to insist, however improbably, that modern technology (and its side-effects) developed not as side-consequences of the modest desire of individuals to better their lot but as a conscious, willful attempt to dominate nature. (See, e.g., William Leiss, *The Domination of Nature* (Boston: Beacon Press, 1974).)

As Dworkin notes in a related context, it is "distinctive to the conservative's position to regard regulation as condemnation and hence as punishment. But he must regard regulation that way, because he believes that opportunities should be distributed, in a virtuous society, so as to promote virtuous acts . . ."48

Of course, there are also other — even more familiar — forms of conservatism. Principal among these is good old-fashioned American conservatism, the set of positions which, broadly speaking, characterize the Reaganite view. This form of conservatism also holds that social institutions are to be justified, at least in part, on their ability to produce a society embodying a specific set of values. But the values in this case are, needless to say, somewhat different from those to which the environmentalist clings.

We can see the American conservative analysis at work to some extent in the writings of Posner, who justifies his wealth-maximization theory of rights partly on the grounds that "the wealth-maximization principle encourages and rewards the traditional virtues ('Calvinist' or 'Protestant') and capacities associated with economic progress. The capacities (such as intelligence) promote the efficiency with which resources can be employed; the virtues (such as honesty, and altruism in its proper place), by reducing market transactions costs, do the same."<sup>49</sup>

Wealth maximization differs from utilitarianism in that it wishes to add up not people's unconstrained desires but their "willingness to pay," a notion that explicitly includes the fact of a finite budget. Ignoring the individual's budget constraint — the extent of which constraint is inversely related to that individual's productive contribution to the economy — is, to Posner, the central problem with utilitarianism. "In effect, the choices of the unproductive are weighted equally with those of the productive. This obscures the important moral distinction, between capacity to enjoy and capacity to produce, that distinguishes utility from wealth."<sup>50</sup> Wealth-maximization does not ignore this distinction, a fact arguably qualifying it as a kind of "supply-side" consequentialism in the manner of George Gilder,<sup>51</sup> one that "gives weight to the human impulse, apparently genetically based, to share wealth with people who are

<sup>47</sup> Kelman, "Economists and the Environmental Muddle."

<sup>48</sup> Dworkin, "Liberalism," p. 140.

<sup>49</sup> Posner, "Utilitarianism, Economics, and Legal Theory," p. 124. For a critique by Dworkin, see "Is Wealth a Value?" *Journal of Legal Studies* IX (March 1980): 191.

<sup>50</sup> Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication," *Hofstra Law Review*, Spring 1980, p. 499.

<sup>51</sup> See Gilder, *Wealth and Poverty* (New York: Basic Books, 1981).

less effective in producing it."<sup>52</sup>

The formal similarity between the environmentalist and the American conservative viewpoints is striking. Both have a coherent vision of the specific set of personal values the good individual ought to embrace, and both are insistent that social institutions be judged by their ability to instill those values in the populace. And both object to utilitarianism not because it treats individuals with insufficient respect, but because it is too indiscriminate — too neutral — in the virtues it rewards and the vices it punishes.

It is in many ways the similarity between the two viewpoints that makes the debate between them seem at times so heated. Both are fighting in the same way for the same turf, which, unhappily, is less the hearts and minds of the citizenry than it is the levers of government. One result has been polarization and caricature, to such an extent that one might almost be forgiven for seeing the dispute as a kind of class-war among conservatives,<sup>53</sup> or at least as a doctrinal squabble between the Low Church of Moral Majority fundamentalism and the High Church of the earth's cathedrals (the Sierras).<sup>54</sup>

### On the Liberal Alternative

Let me end on the different note of guarded optimism characteristic of the embattled liberal.

Regulation that promises to establish and promote the value system of one's group over that of others has clear political appeal. An approach to regulation that offers neutrality necessarily evokes a more lukewarm response among the virtuous. But liberal approaches to pollution control — like those based on negative rights in common law — do have the corresponding advantage that they are not necessarily antagonistic to either the conservative's or the environmentalist's system of virtues.<sup>55</sup>

This may be cause for at least a little optimism. Perhaps the warring factions will someday come to recognize the liberal alternative as a mutually advantageous compromise position in the battle of virtue.

<sup>52</sup> Posner, "The Ethical and Political Basis," p. 494.

<sup>53</sup> Cf. William Tucker, "Environmentalism and the Leisure Class," *Harper's*, December 1979.

<sup>54</sup> In what has proven to be one of the seminal works of modern environmentalist thought, medievalist Lynn White, Jr., traced the postulated "environmental crisis" to a problem in Christian theology — to which he proposed a theological solution. ("The Historical Roots of Our Ecological Crisis," *Science*, 10 March 1967.)

<sup>55</sup> One is often inclined — mistakenly, I believe — to see rights-based approaches as

particularly congenial to the conservative vision. But there is an equally strong case that such approaches accord as well if not better with environmental values. In one article, indeed, Tribe himself seems to recognize this. See his "Towards a New Technological Ethic: The Role of Legal Liability," in T.J. Keuhn and Alan Porter, eds., *Science, Technology, and National Policy* (Ithaca: Cornell University Press, 1981), p. 347.

## THE PHILOSOPHY AND IDEOLOGY OF POLLUTION REGULATION

*Charles W. Baird*

**R**ichard Langlois warns us to beware of wolves in sheep's clothing: Those who, like Laurence Tribe and Stephen Kelman, inveigh against too much cost-benefit analysis of regulatory policy on the grounds that cost-benefit analysis is likely to trespass against fundamental human rights, may in fact want to defend only some human rights, but to trespass against others in the name of service to, as Kelman puts it, "higher (public) preferences." Such people, as Langlois says, typically are inclined not to regard economic rights as worthy of defense. They are eager, for example, to protect the lifestyle rights of backpackers at the expense of the rights of private owners of undeveloped land, and they do so in the name of protecting the environment. Such people seem to endorse the establishment of an endowed class of morally and intellectually superior people to inculcate higher-order (public) values in the rest of us in order to protect us against the false choices we would make if we were guided by our lower-order (private) values.

Langlois establishes that an alternative to both vulgar cost-benefit analysis that ignores questions of basic human rights and direct administrative control by an endowed elite that trespasses against so-called economic rights does exist and ought to be implemented. His alternative is a rights-based approach involving the adjudication of pollution disputes as torts. Langlois would first identify the correct set of absolute negative claims that each individual has against every other individual and then implement cost-benefit analysis of

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regulation subject to the constraint that this set of negative claims cannot ever be violated. He would first determine what are human rights and then determine what is good regulatory policy by applying cost-benefit analysis wherever those human rights are not thereby trespassed against. In cases where human rights claims seem to be in conflict he would determine good policy through private law adjudication of disputes. His is a rights-before-utility approach. Where, for example, pollution exists he would not impose BACT (Best Available Control Technology) regulations to get rid of it. He would, instead, inquire into the history of the development of the pollution at issue to see whose entitlements were trespassed against and rectify those trespasses. "If people have rights against polluters . . . those rights will themselves serve to determine the appropriate level of pollution." (p. 290)

I agree with Langlois and with Kelman ("Cost-Benefit Analysis — An Ethical Critique," *Regulation*, Jan./Feb. 1981, pp. 33-40) that there is a lot wrong with an unconstrained application of cost-benefit analysis to regulatory questions. In brief, such an approach inevitably leads to the denial of someone's rights. I also agree with Langlois that Kelman, and other advocates of ad hoc administrative control in pollution matters, talk about rights in a sense that is very different from, and logically inferior to, the libertarian view. Such advocates are really selling the tyranny of a "public interest" elite, while libertarians are concerned with defining and defending the rights of all individuals. But Langlois lets Kelman get away with too much. In his first section, Kelman repeatedly attacks cost-benefit analysis by suggesting that cost-benefit proponents are, at least implicitly, utilitarian moral philosophers. While all utilitarian moral philosophers may be advocates of cost-benefit analysis of government regulation, not all advocates of cost-benefit analysis purport to be utilitarian moral philosophers. Harold Demsetz, for example, openly advocates making most regulatory decisions on the basis of cost-benefit analysis, but he would not say that actions with benefits that exceed costs are therefore moral. He would not, as Kelman implies, "permit rape . . . if it could be demonstrated that the rapist derived enormous happiness from his act while the victim experienced only minor displeasure." (Kelman, p. 35)

Murray Rothbard has criticized economists such as Demsetz for ignoring the question of entitlements in their discussions of positive exchange theory. He points out that one cannot engage in what can legitimately be called voluntary exchange with things that one has stolen from others. I believe that is a valid criticism. However, it is

nonsense to imply, as Kelman does, that those who focus on the narrow question of efficiency are moral cretins. Demsetz would be almost as upset by the ravages of the "utility monster" as he would by the antics of the endowed elite who remake the *Forbidden Planet*. Kelman's suggestion that advocates of cost-benefit analysis must not care about fundamental human rights is at best disingenuous. As Langlois convincingly points out, it is the advocates of ad hoc administrative regulation who, by their actions, betray a lack of concern for fundamental human rights.

Langlois' rights-before-utility approach to externalities problems has long been advocated by Rothbard and others. In my view, exclusive reliance on private law adjudication of torts can effectively deal with most externalities problems. However, in the case of air pollution, the large number of litigants involved makes it very costly to enforce property rights. Thus, in this case a system of government-created exchangeable pollution permits might be better than the tort approach. Such a solution, however, is problematic because government cannot identify the optimum quantity of permits to create. Since all costs and benefits are subjective, no government can accurately identify, much less establish, the optimum quantity of anything. But even the tort approach runs up against the immeasurability of costs and benefits: how are damages to be determined?

While Langlois does not tell us nearly enough about identifying rights, he does mount a good defense of (appropriately constrained) cost-benefit analysis in OSHA- and EPA-type decision-making. In keeping with the classical maxim that each person ought to count for one and no one ought to count for more than one when it comes to the disposition of public resources, the Coast Guard captain is bound to save the larger group of people while the captain of a private boat could quite properly save the smaller group that contains people who are, to him, more significant than the people in the larger group. The decision-maker in the case of public resources is "morally duty-bound to balance competing claims, to make tradeoffs, to let the numbers count — indeed to undertake cost-benefit analysis." (p. 292)

One could use Rothbard's argument that collective decisions are never really necessary and that there really is no such thing as a public resource, but in this very imperfect world taxpayer resources are forcibly assembled and the collective will forcibly imposed. If cost-benefit analysis can be used to help tame the leviathan, it ought to be promoted as well as appropriately con-

strained. Langlois' paper is a useful contribution to at least the former.