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A Self-Esteem Theory of Justice

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**A Self-Esteem Theory of Justice:
A New Utilitarianism to Challenge the
Reigning Rights-Based Liberal Paradigm
of the 20th Century**

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Abstract

This Article argues that the task of the next generation of philosophers and statesmen is to transcend the limits of the reigning rights-based liberal paradigm of the late twentieth century through a return to utilitarianism. Yet instead of utility metrics like happiness, wealth maximization, or even Peter Singer's pain minimization theory, this paper posits that the aim of a just society is to maximize the *self-esteem* of its citizens.

As is shown, self-esteem is a fundamental interpersonal unit not susceptible to bargaining. This approach thus avoids traditional attacks from rights-based liberals who argue that utilitarianism inherently implies inhumane tradeoffs. Moreover, the paper demonstrates how the most prominent liberal philosophers in fact exalt self-esteem as a paramount social good. They have merely lacked the courage or the creativity to centralize the concept.

This paper not only provides a useful normative framework for considering public policy, but it also advances a descriptive sketch of American political theory that is more accurate even than rights-based theories. The conclusion explains how, with self-esteem as the critical social value, utilitarianism and rights-based liberalism merge thereby offering a critical new paradigm for 21st century political and legal philosophy.

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The only real freedom is wisdom – i.e., the knowledge of what is right and what is wrong; the road to freedom lies not through politics or revolution, but through philosophy; and true philosophy consists not in the speculations of books, but in the faithful practice of honor and virtue according to the dictates of that inmost voice which is, in some mystic sense, the word of God in the heart of man.

- Will Durant, paraphrasing the philosophy of Dio Chrysostom (A.D. 40-120).¹

Introduction

In the second half of the twentieth century, rights-based liberalism as emblemized by Rawls, Nozick, and others reached an apex in its domination of the western political philosophical terrain.² In the last generation, different strains of utilitarianism, such as those espoused by Posner and Singer, pushed back on the accepted wisdom, but none achieved widespread success.³ In the meantime, contemporary legal and political theory has been searching for a new philosophy, one capable of transcending the limits of the reigning rights-based liberal paradigm of the late twentieth century.⁴ This can be done, as this paper explains, by returning to utilitarianism. Instead of the usual metrics of utility such as happiness, wealth maximization, or even pain minimization a la Peter Singer, the paper argues that the aim of a just society is to maximize the self-esteem of its citizens. This approach avoids traditional attacks from rights-based liberals who assert that utilitarianism implies tradeoffs that are inhumane. It also illuminates the defects, or rather the vast and far reaching (though ultimately unsatisfying), merits of these diametric intellectual camps. As this paper shows, the foundational political

¹ WILL DURANT, CAESAR AND CHRIST, Vol. 3 of The History of Civilization, pg. 522 (1944).

² Liberalism as a broad set of political theories places paramount importance on personal freedoms and individual liberties. Its source is at least as old as the enlightenment philosophies of Hume, Smith, and Kant, but post-war generations have showed an undeniable surge in classical liberal principles from philosophers such as Rawls and Nozick, economists such as Milton Friedman, and politicians such as Thatcher and Reagan. *See generally*, SAMUEL FREEMAN, RAWLS (2007).

³ Both Posner and Singer have achieved widespread success in conventional terms. This assertion is merely a broader comment on the hegemony, for lack of a better word, of rights based liberalism in the face of competing philosophies.

⁴ *See, e.g.* DAVID JOHNSTON, THE IDEA OF A LIBERAL THEORY: A CRITIQUE AND RECONSTRUCTION (2007); MICHAEL SANDEL (ED.), LIBERALISM AND ITS CRITICS (1984) (criticizing liberalism in favor of communitarian doctrines).

ideals of the late twentieth century, themselves informed by both classical and enlightenment philosophy, are in need of a unifying element.

By making self-esteem society's critical social value, utilitarianism and rights-based liberalism merge. This is not wholly surprising, given that many rights-based liberal philosophers like Rawls and Ackerman actually exalt self-esteem as a paramount social good. Utilitarians, too, seek a just society, but they believe that promoting a specific good is the most instrumental way to achieve that end. What no philosopher has said outright, and what forms the central argument of this paper, is that justice is nothing less than the scheme of rules that maximizes the collective self esteem of society's individual members.⁵ The key feature of this proposal is that self-esteem, unlike concepts of happiness or money, does not bend to the same register of tradeoffs. The reduction of another's self-esteem does not raise my self-esteem. To say so is to pervert the fundamental concept.

This idea will be explored shortly, but its roots are already evident in the defining works of modern political philosophy. In 1971, Rawls reinvigorated and perhaps redefined western political philosophic ideals by asking how one would organize society if one's place in society were not known in advance.⁶ In answering the question, he advocated two undergirding principals.⁷ The Liberty Principal dictated "the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others," and the Distributive Principal proposed the more controversial idea that offices and positions must be distributed so as to benefit the least-advantaged members of society.⁸ This second notion shocked Nozick's libertarian

⁵ A preliminary definition may be helpful. Self-esteem at its most basic level is one's self-conception or self-regard. This and its corollaries are discussed and disputed at much further length in Section 3.

⁶ Commonly referred to as the "original position," this heuristic or thought experiment is a spin on the classical social contract idea. Rawls says that from this position one is as if behind a "veil of ignorance." JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1999).

⁷ For explicative and focused essays, *see* THE CAMBRIDGE COMPANION TO RAWLS. (2002).

⁸ RAWLS, *supra* note 6, at 53.

conscience and prompted a 1974 defense of fundamental freedoms in the form of *Anarchy, State, and Utopia*.⁹ Nozick turned the initial question on its head, asking how much state action can be justified before individual rights are violated. He justified the growth of state action through various stages, never reaching more than a minimal state “limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on.”¹⁰

Much later work in political philosophy has shied away from libertarian principles, but it has not lost a commitment to individualism. Ackerman in *Social Justice in the Liberal State*, for instance, stressed the importance of dialogic reasoning and the development of basic human faculties as a means to avoid domination.¹¹ Even Walzer’s *Spheres of Justice*, with its communitarian and egalitarian overtones, sought to understand the reach of markets in different social goods so as to vindicate individualism.¹² Though very different, one can already distill from these few representative works a broad-based liberal philosophical paradigm that revolves inexorably around the rights of individuals to live freely and to exercise to the fullest extent possible their natural and learned capacities.

It may be unnerving to discover through the theory of self-esteem that the great utilitarians actually have much in common with this paradigm and their rights-based counterparts. Consider Mill, for instance, who believed so strongly in the innate capacities of mankind for learning, knowledge, and socially productive interaction, that it led him to place an alarming faith in the stewardship of an educated elite.¹³ Posner is frequently depicted as a utilitarian based on the now common argument that public policy should be designed to facilitate

⁹ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

¹⁰ *Id.* at xi.

¹¹ BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

¹² MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

¹³ In the 1850s, Mill advocated through pamphlets an electoral reform program that included plural votes for the higher educated. See JOHN STUART MILL, *THE COLLECTED WORKS OF JOHN STUART MILL, VOLUME XVIII - ESSAYS ON POLITICS AND SOCIETY PART I* (1832), with Introduction by Alexander Brady.

wealth creation or avoid deadweight loss.¹⁴ Since money is merely a medium of exchange, it allows individuals to make their own choices about how to enjoy life. Posner, like any economist, thus displays a tremendous amount of respect for the latent power of the individual. Singer, perhaps the lightning rod among contemporary utilitarians,¹⁵ extends his boundary of concern to all sentient beings, and has thereby earned the disdain of many “speciesists.”¹⁶ But most of the offense is misplaced. The disconnect lies in Singer’s argument that a human being discredits his or her humanity by failing to respect other forms of intelligent life. Rather than place humans alongside animals in some moral hierarchy as many charge, the opposite is the case in Singer’s argumentation.¹⁷ Because mankind has the power to conform behavior to reason, it is obligated to do so. Whether or not one agrees with Singer’s extension of the boundary line, his philosophy shares the faith in the sanctity of individualism and rights that is common to the varied moral and political philosophies detailed herein.

One may be itching to mention at this point, that even granting the brief discussion above, individualism and individual rights are not synonymous with self-esteem. That is the precise issue this paper seeks to address. The two ideas are actually inextricably connected so that rights-based philosophies and instrumental utilitarian philosophies share more common ground than previously thought. Both approaches finger an overarching truth – good government makes policy that enables individuals to achieve positive self-conceptions, fulfilling lives, and other qualities that, through examination, can be labeled components of self-esteem.

The basic ideals associated with modern western philosophy are really ingredients in a larger

¹⁴ The utility metric responsible for this assertion is preference satisfaction. *See generally*, ERNEST WEINRIB, *Utilitarianism, Economics, and Legal Theory*. U. OF TORONTO L. J. (1980).

¹⁵ This phrase has been used numerous times to describe Singer or his various ideas. *See e.g.*, Bob Abernethy, *Cover Story: Peter Singer*. RELIGION AND ETHICS NEWSWEEKLY (September 10, 1999).

¹⁶ A speciesist is one who discriminates on the basis of belonging to a different species. The term was actually coined by Richard Ryder in 1973, but taken up and highly publicized by Singer. *See* Peter Singer, *ANIMAL LIBERATION* (1975).

¹⁷ *See* Jeff Sharlet, *Why Are We Afraid of Peter Singer?* THE CHRONICLE OF HIGHER EDUCATION (March 10, 2000).

political effort, the quest to structure society through law and policy in a way that promotes the collective self-esteem of its members.

With this rough sketch in mind, the organization of the paper is as follows. The first section canvasses the prevailing utilitarian and liberal paradigms. This sets up the problem and puts us on the same page so to speak. The second section defends the choice of self-esteem as the right utility factor. How is it different than happiness or other similar qualities? What role has the notion of self-esteem played in the competing philosophical schools? The third section explains more fully what is meant by the term self-esteem. Is it just one's self-regard? What does high self-esteem look like? How can self-esteem be measured or compared? The fourth section considers the outlines of a new utilitarian paradigm. What might a self-esteem theory of justice actually look like? What are its policy implications? A case study on various aspects of the criminal justice system is provided in an attempt to consider the theory in action. In conclusion, the paper offers an assessment of the reach of the argument. What are its prospects? Will this theory of justice appeal to the next generation? The closing thoughts maintain that the argument responds to an entire series of pressing philosophical questions, including an inquiry into the overarching purposes of our political, legal, and social structures. This is so because the theory draws on one of the guiding, though underemphasized, themes of contemporary political philosophy: self esteem.

I. The Competitors

Utilitarianism had its greatest champion in Jeremy Bentham, an Anglo-American philosopher of the early 19th century.¹⁸ Bentham saw a fundamental dichotomy in the world, that between pleasure and pain. In his own often-quoted words,

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think...¹⁹

Bentham therefore advocated a formula he developed known as the “felicific calculus.”²⁰

Through a series of inquiries (what is the intensity, duration, certainty of the pleasure?), one might be able to determine the degree or amount of happiness or pleasure that a certain action will produce. To an ethical hedonist, this would be of importance because one’s moral compass (rightness over wrongness) should be set in the direction of those actions that produce the most pleasure and away from those that cause pain.

A. The Appeal of Utilitarianism

If not immediately appealing to the contemporary thinker, Bentham’s approach was a powerful influence on many later thinkers. James Mill, a contemporaneous philosopher and sometime coworker of Bentham, was so taken that he had his young son transcribe entire volumes of utilitarian writings.²¹ John Stuart Mill, James’s son and Bentham’s godson, used these ideas to promote the happiness principle, which holds that “one must act so as to produce

¹⁸ A collection of Bentham’s work can be found in JOHN TROYER, (ED.) THE CLASSICAL UTILITARIANS: BENTHAM AND MILL (2003).

¹⁹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch I, p 1 (1789).

²⁰ Bentham explained in detail the workings of this concept in AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. 4.

²¹ Mill reveals a good deal in his autobiography. John Stuart Mill, THE AUTOBIOGRAPHY OF J.S. MILL (1873).

the greatest happiness for the greatest number of people.”²² This principle has been ardently attacked by later generations of rights-based liberals, because it implies that rights are malleable and if necessary at all, only in servitude to the greater cause of a sum total of happiness.

A couple of examples may help to illustrate: first, imagine that someone enslaves you and forces you to work all day in her garden. Being a lover of natural beauty, she takes tremendous pleasure in the flowery output of your work. On the other hand, since you know practically nothing other than toil and moil, she might argue that the pain inflicted on you is less than the positive count of her pleasure. Is she not therefore morally justified in enslaving you? A second example concerns *schadenfreude*, the German term for taking pleasure in another’s pain. Imagine that a group despises an outsider for whatever reason. The mobsters, as one might call them, may enjoy seeing this outsider tarred and feathered. Since the sum of many small pleasures may outweigh the lone victim’s pain, might the group/mob be justified in its actions? The problem facing utilitarianism is thus a serious one, because such perverse outcomes violate an intuitive sense of right and wrong.

1) Wealth Maximization

Utilitarianism, however, spawned a host of other consequentialist theories.²³ The term consequentialism refers to any line of thought that judges the morality of an action by its results.²⁴ For example, various societies throughout human history including Islam, Judaism, and to some extent the ancient Greeks, have argued in one way or another that knowledge is the

²² JOHN STUART MILL, *UTILITARIANISM* (1863). Ch. 2 and 4.

²³ *See generally*, STEPHEN DARWELL, (ED.) *CONSEQUENTIALISM* (2002) (offering a selection of classical and contemporary expositions).

²⁴ Teleology is another term, sometimes used interchangeably to refer to a philosophical focus on ends or outcomes.

ultimate pursuit of the good.²⁵ Two of the most exciting contemporary utilitarian philosophies have focused on wealth-maximization and, in an inverse of the general approach, pain minimization. The leaders of these two movements are Richard Posner and Peter Singer, respectively.

Posner, along with a number of other leading economists, including his compatriot in the blogging world, Gary Becker, generally believes that the profit motive is the best organizational tool available to mankind.²⁶ The legitimate job of government is to police the market system to ensure that individuals and firms are ensured free and fair opportunities to buy and sell their labor, property, and skills. Since money is merely an exchange currency, conditions that facilitate trade allow for the maximization of human preferences.²⁷ In a world where demand outstrips supply (human wants outpace resources), what better way for man on earth to reach for heaven than to maximize the sum total of individual preferences? The attractive thing about this utilitarian approach is that a system based on well-delineated rights and liberties (personal freedoms, property and criminal legal regimes) is most conducive to economic growth because it reduces transaction costs to bargaining.²⁸ The classic theoretical objections to utilitarianism (dismissive of rights) are thus met by pointing to the practical realities and conditions necessary for wealth maximization.²⁹

²⁵ Prophet Muhammad is commonly quoted as saying “The ink of the scholar is more holy than the blood of a martyr.” Regarding the Jewish faith, Einstein noted “The pursuit of knowledge for its own sake, an almost fanatical love of justice, and the desire for personal independence—these are features of the Jewish tradition which make me thank my lucky stars that I belong to it.” Though neither quotation is far-reaching, they represent such traditions in a broad sense.

²⁶ See <http://www.becker-posner-blog.com/>. Other notable economists in the blogosphere devoted to this overarching premise include Greg Mankiw at <http://gregmankiw.blogspot.com/> and Tyler Cowan and Alex Tabarrok at www.marginalrevolution.com.

²⁷ That trade makes both parties better off is a standard economic principle. See e.g., N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS*, 4th ed. (2006).

²⁸ Bright line rules help market participants. See generally, Ronald Coase, *The Nature of the Firm*, *ECONOMICA*, Vol. 4, No. 16, Nov., 1937.

²⁹ The neoliberalist movement has been a primary champion of this central idea. See generally, DAVID HARVEY, *NEOLIBERALISM* (2006).

2) Pain Minimization

As mentioned, Singer takes a different tack in that his utility function is based on pain minimization. He argues in his seminal book, *Animal Liberation*,³⁰ on the basis of a conditional statement. If you believe humans have the right to eat or torture animals because they are smarter than them, then you logically believe that the ill or severely retarded are equally devoid of such protection. It is a catch-22 for the common “speciesist,”³¹ because the defining characteristic of humankind is, rationally, terribly difficult to discern. Individuals are often reduced to arguing that humans can be categorically differentiated from other species on the basis of being born from other humans or that they are blessed with divine providence.³² Both of these common arguments, unfortunately, suffer from circularities. Why are humans divinely blessed? Because they sit atop the animal kingdom. Why do they sit atop the animal kingdom? Because they are blessed. Why are humans different from animals? Because they are born from human beings. Why are they born from human beings? Because if they were born from animals they would not be human in the first place.

Singer thus lays down a rule of equal consideration, which dictates that all sentient beings are deserving of equal consideration when it comes to actions that can cause them pain.³³ Hence, failing to educate a cow would not qualify as speciesist because cows, as far as we know, cannot derive benefit from schooling. Slaughtering a cow, on the other hand, for the enjoyment of a steak dinner, implies that a modicum of human pleasure is more valuable than a good deal of bovine pain and that falls into the logical inconsistency just laid out.

³⁰ PETER SINGER, *ANIMAL LIBERATION* (1975).

³¹ ABERNATHY, *supra* note 14.

³² For a fuller treatment of this, see *Animal Rights: A Debate Between Peter Singer and Richard Posner*, SLATE, (June, 2001), available at: <http://www.utilitarian.net/singer/interviews-debates/200106--.htm>.

³³ SINGER, *supra* note 30, Ch. 1.

B. The Nobility of Liberalism

Though novel, Singer's approach joins a line of utilitarian philosophies tied together by the instrumental functionality put on the social enterprise and the state apparatus. In other words, utilitarians argue based upon one conception of the good or another, that government institutions and policies should be aligned toward producing more (or less in Singer's case) of that particular good (or bad). For each account of the good, the theorist or the politician for that matter typically seeks to promote social and political arrangements that facilitate a specific end in mind.

In contrast, most liberals can be classed as deontologists.³⁴ A deontologist believes that the rightness or wrongness of an act is derived from the nature of the act itself. "Lying is always wrong" is an example of this type of argument. A more practical conception might be the constitutional ban on cruel and unusual punishment as laid out in the 8th Amendment.³⁵ There may be debate on what exactly constitutes cruel and unusual punishment, or on the very definition of 'cruel and unusual,' but once the definitional question is settled the argument is over – there will be no cruel and unusual punishment, even if in certain cases like the ticking time bomb it would behoove society.³⁶ Kant is perhaps the most famous deontologist, having advocated the categorical imperative that one must "act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means,

³⁴ Deontological is a term credited to C.D. Broad. *See* C.D. Broad, FIVE TYPES OF ETHICAL THEORY (1930). *See generally*, STEPHEN DARWALL, (ED.) DEONTOLOGY (2002) (offering a collection of significant writings in the field).

³⁵ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, VIII Amend.

³⁶ The Israeli Supreme Court faced this exact question, whether torture is permitted in an attempt to gain information critical to defusing a "ticking time bomb," in 1999 with respect to Shin Bet, the Israeli Security Agency. A nine judge panel ruled that the agency lacked authority to torture even in cases of necessity. The text of the decision can be accessed at: <http://www.jewishvirtuallibrary.org/jsource/Politics/GSStext.html>.

but always at the same time as an end.”³⁷ In whatever form, one can see how different this mode of thinking can be. This is a key difference in the philosophies (or as I will argue: they think this is a key difference) of some of the strongest contemporary efforts to resist the allure of utilitarianism. Before deconstruction, however, there must be an edifice in the first place and so it will be useful to contrast the basic arguments of Rawls and Ackerman with the utilitarians.

1) The Liberty Principle

With *A Theory of Justice*, Rawls ushered in a sea change in contemporary moral philosophy.³⁸ The regnant liberal paradigm sees through the lens of the veil of ignorance.³⁹ This phrase refers to a thought experiment suggested by Rawls in which participants are placed in an original position (as contrasted with the state of nature discussed in the classical social contract theories of Hobbes, Locke, and Rousseau)⁴⁰ in which they are both deprived of any individuating characteristics about themselves and ignorant of what position or class they will occupy in the society they form.⁴¹ Behind this “veil of ignorance,” Rawls argues compellingly that two overarching principles will emerge: the liberty principle and the difference principle. In short, each person should enjoy the greatest degree of liberty compatible with liberty for others, and second, and only then, should social and economic inequalities be arranged so that they are of advantage to the least well-off.⁴² The key idea for the purposes of this argument is the priority of the liberty principle. Only once rights are preserved may society venture down the path of

³⁷ IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 36 (1785) trans. by James Ellington (1993).

³⁸ RAWLS, *supra* note 6.

³⁹ *Id.*

⁴⁰ See THOMAS HOBBS, *LEVIATHAN*; JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*; JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*. For critical essays on social contract theory, see CHRISTOPHER W. MORRIS, *THE SOCIAL CONTRACT THEORISTS: CRITICAL ESSAYS ON HOBBS, LOCKE, AND ROUSSEAU* (1999).

⁴¹ RAWLS, *supra* note 6.

⁴² *Id.*

redistribution, and even that need not take place as long as wealth and opportunity are still benefiting the lowest classes.⁴³

2) Neutral Dialogue

Ackerman altered the liberal paradigm in an interesting way. Instead of an original position, Ackerman began with a slightly more realistic scenario. Imagine your poorer neighbor or the local vagrant asked: “How can you justify the powers you have so comfortably exercised in the past?”⁴⁴ To meet this challenge, Ackerman envisioned a society built out of neutral dialogue. Power struggles and resource distributions are legitimate so long as the reasons for them can satisfy the neutrality principle, which says “No reason is a good reason if it requires the power holder to assert: a) that his conception of the good is better than that asserted by any of his fellow citizens, or b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens”⁴⁵ Together with Rawls, Nozick and others, Ackerman posits that there are rules that should govern civilization (as Nozick argues, these rules are self-limiting in that a state is justified, but only the least extensive state – the minimal state – required to ensure fundamental rights)⁴⁶ which are right in and of themselves. In other words, the rules are the ends and whatever social and political life they spawn can be considered just.

⁴³ *Id.*

⁴⁴ ACKERMAN, *supra* note 11, at 3

⁴⁵ *Id.* at 11

⁴⁶ NOZICK, *supra* note 9.

II. How Sticky is the Concept of Self-Esteem?

In this section, I defend my choice of self-esteem as the right philosophical focus by arguing that it is both a necessary element to human existence and already a constituent factor in the philosophies of some of the most notable rights theorists. Rawls, Ackerman, and Nozick believe that they are not utilitarians precisely because they promote rights in the face of state action, and propose limits on coercive behavior. These rights and limits, they argue, are subservient to no higher authority or more worthwhile goal. This paper asserts, however, that the reigning liberal paradigm is kidding itself. The rights and liberties espoused therein are as instrumental to their philosophy as anything in the utilitarian handbag. Western political philosophy wants rights protections only because it is the best known system for producing social stability, economic growth, and political progress. Why is this so? This is the case because rights protections, the keystone of liberalism, vindicate the autonomy of the individual. When freed from the macro-enterprise of producing a state's chosen good (utilitarianism was a bedrock theory for much of socialist thought),⁴⁷ the citizen is allowed to pursue his or her own conception of the good.

Contemporary liberal thinkers have thus spent their energy exalting cultural diversity, efficient marketplaces, and robust political colloquies as though they are the natural byproduct of a system of secure fundamental rights.⁴⁸ While this may be true generally, this paper argues that there is an element in the paradigmatic liberal equation that is more fundamental than rights. Self-esteem is the basic building block of the liberal society and should be philosophically (and practically) treated as such. Having a positive conception of the self and the required amount of confidence to act to improve one's self, one's life, or community, is what in the collective

⁴⁷ See e.g. JOHN STUART MILL, *PRINCIPLES IN POLITICAL ECONOMY: AND CHAPTERS ON SOCIALISM* (1998).

⁴⁸ See e.g., WALZER, *supra* note 12.

provides true foundation from which growth towards justice and the “good life” flow. Though it is not fully recognized, it is the idea that life has meaning that leads members of society to interact in constructive ways. Social capital, entrepreneurship, political activism – these noteworthy liberal ideals are made possible in the first place by the positive self-valuations of individual citizen participants.

A. The Nihilist Proposition

It may be useful to start off by taking the question of nihilism seriously. Recall that Nozick was courageous enough to begin his exploration of the minimally justifiable state by giving serious consideration to the anarchist agenda.⁴⁹ Likewise, since this paper purports to advocate a utilitarian philosophy based on self-esteem as the primary utility factor, it must first dismiss the doctrine of nihilism, which argues (from the Latin “nihil” meaning nothing) that life is devoid of objective meaning.⁵⁰ Nihilist critics generally argue against one philosophical position or another by denying the existence of a higher purpose, truth, or power.⁵¹ In other words, morality is meaningless and secular ethics are a sham imposed on others who privilege their worldview over a range of other equally worthless competitors.

This line of thought is difficult to refute. The main problem is that to remain at a theoretical level, one might at some point need to resort to a faith-based appeal to universal law or to rhetoric (how could homosapiens have arrived here or prospered to this extent without there being any meaning to their existence?). This would run head-on into the basic premise of nihilism and start a vicious circle. It is interesting to note at this point that the generic liberal critique of utilitarianism (that rights are malleable) sanctifies rights with a similar appeal. When

⁴⁹ See Robert L. Holmes, *Nozick on Anarchism*. POLITICAL THEORY Vol. 5, No. 2 (May 1977).

⁵⁰ See CONNOR CUNNINGHAM, GENEALOGIES OF NIHILISM: PHILOSOPHIES OF NOTHING AND THE DIFFERENCE OF THEOLOGY (2002).

⁵¹ *Id.*

challenged on the question of why rights are so important, what more can be said from the liberal than that rights comport with the vision of the creator? One is left to replicate a system of higher, universal law. If that is not the argument, the only alternative is to say in utilitarian fashion that they produce good results.

To dismiss the nihilist claim, one needs then to duck into the world of empiricism. In Singerian fashion, consider the following conditional: if life was devoid of meaning for all involved, how would people literally sustain themselves? Under religious (or liberal) delusions? Perhaps, but then how would the nihilist sustain herself? Daily living requires volition, the expenditure of energy.⁵² One must hunt, gather, clothe, and shelter oneself. Even in modern times, one must typically work to earn money to buy or rent necessities. If there was truly no point or purpose (perhaps simply pain minimization on the individual scale), life would wither away.

1) Self-Esteem as Purpose

Breaking the term “self-esteem” down into its component roots gives us nothing more for a definition than the esteem in which one holds oneself. This simple definition is not without value, though, because it prevents us first off from considering negative properties of self-esteem. It says that one can only have low levels of self-esteem, not negative levels. This is the language of psychologists too.⁵³ It fits well with the foregoing discussion, moreover, because it shows that one is not required to have a negative valence of self-esteem before one ceases to

⁵² A discussion of ontology (Ontology is the branch of metaphysics dealing with questions of existence) is not necessitated by this relatively uncontroversial assertion primarily because the statement merely expresses a logical relationship between physical existence and that which is physically necessary to sustain existence.

⁵³ The National Association for Self-Esteem cites a wide-range of self-esteem research, *available* at: <http://www.self-esteem-nase.org/research.shtml>.

show any qualities of self-sustaining behavior. Having zero or no conception or regard for the self is quite sufficient.

This argument is easily differentiated from Singer, because there is more involved than mere pain minimization. Individuals certainly seek to avoid pain, but they also seek a positive conception of the self. Human beings desire affirmation from themselves and others about their potential to exercise their faculties and to contribute to others' positive conceptions of themselves. One lives and seeks more life so that he or she can experience some combination of the self-affirming values of fun, happiness, and fulfillment. People know this through lived experience. In fact, these qualities form the basis of the lived-experience. Without any semblance of one or the other (even as small as mere contrast from pain) life loses meaning and becomes unsustainable.

2) Happiness, Fun, and Fulfillment

The logical questions are: 1) How do they (fun, happiness, and fulfillment) differ from one another? and 2) How do they relate to self-esteem? In his advocacy of the happiness principle, Mill argued for the qualitative separation of pleasures.⁵⁴ By this he meant that some pastimes were more intrinsically valuable than others. Learning, arts, political participation, and self-development stood higher on the moral hierarchy than drug-induced hazes, television series, and fast cars. He says:

Whoever supposes that this preference takes place at a sacrifice of happiness – that the superior being, in anything like equal circumstances, is not happier than the inferior – confounds the two very different ideas, of happiness, and content. It is indisputable that the being whose capacities of enjoyment are low, has the greatest chance of having them fully satisfied; and a highly endowed being will always feel that any happiness which he can look for, as the world is constituted, is imperfect. But he can learn to bear its imperfections, if they are at all bearable; and they will not make him envy the being who is indeed unconscious of the

⁵⁴ Mill, *supra* note 22, Ch. 2.

imperfections, but only because he feels not at all the good which those imperfections qualify. It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides.⁵⁵

In this passage, Mill is not just elitist,⁵⁶ but slightly wrong. He was trying to touch on the central differences between the concepts of fun, happiness, and fulfillment, but confused or perhaps lacked the right lexicon. Assuming an equality of choice, many people might choose (and indeed many do) a life of fun. This concept carries with it the connotation of an evanescent or temporary experience of pleasure. Perhaps on a chemical level, the feelings induced by laughing or thrill-seeking or even artificially altering one's chemistry are irresistibly attractive to many.

Others if given the option might choose a happy life, because it may be spared the ordinary cares and burdens of a fuller existence. Happiness accordingly implies a degree of risk-aversion, the avoidance of disappointment, failure, bankruptcy, and loss. In Buddhist philosophy, too, happiness involves a freedom from suffering, or the elimination of unsatisfied wants and cravings.⁵⁷ As evidenced by Mill, though, much of Western society finds this approach to be simplistic or unattractive for lack of an appreciation of the fullness of life's ups and downs. Ignorance may produce a sort of bliss, as the saying goes, but bliss is not the underlying point. Moreover, the bliss produced from ignorance is a sort of negation of life's possibility.

A philosophical approach centered on self-esteem, however, shows that what Buddhist philosophy refers to as happiness is really much closer to the third option herein: fulfillment. This is evident from the fact that the eightfold path is a deeply reflective process that involves

⁵⁵ *Id.*

⁵⁶ See generally, Willmore Kendall and George W. Carey, *The "Roster Device": J.S. Mill and Contemporary Elitism*, THE WESTERN POL. QUART. Vol. 21, No. 1 (Mar. 1968).

⁵⁷ See, e.g. BHIKKU BODHI, THE NOBLE EIGHTFOLD PATH: WAY TO THE END OF SUFFERING (2000).

coming to terms with and then letting go of, rather than merely avoiding, those things that might disrupt a happy existence.⁵⁸ Choosing to pursue a fulfilling life is more difficult per se than a life of fun or happiness, but fulfillment is the key concept. As previously discussed, showing regard for oneself or having self-esteem is manifested in how one makes decisions. Fulfillment speaks to decision-making that uses a proper discount rate and a relatively long temporal horizon.⁵⁹

To better understand this idea, consider a constrained opportunity set of two choices regarding activities for this very evening. On the one hand, an individual can induce a state of drunkenness by consuming twelve bottles of beer in a row. On the other, the individual can take a run and go to bed early. If the decision maker was thinking no further ahead than this evening, inebriation might win out. The ecstasy of forgetting about one's worries and the inflated sense of confidence in one's abilities that alcohol can produce could be judged sweeter and more enjoyable in the moment than is the endorphin release or meditative focus that one may experience while running. But the scenario changes when one considers the following morning, and perhaps even more so when one thinks and plans fully into the future. The temporary high of inebriation often gives way to hangover and disarray whereas the muscle soreness and discomfort of physical exercise often begets better fitness and even stress reduction. As mentioned, one must try to discount future payoffs to their present value (feeling fit and stress-free in the distant future is not quite as valuable as feeling fit and stress-free *now*), but the basic point remains. Short term satisfactions do not always produce the most self-esteem, as measured by one's self conception over a lifetime.

⁵⁸ *Id.*

⁵⁹ By this, I simply mean that the satisfaction of immediate wants may be at the expense of more distant, but more worthwhile goals. A proper discount rate would value correctly the costs and benefits of discipline, planning, and forbearance.

If maximization of the collective self-esteem of a society's members is inextricably linked with their ability to lead fulfilling lives, fun and happiness therefore lose importance since those experiences do not speak directly to the growth of one's self-esteem. Experiencing these latter two concepts might be important, even necessary, contributions to a fulfilling life, but standing alone or even in conjunction, neither is sufficient. Instead, fulfillment is the quality which best facilitates the maximization of self-esteem because it encompasses the right temporal element (a life's duration) and the proper depth (the recognition and embrasure of life's fullness).

B. The Role of Self-Esteem in Rawls and Ackerman

In this claim, this argument is fortunately in good company. Many of the regnant liberal philosophers also believe that a fulfilling life is an end goal for the system of rights that they advocate.⁶⁰ As this point develops, keep in mind that part of the argument is actually that the reigning liberal philosophers have more in common with this conception of utilitarianism than they would like to believe. They want the same end-state, but loathe any association with the utilitarianism of the past. An admittance of their true goal, the promotion of fulfilling lives for members of a given political community, takes them a large step closer to this paper's consequentialism.

1) Life Plan

As Rawls explains, self-respect "includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out."⁶¹ This is critical, Rawls says, because "when we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can

⁶⁰ ACKERMAN, *supra* note 11.

⁶¹ RAWLS, *supra* note 6, at 386

we continue in our endeavors.”⁶² His direct conclusion is that “parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect.”⁶³ Note the similarity with the rejection of nihilism above. It is here that Rawls is most persuasive, because his abstract logic actually conforms to our intuitive notions about human nature and how society functions. Rawls states simply that “the effective protection of the equal liberties becomes increasingly of first importance in support of self-respect and this affirms the precedence of the first principle.”⁶⁴ The reason, one could argue, for the great success of Rawls’s idea is not just that it promotes a system of rights, but that it does so in a greater effort to vindicate the self-esteem of society’s members:

“For by arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, persons express their respect for one another in the very constitution of their society. In this way they insure their self-respect as it is rational for them to do.”⁶⁵

Is Rawls then a utilitarian of sorts? Perhaps a utilitarian of self-esteem? Not according to his own self-conception, but when he talks about self-esteem in relation to his rights-theory it sounds eerily similar. This is the case because his acknowledgement of the value of rights implicitly says not that they are sacrosanct in and of themselves in a Kantian sense, but that rights are instrumental in an effort to allow each individual to act truly autonomously – to create, choose, develop, and execute on life plans.

2) Absence of Domination

Ackerman is even easier to square with the notion of self-esteem. The neutrality principle is little more, in fact, than a self-esteem principle in liberal guise. Its two tenets, a) that

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 480.

⁶⁵ *Id.* at 156

no conception of the good is better than another and b) that no one is intrinsically superior to another, are Ackerman's best guess at what will preserve the collective self-esteem of the community. Ackerman speaks in the language of domination, thereby cloaking his theme thickly in a rights-based veneer. One wonders, though, if he is really touching on something deeper. He says:

[Y]ou might think that you can only learn anything true about the good when you are free to experiment in life without some authoritative teacher intervening whenever he thinks you're going wrong...[Accordingly,] you may adopt a conception of the good that gives a central place to autonomous deliberation and deny that it is possible to force a person to be good."⁶⁶

While most likely true, this rationale is precisely what makes self-esteem the right utility factor in the utilitarian equation. Since you are not bolstering an individual's self-esteem when you force-feed an ideology (even if your ideology is plausibly correct), a good route to self-esteem maximization is through neutral liberal dialogue.

Since a child cannot be expected to automatically know right from wrong, Ackerman is quick to say that a certain level of education is necessary to achieve the self-possession and responsibility necessary to partake in neutral dialogue. This may therefore justify some degree of domination in the educational sphere, most likely from parents. A strict or uncompromising teacher, for instance, might seem a menace or a tyrant, but in fact may impart critical lessons for the future, lessons that actually enable an individual to take charge of his or her life in the future. Once this state is attained, however, neutral dialogue must reign supreme. For when an individual comes to see certain lines of thought for him or herself, then he or she is capable of understanding how and why a specific decision may lead to a more fulfilling life. Self-esteem, at bottom, is what makes humans tick. Ownership of new ideas in an Ackermanian sense helps to fire the personal engine with which to live those ideas.

⁶⁶ ACKERMAN, *supra* note 11, at 11.

III. A Definition Please

Rather than “self-worth” or “self-conception,” this paper posits that self-esteem is more accurately characterized as a state of being in which an actor consciously chooses how to live his or her life in an effort to achieve fulfillment. Such a state involves consideration of one’s opportunity set (one’s range of decision possibilities) and then thought or reflection about how different choices may produce lasting satisfaction over the course of one’s life. Note that such a process encompasses the simple definitional ideas in that the time and energy required by such a course also demands relative senses of self-worth and a positive self-conception. As discussed in the rejection of nihilism, one with excessively low or no self-esteem would find such an existential undertaking insurmountably difficult.

Does this then imply that a more time-consuming and intensive decision-making process is indicative of a higher level of self-esteem? Is the philosophical life the best life?⁶⁷ Perhaps, but not in the way it might appear. Reflection is required, but a life spent in pure reflection becomes a life devoid of action. This inherent trade-off shows the notion of self-esteem to be surprisingly inclusive, encompassing a wide range of different life-plans. One may be inclined to entrepreneurial risks, another to charitable enterprises, and a third to beer-drinking and television. The preceding definition does not impose an immediate and rigid value hierarchy on any of these choices. It does demand, however, that competing life plans or decisions be given independent thought in an effort to ferret out for the individual in question the most likely route to fulfillment.

A. What Does High Self Esteem Look Like?

⁶⁷ Nozick offers musings on this subject. *See* ROBERT NOZICK, *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* (1990).

Recall that fun and happiness, while perhaps desirable states in themselves, do not address directly the shared human goal of achieving satisfaction. Fun is, temporally speaking, quite short. Moreover, it can be enjoyed even in the shadow of more severe pain or dissatisfaction. Happiness, on the other hand (as in the phrase “ignorance is bliss”), can be perversely achieved through the rejection of ambition and reflection. This fact exposes the happy person as actually quite fragile. The slightest examination of alternate life-plans or comparison with a neighbor might be enough to topple that individual from such a precarious perch. Only the latter concept, fulfillment, encompasses the right time-frame (a life in full) and the more durable ideas of inner-peace and contentment that flow from consideration of life’s offerings and acceptance of life’s challenges. In this, one can see that fulfillment is the antidote to the most discomfiting and pernicious human experiences such as fear, anxiety, and confusion. One can suffer miserable failures, have goals and life-plans ruthlessly thwarted by the hands of chance, and yet still find fulfillment in a life well-lived. Fun may never have entered the picture and happiness would have been eviscerated shortly after the first set-back.

As evidenced in the preceding section of the paper, rights-based liberalism talks of “plans,” “autonomy,” “reflection,” “respect,” and “happiness,” yet it does so without a unifying framework. It evinces an assumption that this amorphous collection of desirable human qualities and states of being is somehow coincidental to a defense of rights, rather than a necessary correlation. The primary source of confusion comes from the fact that these concepts are actually components of self-esteem. Philosophers and even psychologists make the mistake of reducing self-esteem to something as simple as one’s conception of the self or one’s idea of one’s self-worth.⁶⁸ Etymologically, it is easy to see the temptation since “self-esteem” is the

⁶⁸ Dictionary definitions do not help matters, typically defining self-esteem as “self-respect” with a second definition meaning “self-conceit.” See e.g. MERRIAM WEBSTER’S DICTIONARY, available at <http://www.m-w.com/>.

hyphenation of two readily understandable, stand-alone words. But in the simplicity of such a deconstruction, one allows, perhaps encourages, the casting aside of the term “self-esteem” in favor of such disorganized concatenations of component terms. As a result, something more robust is lost, something that ultimately offers the key to understanding both the beauty of the liberal paradigm and its failure.

1) Boasting

In his definitive work on The Years of Lyndon Johnson, biographer Robert Caro makes a case study of America’s 36th president.⁶⁹ Renowned for his imposing presence, his domineering style, and his relentless pursuit of power, Johnson achieved a remarkable feat – rising from the impoverished Texas hill country to the United States presidency. One might, and indeed many have, noted Johnson’s superlative self-confidence and his high estimation of his own self-worth and potential. His first congressional campaign, for instance, was won in the face of imposing odds. Johnson outlasted his better known and well-funded opponents by delivering speech after speech touting his electability and his would-be efficacy in office.⁷⁰ He motivated his aides and campaign staff with a now legendary work ethic, making everything seem possible.

A look behind Johnson’s appearances, however, reveals an inner child deeply scarred by an impoverished youth and an alcoholic parent. Johnson’s father had achieved prominence in politics as a long-time member of the Texas state legislature, but his adherence to principle at a time when special interests held sway and his love-affair with the bottle caused a salacious fall from grace. Johnson’s hero, the father-figure with whom he rode the campaign trail and whose

⁶⁹ Three volumes have been written; a fourth is hoped-for. ROBERT CARO, THE PATH TO POWER (1982); MEANS OF ASCENT (1990); MASTER OF THE SENATE (2002). The first two won National Book Critics Circle Awards for best nonfiction works of the year, and the third won the National Book Award for Nonfiction and the Pulitzer Prize for Biography.

⁷⁰ CARO, PATH TO POWER, *supra* note 69, at 389 (describing his first campaign).

orations he watched in awe on the state house floor, was outcast and rendered almost effete relatively early in life: unemployed, deeply indebted, and so unhealthy as to be bed-ridden for months at a time.⁷¹

This difficult and no doubt formative childhood experience manifested itself in startling ways. Johnson, as a child and even as an adult, told pathological lies about nearly everything, creating an almost alternate reality or persona.⁷² His showboating and attention-grabbing was a consistent theme from childhood all the way into his political career. At first laughable and almost ignored, as Johnson rose to power it became overlooked as a mere byproduct of his success. Under it all, Johnson was not only a physical coward, but clung, even groped, for maternal support.⁷³ His all-consuming ambition was, in fact, the result of an intense self-doubt and loneliness, two prototypical qualities of children of alcoholics. Johnson, in other words, was being acted upon. His burning need for power and for respect from others was evidence, not as many might think, of self-confidence or high self-esteem, but quite the contrary.

Though perhaps easy to miss, this point comports well with intuition. A person who is truly content, one that derives satisfaction from the process of making life-choices and attempting to carry them out, does not need constant affirmation from others. Self-promotion, the deliberate distortion of reality, a desire to dominate other people – these are acts that create a temporary respite from the pain of low self-esteem, from the out of control feeling that comes from a lack of consideration about one’s state in life.

2) The Ancients

⁷¹ *Id.* at 234 (describing his assistants’ willingness to adhere to “so brutal a routine” as stemming “in part on admiration for their boss.”).

⁷² *See e.g. Id.*, ch. 8 (describing Johnson’s antics in college and how he earned the nickname “Bull” (for “bull-shit”) Johnson).

⁷³ Not only in college, but for years beyond Johnson would write his mother frequently begging for attention and reassurance. *Id.* at 197.

The ancient Greeks were perhaps the first to recognize this. Epictetus, paraphrased by Durant, understood clearly that “the essence of the matter is that a man should so mold his life and conduct that his happiness shall depend as little as possible upon external things.”⁷⁴ Durant notes that “this does not require a hermit’s solitude; on the contrary...he will accept with equanimity all vicissitudes of fortune – poverty, bereavement, humiliation, pain, slavery, imprisonment, or death; he will know how to ‘endure and renounce.’”⁷⁵ University of Michigan psychological researcher Jennifer Crocker has given modern meaning to this idea in numerous studies on what she calls contingencies of self-worth, “those things that people believe they need to be or do to have value and worth as a person,” particularly in the academic arena.⁷⁶ As Cambell and Foddis have summarized, “Crocker has gone on to contend that self-esteem ought to be non-contingent: not based on any source at all.”⁷⁷

Assuming this is broadly correct, what then does a person with high self-esteem look like? Aside from a monk in a state of enlightenment or Thoreau in his cabin, how might high self-esteem be manifested in cosmopolitan society? This question harkens back to the TV-watching beer drinker or a down-on-his-luck go-getter who has seen his life goals repeatedly dashed. I maintain that both of these individuals can manifest high-levels of self-esteem by virtue of the fact that their choices about how to live life are the product of conscious decisions about which course of action will produce, for them, fulfillment. Requisite in this outlook is a

⁷⁴ DURANT, *supra* note 1, at 491.

⁷⁵ *Id.*

⁷⁶ Quotation from her home page, available at: <http://crocker.socialpsychology.org/>.

⁷⁷ See Robert Cambell and Walter Foddis, *Is High Self-Esteem Bad For You?* NAVIGATOR, July/August 2003, available at: <http://objectivistcenter.org/showcontent.aspx?ct=670&h=53>. See also, Crocker, J., Karpinski, A., Quinn, D. M., & Chase, S., *When Grades Determine Self-Worth: Consequences Of Contingent Self-Worth For Male And Female Engineering And Psychology Majors*, 85 J. of Personality and Social Psychology 507 (2003); Crocker, J., & Luhtanen, R. K., *Level Of Self-Esteem And Contingencies Of Self-Worth: Unique Effects On Academic, Social, And Financial Problems In College Freshmen*, 29 Personality and Social Psychology Bulletin 701 (2003); and Crocker, J., Luhtanen, R. K., Cooper, M. L., & Bouvrette, S., *Contingencies Of Self-Worth In College Students: Theory And Measurement* 85 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 894 (2003).

certain degree of honesty, because one must try to differentiate outcomes based not on desire but on reality. Inherent in the process, and thus in the concept of self-esteem, is a certain degree of self-respect, because one must hold the belief that future satisfaction is a worthwhile objective. Success is not critical.

This may imply, as odd as it sounds, that self-esteem as a process requires an original modicum of self-esteem in the sense that one must feel deserving of happiness (in the fulfillment sense of the word) in the first place. One might think that if not immediately forthcoming from birth or through an upbringing involving sufficient amounts of love and nurturing, the future of self-esteem is in jeopardy. This is not necessarily the case, however. One can manufacture self-esteem. In the definitional sense used in this paper, self-esteem can be a process that reinforces itself, with an initial spark that churns the wheels of examined living that comes from a conscious moment of self-actualization. Here is a similar sentiment straight from Epictetus's mouth 2000 years ago:

“Alas, that I should be lame in one leg!” Slave! Do you then, because of one paltry leg, blame the universe? Will you not make a free gift of it to the whole? ... I must go into exile: does anyone keep me from going with a smile, serene? ... “I will throw you into prison.” It is only my body you imprison. I must die; must I then die complaining? ... These are the lessons that philosophy ought to rehearse, and write down daily, and practice. ... A platform or a prison are places, one high, the other low; but your moral purpose can be kept the same in either place.⁷⁸

In its most simple form, the engine of self-esteem is catalyzed by a moment of acceptance, of responsibility. It would be an abdication of self-determination to deny that anyone can achieve this.

B. How Can Self-Esteem Be Compared?

⁷⁸ *Id.* quoting EPICETUS, WORKS, Vol. 2. Encheiridion, Girard, Kan., n.d.

To further answer the question about what high self-esteem looks like, it is necessary to focus for a moment on whether and how self-esteem can be compared across individuals. This will be of critical importance as well when considering self-esteem as a utility factor in a governing sense. How might we choose one policy over another on the basis of self-esteem?

The need for a calculus is in a sense the largest drawback to utilitarian theory and to this paper as well. If one policy *ceteris paribus* improves the self-esteem of ten people, but reduces the self-esteem of five others, should it be implemented? Is it just a matter of cost-benefit analyses? If we could factor in the intensity (that is, the quantitative amount of self-esteem gained or lost) for all affected parties for each such policy, one would be inclined to say yes. This presupposes, however, that self-esteem can be counted or measured, a proposition fraught with difficulty.

1) Measuring

The most recognized attempt in the behavioral sciences to measure self-esteem is the Rosenberg Self-Esteem Scale.⁷⁹ It is essentially ten questions asking the respondent to fill in a five point scale (Strongly Agree to Strongly Disagree) for statements such as “I take a positive attitude toward myself” or “On the whole, I am satisfied with myself.”⁸⁰ The principle problem with this lies in the knowledge of cognitive biases. Asking someone to directly self-assess pits them in a sense against themselves or rather who they want to be, producing terribly inaccurate results. Repeatedly, in surveys asking individuals to rate how much house work they do or how good a driver they are, individuals’ images of who they might like to be or think they ought to be

⁷⁹ Maurice Rosenberg was a professor of Sociology at the University of Maryland. The school maintains a website on his work, including a copy of the scale, available at: http://www.bsos.umd.edu/socy/grad/socpsy_rosenberg.html.

⁸⁰ *Id.*

trump everything else.⁸¹ So too, one can imagine, with surveys that effectively ask individuals to rate their own self-esteem.

Techniques such as implicit attitude and implicit association tests have emerged in an effort to avoid the overt bias problem.⁸² These experimental methods try to measure an individual's unconscious response to various stimuli. How people pair certain pictures or words and how quickly they do so may suggest true or unfiltered sentiments. One problem with such tests, however, is that they might simply be assessing familiarity or mere cultural knowledge as opposed to endorsement or belief of that knowledge.⁸³ It seems that no matter how deeply the social scientist looks, and there is a veritable mine of research on self-esteem and its measurement,⁸⁴ the researcher simply uncovers a new layer of socialization. This should not be particularly surprising considering that from birth, humans are involved in a highly sensory experience continually seeking more data with which to make sense of the surrounding world.

The best that can be done is probably to look for symptoms of high self-esteem. Asking individuals factual, rather than perceptual, questions about how they lead their lives and how they make decisions (if they make decisions at all) would be far more telling about an underlying state of being. One might object that this leaves the characterization of self-esteem to an original conception based on little more than intuition. This is the point, however, and precisely what

⁸¹ In such surveys, both spouses will reckon that they perform a majority of the housework – a physical impossibility. Likewise, a majority of drivers appear to think they are above-average drivers. *See generally*, Jacob Shamir, Michal Shamir, *Pluralistic Ignorance Across Issues and Over Time: Information Cues and Biases*, 61 PUBLIC OPINION QUARTERLY 2 (Summer, 1997)

⁸² *See generally*, Anthony G. Greenwald and Shelley Farnham, *Using the Implicit Association Test to Measure Self-Esteem and Self-Concept*, 79 J. of Personality and Social Psychology 1022 (2000).

⁸³ *See* C. M. Brendl et al, *How Do Indirect Measures of Evaluation Work? Evaluating the Inference of Prejudice in the Implicit Association Test*, 81 Journal of Personality and Social Psychology 760 (2001); Andrew Karpinski and James L. Hilton, *Attitudes and the Implicit Association Test*, 81 Journal of Personality and Social Psychology 774 (2001).

⁸⁴ *See generally*, CHRISTOPHER J. MRUK, SELF-ESTEEM RESEARCH, THEORY, AND PRACTICE: TOWARD A POSITIVE PSYCHOLOGY OF SELF-ESTEEM (2006) (noting over 7,000 articles and books on the topic of self-esteem); *see also* Rodewalt & Tragakis, *Self-esteem and self-regulation: Toward optimal studies of self-esteem* 14 PSYCHOLOGICAL INQUIRY 66 (2003) (noting that self-esteem has become the third most referenced topic in psychology, with the concept being mentioned over 25,000 times in articles, chapters and books as of 2003).

saves the self-esteem theory from the pitfalls of utilitarian calculi. On the topic of self-esteem, we are in an analytical sense, far better legal, moral, political, and philosophical theorists than we are scientists. And this is fine, because though more data is usually better, it can never replace the filter of intuition.

2) Grammatology

On this count, consider Roy Baumeister, a noted psychologist who has vaulted himself to prominence in part by rejecting the idea that self-esteem is a positive social good to be promoted.⁸⁵ In a 1996 study on violence and aggression, for instance, Baumeister concluded that all sorts of anti-social actors from bigots to bullies actually have high levels of self-esteem.⁸⁶ Over the course of the past decade, Baumeister has trumpeted the conclusion that self-esteem is not a panacea, but rather the cause, of all sorts of socially negative behavior.⁸⁷ A number of media outlets even celebrated the contrarian nature of this assertion.⁸⁸ Nevertheless, the foundation of Baumeister's work belies a glaring conflation of different, misleading concepts. His basic idea rests on the fact that the individuals in question believe they are vastly superior to their peers. In other words, they score very highly on the Narcissistic Personality Inventory – a test that measures such qualities as ego and arrogance.⁸⁹

⁸⁵ See ROY BAUMEISTER (ED.) *SELF-ESTEEM: THE PUZZLE OF LOW SELF-REGARD* (1993).

⁸⁶ Roy Baumeister, et al. *Relation Of Threatened Egotism To Violence And Aggression: The Dark Side Of High Self-Esteem*, 103 *PSYCHOLOGICAL REVIEW* 5 (1996).

⁸⁷ See e.g. Roy Baumeister, *Violent Pride: Do People Turn Violent Because of Self-Hate, or Self-Love?* 284 *SCIENTIFIC AMERICAN* 96 (April 2001).

⁸⁸ See generally, Erica Goode, *Deflating Self-Esteem's Role in Society's Ills*, *N.Y. TIMES* (October 1, 2002), available at:

<http://query.nytimes.com/gst/fullpage.html?res=9A02EEDA1538F932A35753C1A9649C8B63&partner=rssnyt&emc=rss>.

⁸⁹ See generally Robert Raskin and Howard Terry, *A Principal-Components Analysis of the Narcissistic Personality Inventory and Further Evidence of Its Construct Validity*, 54 *J. OF PERSONALITY AND SOCIAL PSYCHOLOGY* 890 (1988); Raffaele Siniscalco, *Narcissism. The American Contribution - A Conversation With Otto Kernberg*, 12-13 *JOURNAL OF EUROPEAN PSYCHOANALYSIS* (Winter-Fall 2001).

Baumeister's problem lies in his failure to differentiate qualities that sound like self-esteem when it is defined as merely how an individual perceives him or herself from those qualities that form true self-esteem when it is properly defined. French philosopher Jacques Derrida, the leader of the deconstructionist movement, counseled that a discussion ends and begins with definition of the concepts in play.⁹⁰ Without this, participants in a colloquy talk past one another. At worst, the situation devolves into error.⁹¹ For this exact reason, the preceding discussion intended to disabuse self-esteem of any baggage involving notions of self-confidence or of stated levels of self-worth.

Nathaniel Branden, a psychotherapist, objectivist, and prominent champion of self-esteem, is quick to avoid this problem in his own work.⁹² Unlike Baumeister, he lays out a clear definition at the outset, saying:

Self-esteem is the disposition to experience oneself as being competent to cope with the basic challenges of life and of being worthy of happiness. It is confidence in the efficacy of our mind, in our ability to think. By extension, it is confidence in our ability to learn, make appropriate choices and decisions, and respond effectively to change.

One can clearly see the common ground with this paper's chosen definition. Though I leave aside complicated terms like efficacy and worthiness in favor of viewing self-esteem more succinctly as the process of consciously choosing how to live life in an effort to achieve fulfillment, both terminologies nevertheless employ a similar vocabulary (words like experience, consciousness, responsibility) and similar judgments about its characteristics (that self-esteem is a process, that it is necessary to survival, and that it can be cultivated).

⁹⁰ Derrida's later work branched out into questions of policy, yet his methodology remained firm. *See e.g.* JACQUES DERRIDA, *ON COSMOPOLITANISM AND FORGIVENESS* (2001).

⁹¹ For a cogent defense of self-esteem robustly defined and a rejection of Baumeister's methods, *see* Cambell, *supra* note 77.

⁹² For more on Branden's books on self-esteem as well as his ties with Ayn Rand, see his personal website at: <http://www.nathanielbranden.com/catalog/splash.php>.

Moreover, both approaches immediately reject Baumeister's terminological looseness. In

Branden's words:

[T]here is nothing in the authors' idea ... that would allow one to distinguish between an individual whose self-esteem is rooted in the practices of living consciously, self-responsibility, and personal integrity—that is, one whose self-esteem is rooted in reality—and one whose “self-esteem” consists of grandiosity, fantasies of superiority, exaggerated notions of one's accomplishments, megalomania, and “favorable global self-evaluations” induced by drugs and alcohol. No definition of self-esteem or piece of research that obliterates a distinction of this fundamentality can make any claim to scientific legitimacy. It leaves reality out of its analysis.⁹³

Branden points out further that:

One does not need to be a trained psychologist to know that some people with low self-esteem strive to compensate for their deficit by boasting, arrogance, and conceited behavior. What educated person does not know about compensatory defense mechanisms? Self-esteem is not manifested in the neurosis we call narcissism—or in megalomania. To offer both types as instances of “high self-esteem” is to empty the term of any useable meaning.⁹⁴

He thus concludes that “self-esteem is not the euphoria or buoyancy that may be temporarily induced by a drug, a compliment, or a love affair. It is not an illusion or hallucination.” “If it is not grounded in reality,” he says, “if it is not built over time through the appropriate operation of mind, it is not self-esteem.”⁹⁵

Researchers Robert Cambell and Walter Foddis, in a defense of self-esteem as an objective concept, offered the following exposition of Branden's basic ideas:

The standards for adult self-esteem include self-reflective and independent thought; taking responsibility for and authentically asserting one's thoughts, beliefs, values, and actions; pursuing meaningful life goals; and adhering to moral values that are based on reason. Branden calls these objective standards of self-esteem “pillars,” meaning that they are foundational to self-esteem. If we act in ways that meet these objective standards, our self-esteem will necessarily rise; if we fail to act in these ways, or betray these standards, our

⁹³ Nathaniel Branden, *What Self-Esteem Is and Is Not*, adapted from *THE ART OF LIVING CONSCIOUSLY* (1997), available at: http://www.nathanielbranden.com/catalog/pdf/what_self_esteem.pdf.

⁹⁴ *Id.*

⁹⁵ *Id.*

self-esteem will drop. In sum, these sources of self-esteem are internal to the person; they depend on self-directed psychological processes that are under each person's control.⁹⁶

Conceiving of self-esteem as such implies that no numerical calculus is going to provide answers to the quest of determining an individual's true state of self-esteem or as to how two people's self-esteem levels might be compared. Does this mean that the self-esteem theory of justice is doomed for lack of practical application? Far from it.

Instead, it suggests that intuition or rather, research balanced with reason, has a great deal to offer self-esteem theory. Fine comparisons (two people with self-esteem levels that are near equal – high and high or low and low, for example) may be out of reach, but an entire spectrum of differing levels of self-esteem can still be filled out. One would measure individuals against the foregoing criteria, on the basis of whether they think consciously about their life and their opportunity set, whether they seek fulfillment as opposed to delusion, and whether they act autonomously and take responsibility over those life choices within their reach. It is true that on a macro level, a state would be hard pressed to choose among competing policies that aimed to empower, or rather infringe as little as possible, on individuals' abilities to do so. By the same token, however, the current paradigms of law and economics (placing policy incentives on those with the most information or those in the best position to avoid losses) or simply economics (choosing those policies that maximize wealth or show the greatest net benefits in a cost-benefit analyses) suffer from similar inabilities to refine policy to a strict science. The world can be too complicated. The merit of this proposal is that it takes the rights-based paradigm and further aligns it with its own underlying logic. Nothing is lost in a policy evaluation sense, and as the next section will show, a new sense of clarity and analytical rigor stands to be gained.

⁹⁶ Campbell, *supra* note 77.

IV. The Self-Esteem Theory of Justice

The beauty of self-esteem as the ultimate factor of utility is that it is not easily susceptible to trade-offs as other values like happiness or even pain minimization may be. One might attempt a typical rights-based attack on the self-esteem theory of justice by saying, for instance, that a sadist may live his dream or plan by torturing others. That is to say, however, that it is possible that a gain in one person's self-esteem can be more than the corresponding loss to another's or a group of others, which cannot be the case. One may feel some pleasure that could plausibly outweigh another's pain, but as previously noted, pleasure or even happiness does not speak directly to the concept of self-esteem. To put it another way, you cannot obtain more self-esteem from my self-esteem than I could with my self-esteem. Such trade-talk does not make any sense. As asserted in the introduction, a utilitarianism of self-esteem collapses the rights rhetoric of the liberal paradigm into the honest, forward-thinking, goal-oriented *modus operandi* of modern civilization. The utilitarian thought of past generations was susceptible, as the liberals vehemently argued, to subordinating rights in an effort to maximize utility however defined. But that is because previous utilitarian visions were trying to grasp, but never quite did, at this most fundamental of human attributes.⁹⁷

Interestingly enough, the liberal paradigm and its advocates have spent a generation or two trying to grasp at the same basic human quality. This explains the curious talk about "self-respect," "the good life," "meaning," and "fulfillment" that litters the pages of the rights-based tomes. The rules of the game are said to be more important than anything else, but then the game and its main point are defined in such vivid terms that the critical interpreter is left with only one conclusion as to why rights are important. This calls into question the impartiality of

⁹⁷ See the prior discussion regarding the felicific calculus and Mill's Happiness Principle. Both sound invitingly grand, but remarkably cloudy because happiness is not a fundamental unit on which to build a theory of justice.

the rights-regime in the first place and is perhaps the reason why much post-modern critical theory (Iris Marion Young and William Connolly to name a couple) has focused explicitly on discounting or refashioning claims to impartiality.⁹⁸ A utilitarianism based on self-esteem is truer to the underlying aim of the liberal paradigm and solves the principle problem with previous utilitarian theories.

A. Policy Implications

Whether we define self-esteem robustly, as in the preceding section, or as nothing more than one's "self-conception," that is, how one sees oneself, an important and related policy question arises. How might a state determine the self-esteem inducing properties of a policy and then how might a state choose one policy over another? One answer is that by using the rights based liberal framework, the state can, and in many cases already is, making correct comparisons. Since rights-based liberalism is a proxy for self-esteem maximization, those policies that maximize human autonomy and that show a deep regard for the power and potential of the individual to shape his or her own life and self-conception are those that contribute most to self-esteem.

Legislators and other politicians already regularly exalt western theoretical ideals and bedrock American values such as liberty, freedom from harm, opportunity and class-mobility.⁹⁹ Academics and philosophers, too, have informed the general debate over social goals by promoting ideas of wealth maximization, pain minimization, and rights protection.¹⁰⁰ Some have tried to connect these seemingly disparate ideas by arguing that rights protections create

⁹⁸ See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); WILLIAM CONNOLLY, *WHY I AM NOT A SECULARIST* (2005).

⁹⁹ See e.g. Paul Krugman, *The Death of Horatio Alger*, *THE NATION*, December 18, 2003, available at <http://www.thenation.com/doc/20040105/krugman>; David Wessel, *As Rich-Poor Gap Widens in the U.S., Class Mobility Stalls*, *WALL STREET JOURNAL*, May 13, 2005, available at <http://online.wsj.com/article/SB111595026421432611.html>.

¹⁰⁰ As previous discussion has made clear, champions of these ideas include Posner, Singer, and Rawls respectively.

conditions for wealth maximization.¹⁰¹ This is broadly correct, but as this paper emphasizes, it only tells part of the story. There is an overarching and as yet unmentioned meta-goal for legal organization, the fostering of self-esteem. The unifying policy element is the fact that many of the bedrock western philosophical principles are actually ingredients in a rough recipe for the maximization of self-esteem among a body-politic.

1) Descriptive Power

Many of the liberal philosophers celebrated their theses on account of the fact that they not only had some important normative ideas, but that they went a long way in a descriptive sense.¹⁰² Like many of the great theories of constitutional interpretation (McCloskey, Bobbit, Bickel),¹⁰³ they sought not just to direct future progress, but to give a detailed explanation of our social, legal, or political evolution and why history supports certain arguments. This paper's basic proposition does both of these things. On one hand, it offers room for debate about the potential institutional changes that could further the end of self-esteem amongst the citizenry. On the other hand, it does not dictate massive structural reorganization, because much of the existing political and social infrastructure already attempts to promote the self-esteem of the citizenry.

The broad outlines of America's political arrangements and public policies show a remarkably solicitous stance toward self-esteem: broad-based institutional support for property

¹⁰¹ This is a general point on the neoliberal agenda. Harvey, *supra* note 26.

¹⁰² Rawls and Ackerman in particular have argued that their theses are apparent in general form in the American public policy scheme.

¹⁰³ Constitutional interpretation is frequently glossed with a normative, as well as descriptive, intention. See ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT*; PHILLIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION*; ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*.

rights and the rights of owners;¹⁰⁴ a robust and highly complex series of markets in all manner of things from manufactured goods to credit; a progressive tax regime,¹⁰⁵ a far-reaching (though perhaps misdirected) system of domestic and international aid; and well-developed systems of legal dispute. The point is not to recite what is readily evident, but to highlight the power of these arrangements and policies with respect to the generation and cultivation of society's collective level of self-esteem. To put it simply, western society makes an impressive effort to convey and carry through on those things that allow individuals to create, choose, and carry out competing visions of the good life.¹⁰⁶

2) Hypothesis Testing

So what would a world based on the self-esteem theory of justice look like? One test of this paper's proposition is through the degree of radicalism implicit in its prescriptions. The right question to ask is whether a particular policy actually serves to promote the self-esteem not just of those for whom the policy is directed, but also for any others that might feel derivative effects. Does this help make sense of affirmative action? Foreign policy? Possibly. The Supreme Court, for example, appears to be inching closer to the idea that affirmative action has

¹⁰⁴ The Supreme Court chipped away at this in its recent ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005) (allowing the use of eminent domain on behalf of a private interest in the case of an economic development scheme). Not coincidentally, the decision was roundly criticized by legal academics and the public alike.

¹⁰⁵ A virtually unending source of political disagreement, the U.S. tax code is the subject of debate in practically every presidential campaign, and could no doubt benefit in a "self-esteem" sense from a hearty streamlining. See e.g. MICHAEL GRAETZ, *DECLINE (AND FALL?) OF THE INCOME TAX* (1997) (proposing a VAT applicable to incomes over \$75,000).

¹⁰⁶ Whether people actually do that and why they might not are questions for another occasion, though there is ample evidence to challenge this proposition. Westerners, at least in studies that themselves may be deeply flawed, show shocking rates of unhappiness, suicide, crime, and other outcomes that may undermine a good deal of this claim. See e.g., Nattavudh Powdthavee, *Economics of Happiness: A Review of Literature and Applications*. Forthcoming in CHULALONGKORN J. OF ECON. (2007), available at: http://www.powdthavee.co.uk/resources/Subjective+Well-Being+Research_revised.pdf; Melissa Lafsky, *Are Health, Wealth, and Happiness Linked Worldwide?* N.Y. TIMES, August 31, 2007, available at: <http://freakonomics.blogs.nytimes.com/2007/08/31/are-health-wealth-and-happiness-linked-worldwide/>.

outlived its usefulness.¹⁰⁷ Public opinion, both at home and certainly abroad, seems to find the current U.S. foreign policy unsatisfactory, implying perhaps that current policies serve neither American interests nor the self-esteem of foreigners.¹⁰⁸

What about the U.S. tax regime? Reform is on the agenda of presidential aspirants at practically every election and various new proposals are on the docket in nearly every session of Congress as well.¹⁰⁹ And no wonder. Locked into a labyrinthine maze of loopholes and special interest concessions, the U.S. Code is a morass of brackets, incentives, deductions, and exclusions. Not only is it difficult to correctly file a tax return in the U.S., it is costly and time-consuming. According to the IRS, “the average time burden for all taxpayers filing a 1040, 1040A, or 1040EZ was 23.8 hours, with an average cost of \$204 per return.”¹¹⁰ Factored across the roughly 135 million yearly tax returns, including over 40 million returns showing zero or negative liability, the scope of the issue is evident.¹¹¹ If we define self-esteem as having the power to consciously consider one’s opportunity set, that is one’s range of decisions about how to live life, and then having the wherewithal to carry through on a chosen plan, it becomes clear that such a resource-demanding policy infringes on collectivity’s ability to do so.

Tax policy would probably engender more self-esteem if a) it was streamlined to save time and stress (eliminating the need for many filings), and b) it was more progressive at the very

¹⁰⁷ See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that the University of Michigan’s undergraduate affirmative action policy was unconstitutional in its application).

¹⁰⁸ See *What Kind of Foreign Policy Does the American Public Want?* Program on International Policy Studies, (2006), available at: http://www.worldpublicopinion.org/pipa/pdf/oct06/SecurityFP_Oct06_rpt.pdf. For a somewhat dated, but interest policy brief, see Todorov, Alexander and Anesu N. Mandisodza, *Public Opinion on Foreign Policy: The Multilateral Public that Perceives Itself as Unilateral*. (Sep. 2003), available at: http://americans-world.org/articles/todorov_opinion.pdf.

¹⁰⁹ Interestingly, the 2008 presidential election seems almost devoid of tax debate. Republicans are content with the Bush tax cuts, while democrats are not making a talking-pint of it. See Editorial, *The Tax Debate That Isn’t*, N. Y. TIMES (December 13, 2007); See generally, Joel Slemrod and Jon Bakija, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE GREAT DEBATE OVER TAX REFORM* (2001).

¹¹⁰ Federal Register: August 3, 2006 (Volume 71, Number 149), available at:

<http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-12496.htm>.

¹¹¹ Tax Foundation, *Number of Americans Paying Zero Federal Income Tax Grows to 43.4 Million*, March, 30, 2006, available at: <http://www.taxfoundation.org/research/show/1410.html>.

bottom brackets and less so at the highest ends (promoting growth through incentives).¹¹² The more resources, in the form of time, money, health, or goodwill, in the hands of individuals, the greater the increase of self esteem at the margins. More people will have more opportunities to consider their choices and make thoughtful decisions about how to lead their lives. The driving point is that by singling out self-esteem as the ultimate social good, one can establish a usable set of criteria for the proper consideration of important practical questions.

B. Case Study

The criminal justice system might therefore make an excellent case study, one representative of the power of looking through the self-esteem prism, because it touches so pervasively the life of the polity. How should violence, delinquency, and anti-social behavior be dealt with? What treatment is government justified in imposing on lawbreakers? What types of punishment will produce the best outcomes for society as a whole? These questions and others are no doubt perplexing; they have been answered very differently by peoples throughout the world and over time.

One small point can be conceded at the outset, however. Assuming adequate process, government is, upon conviction of an offender, justified in constricting that individual's self-esteem or potential for self-esteem. This a Millian concept in the sense that government may legitimately constrain an individual that seeks to coerce, and thereby infringe the rights of, a third party.¹¹³ It is a tenet of the self esteem theory because one is not justified in (and thus can be prevented from) exercising self-esteem at the direct expense of another's opportunity to do

¹¹² Graetz, *supra* note 113.

¹¹³ *See generally*, JOHN STUART MILL, ON LIBERTY (giving flesh to the classical maxim that an individual's rights end where another's begin).

so.¹¹⁴ This may presuppose a fairly (in the most robust sense of the word) written legal code, which is a topic unto itself. This small concession also ignores the elemental question of how much, or to what extent, government is justified in restricting self-esteem. What can be legally or even morally justified, does not speak precisely to what may produce the best outcome from the perspective of self-esteem. Optimum policy, which is what this paper is after, is different from what is merely just from a baseline perspective.

1) The Death Penalty

Consider the death penalty, for example. The self-esteem theory asserts over all the various arguments (against and for), that a system of capital punishment, and certainly the present system, does little to advance the self-esteem of the collectivity. In other words, capital punishment sacrifices a quantum of self-esteem with practically nothing to show in return on the opposite side of the ledger.

Yet the common arguments against state-sponsored death, which follow a number of well-beaten paths, do not quite strike to the core of the matter. Perhaps the most common, or at least the most moderate, attack is on the injustice of its administration. This approach proved enough to win a ban from the Supreme Court in the 1972 case *Furman v. Georgia*,¹¹⁵ at which time Justice Potter wrote that “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual...the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”¹¹⁶ Executions were

¹¹⁴ This raises the difficult question of negative externalities. Driving one’s car on a busy road, for instance, contributes to traffic, which in a small sense limits (by the loss of time) one’s ability to follow a chosen plan. Ideally, government could minimize externalities through focused taxes and other measures, but an externality almost by definition shows that one’s chosen action or plan is not dependent on the reduction of another’s self-esteem. One does not gain self-esteem by reducing that of a third party.

¹¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972) (banning the death penalty on the basis of inconsistency in application).

¹¹⁶ *Id.* at 309.

reinstated, however, only four years later in *Gregg v. Georgia*,¹¹⁷ leaving Illinois Governor George Ryan to impose in 2000 a moratorium on executions in that state for similar reasons. He stated “I cannot support a system, which, in its administration, has proven to be so fraught with error.”¹¹⁸ On the notion of fairness, the self-esteem theory is in conjunction. Arbitrary or inept judicial capital process is an affront to the sanctity of life, not in a religious sense, but in that it cheapens, by showing a reckless disregard for, the self-esteem of individuals and the population at large. But this is a somewhat superficial critique in that it could be construed as implicitly condoning the practice provided it could be justly administered.

Morality is a concept frequently floated, but not necessarily any more trenchant. New Jersey Governor Jon Corzine recently signed into law a complete ban on the death penalty for that state. Whereas Governor Ryan was primarily concerned with application, the New York Times noted that “Corzine spoke of morality and practicality, saying that state-endorsed killing was amoral public policy.”¹¹⁹ The self-esteem theory, offering a type of political morality as it does, might appear to be sympathetic to moral appeal in general, but it actually eschews this discourse in favor of more concrete policy assessment. Even if Corzine is right, for instance, morality commonly conceived is a nebulous concept as evidenced somewhat ironically by religious fundamentalists who as a group continue to be among the most ardent supporters of the death penalty.¹²⁰ Even Mill, the great advocate of individual liberty, women’s rights, and progressive social policies, gave an oration supporting capital punishment precisely on moral

¹¹⁷ *Gregg v. Georgia*, 428 U.S. 123 (1976) (holding that rewritten state statutes complied with the 8th Amendment).

¹¹⁸ The moratorium was announced on Jan. 31, 2000, in light of the 13th exoneration of a death row inmate in Illinois since 1977, making the number of exonerations in the state higher than the number of executions carried out. See Press release, Illinois Governor Ryan, Governor to Appoint Commission to Review Capital Punishment System (Jan. 30, 2000), available at: <http://speakingoffaith.publicradio.org/programs/deathpenalty/ryan.shtml>.

¹¹⁹ Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight*, N.Y. TIMES (Dec. 18th, 2007), available at: <http://www.nytimes.com/2007/12/18/nyregion/18death.html>

¹²⁰ See generally, Capital Punishment –The Death Penalty: Support and Opposition, available at: <http://www.religioustolerance.org/execut4.htm>, citing R.L. Young, "Religious Orientation, Race and Support for the Death Penalty," 31 J. for the Scientific Study of Religion 76 (Mar. 1992).

grounds, albeit under the impression that deterrence works. He stated that “[i]f, in our horror of inflicting death, we endeavour to devise some punishment for the living criminal which shall act on the human mind with a deterrent force at all comparable to that of death, we are driven to inflictions less severe indeed in appearance, and therefore less efficacious, but far more cruel in reality.”¹²¹

Nor is common ground found on the topic of capital punishment’s deterrence value. Much like the gun debate, studies abound on both sides of the question.¹²² A 1996 report for the United Nations concluded that “research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment.” Moreover, the study noted that “such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis.”¹²³ Considering that death is almost certainly more damning to self-esteem than life-imprisonment, it would seem sensible to demand hard evidence that it reaps external social gains. Some have gone so far as to posit a “brutality” theory, arguing that capital punishment may actually increase capital crimes.¹²⁴ Without commenting specifically on this theory, the basic point is that while it might seem intuitive that the death penalty has deterrence value, it is equally intuitive that various factors (crimes of passion, administrative delay, cultural acceptance of killing) could evade or negate that value.

Perhaps in exasperation, many death penalty opponents argue that the U.S. is out of sync with the progression of international mores. Bolstering this view was a recent U.N. vote in favor

¹²¹ John Stuart Mill, “In Favor of Capital Punishment,” April 21, 1868 (Speech given before parliament in opposition to a bill banning capital punishment), available at: <http://ethics.sandiego.edu/Mill.html>.

¹²² See generally, EVAN J. MANDERY, CAPITAL PUNISHMENT: A BALANCED EXPLANATION (2004) (canvassing some of the latest scholarship in the debate).

¹²³ See Amnesty International, *Facts and Figures on the Death Penalty* (March 2002), available at: http://www.amnestyusa.org/abolish/facts_figures032002.pdf.

¹²⁴ See e.g. ACLU, *The Case Against the Death Penalty* (Dec. 1997), available at: <http://www.aclu.org/capital/general/10441pub19971231.html>.

of a global moratorium on the death penalty.¹²⁵ While nothing more than a non-binding resolution, it highlighted the interesting company the U.S. keeps on this issue, having voted against the measure along with Iran, China, Pakistan, Sudan, and Iraq. In fact, this small group of six countries (including the U.S.) accounts for more than 90 percent of the world's state-sponsored executions.¹²⁶ The most curious feature of U.S. policy, however, is the overwhelming domestic popular support behind it. Having fluctuated over the past century (and with different survey questions), public opinion has held relatively stable for decades, with roughly two-thirds of the country in favor of the death penalty.¹²⁷ With this in mind, the “international pariah” line of argument is actually less a critique of U.S. policy than it is a cultural comment.

The key to understanding strong public (and thus legal) support for capital punishment lies at bottom with the entrenched concept of retribution, the mixed feelings of anger and pain that lead one to demand “an eye for an eye.” And this is where the self-esteem theory has most to contribute. From an economic perspective, retribution is senseless because achieving vengeance is akin to ignoring sunk costs. From a self-esteem perspective, a state-sponsored execution intended to show society's abhorrence of the crime committed is pointless since it does not bolster the self-esteem of any participants, including the victim's family. Such an act may satisfy angry impulses, or even allow loved ones to “put the crime behind them,” but both notions are a far cry from advancing self-esteem. As noted, self-esteem is a reflective process

¹²⁵ U.N. general assembly, A/C.3/62/L.29, available at:

<http://www.un.org/Docs/journal/asp/ws.asp?m=A/c.3/62/L.29>.

¹²⁶ See Editorial, *A Pause from Death*, N.Y. TIMES (Dec. 20th 2007) (citing Amnesty International), available at: <http://www.nytimes.com/2007/12/20/opinion/20thu2.html>.

¹²⁷ Gallup notes that “the percentage of Americans in favor of the death penalty has fluctuated significantly over the years, ranging from a low of 42% in 1966, during a revival of the anti-death penalty movement, to a high of 80% in 1994. More recently, public opinion on the death penalty has been more stable, with upward of two in three Americans supporting it.” More information is available at: <http://www.deathpenaltyinfo.org/article.php?did=1266&scid=>.

dependent upon objectivity and logic. Grieving, in contrast, is inherently emotional. At the risk of being callous, the self-esteem theory asserts that policy should not be influenced by the latter because the pure emotional process does not speak to the concept of considered judgment. This is not to deny the value of emotions in individuals' daily lives, only to argue that the elements of self-esteem, including the betterment of human choices and the collective attainment of fulfilling lives, is not materially advanced by conceding to only one aspect (the emotional) of the human experience.

2) Incarceration

On the same note, consider the practice of confining offenders in jails and prisons. As a form of punishment qua punishment, incarceration is a relatively recent phenomenon coming into vogue only a couple hundred years ago.¹²⁸ Historically, punishment was more likely to be corporal, with jails (gaols) and prisons used mostly to facilitate trial and to carry out the sentence.¹²⁹ While torture, mutilation (such as branding), and whipping may be repulsive to modern sensibilities, there is something uniquely peculiar about the idea of locking people in cages (behind bars), thus removing them from society (often families and spouses), and then wasting away their time. What a colossal waste of human resources! Prison seems most constructive as an immediate deterrent, fitting only for those violent menaces to society who are literal threats to the public health and safety. Considering that incarceration is very expensive¹³⁰

¹²⁸ See generally, NORVAL MORRIS (ED.), THE OXFORD HISTORY OF PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (1997); and ROGER SMITH, THE HISTORY OF INCARCERATION (2006).

¹²⁹ *Id.*

¹³⁰ The DOJ reports that "the fee to cover the average cost of incarceration for Federal inmates in Fiscal Year 2006 was \$24,440." See Federal Register: June 6, 2007 (Volume 72, Number 108, Page 31343), available at: <http://cryptome.org/bop060607-2.htm>.

and recidivism rates in the U.S. are over two-thirds,¹³¹ present practice appears to neither improve the self-esteem of those convicted of crimes nor of society as a whole.

For the mass of non-violent offenders (perhaps even aged violent offenders), the self-esteem theory would look to alternative, forward-looking policies with a more direct connection to prevention and deterrence. Despite the ever present difficulty of incentive problems, a broad based approach focusing on fines, raising the probability of capture and successful prosecution, upfront investments in education, backend investments in rehabilitation, and quality integration assistance, would likely pay monetary and self-esteem dividends. Excessive confinement, for lack of more creative correctional approaches, appears almost the antidote to the self-esteem theory in the sense that human capital is merely laid to waste.

This sentiment begs a discussion of what might actually be the largest culprit of self-esteem loss in the criminal justice sphere: misguided legislation. Mandatory minimums and tenacious support, despite abundant knowledge and rationale to the contrary,¹³² for aggressive drug laws has contributed to a staggering rise in incarceration over the past generation. As of the close of 2006, well over two and a quarter million individuals were held in federal or state prisons or in local jails, up from merely a half million in 1980 (two years before Reagan declared the War on Drugs).¹³³ Over the same period, the number of persons under correctional supervision, a term which includes parole and probation, increased from a little fewer than two million to over seven million.¹³⁴ That means one in every 32 U.S. adult residents currently falls under the nation's correctional umbrella. Already the U.S. has the most inmates, and the highest

¹³¹ One study showed “over two-thirds of released prisoners were rearrested within [just] three years.” See USDOJ, Recent Trends in the U.S.: Recidivism, available at: <http://www.ojp.gov/bjs/reentry/recidivism.htm>.

¹³² See e.g., *Stumbling in the Dark*, Economist (July 26, 2001), available at: http://www.economist.com/specialreports/displayStory.cfm?story_id=706591.

¹³³ See USDOJ *Correctional Populations Key Facts*, available at: <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (effects are also apparent of the sentencing guidelines, which came into effect in 1987).

¹³⁴ *Id.*

incarceration rate, of any nation in the world, more in fact than the Russian Federation, South Africa, Mexico, Iran, India, Australia, Brazil, and Canada combined.¹³⁵ And according to projections by the Pew Foundation, one in every 178 U.S. residents will, by 2011, live in prison.¹³⁶

Recitation of these facts is not meant to make the argument that imprisonment begets crime, but rather to say that current levels of incarceration and incarceration growth¹³⁷ are the wrong solution to social ills. For its part, low-level drug use would be better treated as a public health concern than a criminal matter.¹³⁸ Not only would this reap economic savings to society, but it is more in line with self-esteem promotion because treatment is ultimately empowering to the offender.¹³⁹ Drug-dealing on the other hand has been incentivized by artificially high prices and steady consumer demand.¹⁴⁰ Enforcement has been rife with problems too, including infringement of civil liberties at home and foreign policy dilemmas abroad.¹⁴¹ Without belaboring the point, one can conclude that the war on drugs, from a self-esteem (not political) perspective, has been abjectly destructive.

¹³⁵ See Pew Public Safety Performance, *State and Federal Prison Population*, available at: http://www.pewpublicsafety.org/statistics/prisoner_population.aspx

¹³⁶ *Id.*

¹³⁷ Since the enactment of mandatory minimum sentencing for drug users, the Federal Bureau of Prisons budget jumped from \$220 million in 1986 to more than \$4.3 billion in 2001, an increase of almost 2000%. See Prison, Jails, and Probation – Overview, available at: <http://www.drugwarfacts.org/prison.htm>.

¹³⁸ For one example of the success of drug treatment programs as compared to incarceration, see Maryland's Break the Cycle Program, Reports on Years 1, 2, and 3, available at: http://www.bgr.umd.edu/pdf/btc_year1.pdf; http://www.bgr.umd.edu/pdf/btc_year2.pdf; and <http://www.bgr.umd.edu/pdf/FinalWrittenreportMarch02.pdf>.

¹³⁹ See generally, Justice Policy Institute, *Effective Investments in Public Safety* (Feb. 2007); Doug McVay et al., Treatment or Incarceration: National and State Findings on the Efficacy and Cost Savings of Drug Treatment Versus Imprisonment (Mar. 2004).

¹⁴⁰ See e.g., George Melloan, *Musings About the War on Drugs*, WALL STREET JOURNAL (Feb. 26, 2006), available at: <http://www.opinionjournal.com/editorial/feature.html?id=110008017>.

¹⁴¹ See e.g., Steve Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, Cato Policy Analysis 180 (1992), available at: <http://www.cato.org/pubs/pas/pa-180es.html>; Regarding foreign policy, one can consider bilateral relations with *inter alia* Panama, Nicaragua, Peru, Colombia, and Mexico as having been highly affected by drug policy.

If state-sponsored death eliminates the self-esteem of the convict (while probably reducing the self-esteem of the convict's family and loved ones) at no gain to the victim's relatives or society at large, incarceration in conjunction with ill-advised criminal laws can be said to have an even far-more pervasive (and thus negative) self-esteem effect based on the sheer volume of individuals involved in the system. A twist on the brutality theory may even apply. By tolerating and sometimes watching executions (they are frequently shown on television to families and sometimes even broader audiences),¹⁴² society may be disseminating the mistaken impression that publicized revenge actually improves an individual's self esteem or one's ability to "go on." Likewise, the perpetuation of failed policies, like the war on drugs, in combination with the growth of a criminal justice infrastructure in support, may serve to further erode the cultural fabric required to think consciously and logically about how to make fulfilling life choices.

3) Race

Race is an element in each of the preceding issues, but it deserves separate mention both because of the profundity of the entrenched disparities and the broad systemic questions raised. As of 2007, 37 states and the federal prison system held 3,228 prisoners under sentence of death; 1,802 being white, 1,352 black, 35 Asian, 28 American Indian, and 11 of unknown race.¹⁴³ The figures do not jump off the page until one considers that that absolute statistic does not account for the fact that blacks represent only about 13% of the U.S. population (compared to about 77%

¹⁴² See, e.g. CNN, Oklahoma Families Can Watch McVeigh Execution on TV, April 12, 2001, available at: <http://archives.cnn.com/2001/LAW/04/12/ashcroft.mcveigh.02/>.

¹⁴³ USDOJ Bureau of Justice Statistics, available at: <http://www.ojp.usdoj.gov/bjs/cp.htm>.

for whites).¹⁴⁴ Overall incarceration figures by race show that Blacks are imprisoned at roughly six times the rate of whites (2,468 per 100,000 compared to 409 per 100,000 in 2006). An even clearer depiction of the situation is given by looking at males (the vast majority of offenders) during their late 20s (considered the peak offending years). As of year end 2006, white males between age of 25 and 29 were incarcerated at a rate of 1,685 per 100,000. For Latino males of that age group it was 3,912 per 100,000, and for Black males 11,695 per 100,000. That means that, without even including parole or probation, almost twelve percent of Black men in their late 20s are in prison or jail.¹⁴⁵

Such figures raise the question of how society should handle group disparities. The Supreme Court addressed the issue with regard to employment discrimination in the 1970s, beginning with *Griggs v. Duke Power Co.* The Court held that a job test alone, if it produces a disparate impact on an ethnic minority group, was enough to warrant judicial scrutiny.¹⁴⁶ The approach was abandoned wholesale five years later, though, beginning with *Washington v. Davis*.¹⁴⁷ Prevailing law in this area now holds that racial disproportions are not enough; a plaintiff must prove discriminatory intent.

Legal academia has produced a substantial body of literature, under the rubric of anti-subordination theory, and thus has taken the subject out of the limited realm of labor.¹⁴⁸ A central argument has been for the ideal of taking groups into account when balancing governmental interests with social equality. Self-esteem theory, however, has a slightly different

¹⁴⁴ See Overview of Race and Hispanic Origin, Census 2000 Brief, available at: <http://www.census.gov/prod/2001pubs/cenbr01-1.pdf>.

¹⁴⁵ Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2006 USDOJ (June 2007) p. 9, available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>.

¹⁴⁶ *Griggs v. Duke Power Co.* 401 U.S. 424 (1971).

¹⁴⁷ *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁴⁸ See Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL & PUB. AFFAIRS 107 (1976); See generally Robin West, *Groups, Equal Protection, and Law*, ISSUES IN LEGAL SCHOLARSHIP (2002); contra, Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES IN LEGAL SCHOLARSHIP (2002); Peter H. Schuck, *Groups in a Diverse, Dynamic, Competitive, and Liberal Society*, ISSUES IN LEGAL SCHOLARSHIP, Vol. 2., (2002).

take on the problem. Racial disparities of this magnitude are harmful to the collective self-esteem of society. Equal opportunity must mean not only that the most coveted positions in society are open to all, but that the bottom rungs do not evidence a class system. The self-esteem theory is highly solicitous to private enterprise, that is individual choices about how to live life, but when government acts, or when government sanctions the actions of private enterprise, it risks distorting outcomes and individual opportunity sets, thus jeopardizing the collective self-esteem.

In the criminal justice context, the proof is in the pudding as they say. It is simply far-fetched to believe that the current demographic landscape of correctional supervision evidences adequate respect for the notion of self-esteem or of how racial disparities can affect group mindsets regarding the possibilities inherent in civilized life. The Supreme Court apparently agrees, at least to some extent, having held recently that federal judges may exercise discretion with regard to crack-cocaine offenses, in spite of strict federal sentencing guidelines.¹⁴⁹ That particular issue is deeply racialized, considering that blacks are much more likely to be convicted for crack possession, which carries significantly harsher penalties than possession of powder cocaine. The 11,000 cocaine cases handled annually in Federal courts are divided almost evenly between crack and powder, and yet blacks account for over 80% of crack defendants and only a quarter of those sentenced for dealing powder cocaine.¹⁵⁰

In sum, the theory holds that law should not turn its back on empiricism in favor of acting rationally in a pure sense. Accordingly, the self-esteem theory's answer to issues of race deals not with the search for discriminatory intent among individual enterprises or policies, but with the more consequentialist inquiry of whether a certain outcome produces the most self-esteem.

¹⁴⁹ *Kimbrough v. U.S.* No. 06-6330 (2007).

¹⁵⁰ See Bill Mears, Justices: Judges Can Slash Crack Sentences, CNN (Dec. 10, 2007), available at: <http://www.cnn.com/2007/US/law/12/10/scotus.crack.cocaine/index.html>.

Conclusion

In the *Decent Society*, Margalit makes the bold claim that the punishment of criminals is a litmus test for a society's level of decency.¹⁵¹ This paper's argument suggests that Margalit is but an extension of a long liberal search for the right measuring stick by which to judge how just our political civilization actually is. For most, the rights of society and how stringently they are protected is the ultimate barometer of justice in society. For Margalit, the correct metric is how decently society treats its citizens.¹⁵² A self-esteem theory of justice argues instead that each of these concepts, and many others like them, is really a proxy for something more basic – an individual's self-esteem. For only with self-esteem can any human faculties be exercised. Moreover, once affirmed, a degree of self-esteem can start a reinforcing cycle in which a positive self-conception begets positive, socially useful, constructive acts that spill over into the self-esteem of others. A utilitarianism based on the maximization of self-esteem would direct all of society's energy and institutional capacity toward the promotion of this fundamental socio-political driver. Furthermore, this effort would not be at the expense of other dearly held liberal values. Those values are directed toward this enterprise anyway.

A self-esteem theory of justice boils down a number of central late twentieth century philosophical themes, including self-respect, meaning, fulfillment, individualism, and liberty. In so doing, it is responsive to a handful of pressing philosophical enterprises. It is at once a critique of the reigning rights-based tomes like *A Theory of Justice*, *Anarchy, State, and Utopia*, and *Social Justice in the Liberal State*, a defense of an ideal perspective from which to assess social and political arrangements, a stand-alone argument for justice as a “first virtue” of government, and a philosophical principal with which to educate the next generation. The paper

¹⁵¹ See AVISHAI MARGOLIT, *DECENT SOCIETY* (1998).

¹⁵² *Id.*

is presented as is, because it helps to highlight what should be considered a critical element in the theory: the reconciliation of liberalism with utilitarianism. In addition to any philosophical merits the paper may have, it is also an attempt to vindicate a cornerstone policy objective more broadly construed: the promotion of a citizenry that believes in the construction of a society in which individuals' self-esteem is buttressed by the social, political, and economic institutions that shape their lives.

There is, notwithstanding, an ever-present array of alluring (to many) philosophies that offer competing visions of how the world is and should be interpreted or structured. As briefly mentioned, the post-modern political critique has achieved limited success in a broad effort to deconstruct pervasive biases in many areas of modern thought.¹⁵³ Catherine McKinnon, for instance, has advanced a radical broadside against forces of male and heteronormative subjugation.¹⁵⁴ The feminist movement more broadly speaking has achieved success in an effort to extend the rights-based gains more widely.¹⁵⁵ Critical race theory has cued to some extent off of the women's movement in an effort to expose a Western and Eurocentric hierarchy that has distorted legal and social regimes.¹⁵⁶ This school has experienced some success by virtue of a similar goal, to equalize the playing field of economic, political, and social opportunity. Communitarian or egalitarian outlines of the likes of Michael Sandel or Steven Elkin draw small followings in part because they present a competing view of social organization.¹⁵⁷ Rather than

¹⁵³ YOUNG, *supra* note 66; *See also* ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME* (1996).

¹⁵⁴ *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory* 7:3 SIGNS: J. OF WOMEN IN CULTURE AND SOC. 515 (1982); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence* 8 SIGNS: J. OF WOMEN, CULTURE, AND SOC. 635 (1983).

¹⁵⁵ *See generally*, DAVID KENNEDY AND WILLIAM W. FISHER III, *THE CANON OF AMERICAN LEGAL THOUGHT*. (2006).

¹⁵⁶ *Id.*

¹⁵⁷ Communitarian philosophy stands at odds with much of rights-based philosophy. *See* MICHAEL SANDEL (ED.) *LIBERALISM AND ITS CRITICS* (1984); STEPHEN L. ELKIN, *RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON* (1987).

simply criticize and offer reinvigorated versions of rights-based schemes, these theories (as all Marxist theories do) threaten to stifle the engine (individualism) which powers the whole.¹⁵⁸

As this paper presents a more accurate conception of both rights-based and utilitarian theories it is at once singularly ambitious among competitors and surprisingly tame. It calls for a shift in mindset by questioning the lexicon seemingly wedded to rights-based political theory. And yet once the discourse of self-esteem is acknowledged for what it is and what it has been, the history that unites rights-based liberalism with defensible utilitarian thought may require comparatively little policy change.

As a result, this paper may be better framed in conditional form. If one adheres to the ascendant rights-based framework of the past half-century, then one may be compelled to acknowledge the central role of self-esteem in that very framework. When one does so, it becomes evident that self-esteem solves the utilitarian problem of rights-tradeoffs and that society can freely seek, in a consequentialist fashion, to maximize self-esteem. As these two philosophies begin to merge, there is no inconsistency in then utilizing the rights-based framework for comparisons of competing policies. As a result, this paper could be faulted for being overly-academic in the sense that the conclusion boils down to a mere shift in mainstream rights-based liberalism. That is not of great concern, however, because acceptance of the basic premise would be quite enough to command important, albeit intra-systemic change. Going forward, a larger and perhaps empirically irresolvable concern is whether rights-based liberals are correct in the implicit assumption that a rights-based framework and market democracies in general actually produce higher levels of self-esteem.

¹⁵⁸ While neoliberalism speaks to political and economic frameworks for successful market economies, the engine of any market economy is the profit motive as defined by entrepreneurship and individual incentives.

The question remains: Will the next generation be sympathetic to the argument? What are the odds that this new utilitarian formulation will allow political theorists to transcend the limits of the reigning liberal paradigm of the late twentieth century? Considering how entrenched Rawlsianism, Ackermania, Nozickianism and all the other liberalisms are, the outlook is not sanguine. To see just how formidable the obstacles are, consider how far from the mainstream Singer and Posner are regarded, although some of their ideas are practically core American values.¹⁵⁹ Then consider how far from the mainstream classic liberals such as Milton Friedman, who advocated maximum human freedoms regarding trade and speech within a strong, but limited regulatory scheme, still are though these core values too have been widely adopted.¹⁶⁰

The acceptance of this theory would thus require a doubly profound transformation in political thought. Utilitarianism as a school would have to lose a good deal of its stigma and increasing self-esteem would need to be truly recognized as a core socio-political goal. Might this paper spur such a movement? Only time can tell, but of some comfort is the fact that time is indeed on the side of the argument in favor of recognizing self-esteem as the critical socio-political component. So long as theorists and politicians continue to aver self-esteem rhetoric, even as they buttress the rights-based edifice, they are actually strengthening the central claim of the paper. In a sense, they are grasping at the great potential of a self-esteem theory of justice.

¹⁵⁹ By core American values, I refer to the general notions of wealth maximization and pain minimization. The nation's regulatory scheme could fairly be said to promote these basic ideals.

¹⁶⁰ While Milton Friedman is considered a fringe libertarian in modern politics, he not only won the Nobel Prize, but deeply influenced the monetary policy of *inter alia* the Clinton administration.