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Essay: Some Thoughts on the Relationship between Property Rights and Immigration Policy

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ESSAY: SOME THOUGHTS ON THE RELATIONSHIP BETWEEN PROPERTY RIGHTS AND IMMIGRATION POLICY

ROBERT W. MCGEE¹

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I. INTRODUCTION

Most articles and books that have been written on immigration policy start from a utilitarian position. They discuss issues such as whether immigration, on balance, is more harmful than beneficial, and whether allowing immigrants into the country results in job losses, increases in welfare costs, aids in economic growth, and so forth. This article is distinctly different in focus. Although utilitarian themes are discussed, this article places the main emphasis on the relationship between property rights and immigration policy.

Part two reviews the utilitarian arguments that have been made in connection with immigration policy. Part three discusses the balancing of interests argument, which attempts to arrive at solutions to immigration problems by balancing the interests of immigrants with the interests of those who are affected by immigration. Part four examines the public policy rationale for placing restrictions on immigration. Part five applies property rights theory to immigration policy. The article concludes that utilitarian approaches, which include the balancing of interests argument, suffer from fatal defects, as does the public policy argument. The real solution to immigration problems must be found in a policy that recognizes and respects property rights.

II. A REVIEW OF THE UTILITARIAN APPROACHES TO IMMIGRATION POLICY

The vast majority of debates regarding immigration issues have been, at least partially, from a utilitarian perspective.² Such debates revolve around

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²For a brief, scholarly overview of utilitarianism, see 8 THE ENCYCLOPEDIA OF PHILOSOPHY 206-12 (1967).

questions such as "who wins" and "who loses," "does the policy do more good than harm," and so forth—basically variations of "the greatest good for the greatest number" argument, which is utilitarian.³ There is the perception that immigrants will take jobs from citizens, that they will overburden public services like education, health and welfare,⁴ crowd into the cities and generally disrupt the status quo.⁵ Businesses are burdened by having to comply with laws that punish them for hiring illegal immigrants.⁶ However, immigration can be beneficial by allowing people with money⁷ or skills⁸ to enter the country, thus making a contribution to the society they enter.⁹

Political leaders of the last few centuries have supported liberal immigration policies on the ground that they enhance economic growth.¹⁰ There is much evidence to suggest that this is true. Immigrants to the United States have made a disproportionate contribution to economic growth by bringing capital and

³Newspaper and magazine reports invariably discuss immigration issues from this perspective, usually emphasizing who stands to lose rather than who stands to gain. For a more scholarly approach that adopts this perspective, see Brian Adler & Brett Jarrett, *Capital v. Labor: Who Wins and Who Loses Under the Immigration Act of 1990?*, 23 U. MIAMI INTER-AM. L. REV. 789 (1992).

⁴For a discussion of this point, see Kenneth H. Post, *Excessive Demands on Health and Social Services: S. 19(1)(a)(ii) Immigration Act—What is the Standard to Sponsor Infirm and Elderly Parents?*, 8 J. L. & SOC. POL'Y 142-77 (1992).

⁵Gary D. Thompson & Philip L. Martin, *Immigration Reform and the Agricultural Labor Force*, 42 LAB. L. J. 528 (1991); Vernon M. Briggs, Jr., *Immigration Reform and the Urban Labor Force*, 42 LAB. L. J. 537 (1991).

⁶For a discussion of the impact of the Immigration Act of 1990 on businesses, see Timothy J. Horgan, *The Immigration Act of 1990: Its Impact on the Business Community in the United States*, 64 N.Y. ST. B. J. 32 (1992).

⁷Bill Girdner, *Give Me Your Rested, Your Wealthy . . .*, 9 CAL. LAW. 41 (1989); Lawrence C. Lee, *The "Immigrant Entrepreneur" Provision of the Immigration Act of 1990: Is a Single Entrepreneur Category Sufficient?*, 12 J.L. & COM. 147 (1992); Palma R. Yanni, *Business Investors: E-2 Nonimmigrants and EB-5 Immigrants*, IMMIGR. BRIEF., Aug. 1992, at 1-35.

⁸Robert E. Hopper, *Immigration Issues for Professional Nurses*, IMMIGR. BRIEF., July 1991, at 1-43; Demetrios G. Papademetriou & B. Lindsay Lowell, *Immigration Reform and the Skill Shortage Issue*, 42 LAB. L. J. 520 (1991); William V. Roebuck, Jr., *The Move to Employment-Based Immigration in the Immigration Act of 1990: Towards a New Definition of "Immigrant"*, 16 N.C. J. INT'L L. & COM. REG. 523 (1991); Robert D. Aronson, *Immigration Strategy and Practice for Foreign Physicians*, IMMIGR. BRIEF., 1991, at 1-30; Elizabeth A. McCreary, *The Reconciliation of Prominence and Exceptional Ability: A Necessary Step Toward a Coordinated Immigration Policy*, 30 VA. J. INT'L L. 977 (1990).

⁹A number of scholars have examined the economics of immigration. For example, see INSTITUTE OF ECONOMIC AFFAIRS, *ECONOMIC ISSUES IN IMMIGRATION* (London, 1970); JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989) (immigration is good for an economy); JULIAN L. SIMON, *POPULATION MATTERS* (1990) (the United States benefits from immigrants); *THE IMMIGRATION DILEMMA* (Steven Globerman ed., 1992) (immigration has had a positive effect on Canada's economy).

¹⁰Thomas Muller, *Immigration Policy and Economic Growth*, 7 YALE L. & POL'Y REV. 101, 101 (1989).

skills to a number of industries and occupations.¹¹ They have built roads, railroads and canals and filled the labor needs of American businesses.

Statistical studies are not needed to reach this conclusion. It may be done a priori. The average immigrant who comes to the United States (or any other country) must have extraordinary incentives. Otherwise, he or she would not be willing to leave their homeland and relatives behind because doing so involves great sacrifice. People who are willing to make such great sacrifices can be expected to work hard and produce.

Yet at various times, including the period between 1882 and 1924, restrictions were placed on the number of immigrants who could enter the country.¹² A discussion of the reasons for such restrictions goes beyond the scope of this essay. But it can fairly be said that restrictions on immigration have a tendency to reduce the rate of economic growth and cause other economic distortions.¹³

When immigration is restricted there are winners and losers. Those who work in high wage areas tend to benefit (at least in the short run) by immigration restrictions because they can use the immigration laws to prevent willing and able workers from coming into their labor market and bidding down wage rates. However, those who live in low wage areas are not harmed by immigration because people tend to emigrate from those areas.¹⁴ The foreign workers lose because their opportunities for employment are restricted. The employers who might want to hire them are also harmed by restrictive immigration policies, as are the consumers who might purchase the goods and services that the immigrants would produce were they allowed to do so. Civil liberties tend to be weakened because enforcing immigration laws gives the government the excuse to snoop, sometimes without the benefit of due process.¹⁵ There are enforcement problems as well.¹⁶

The argument has been made that immigrants overburden the public service sector. For example, they use the public school system and partake of public welfare benefits. While this may be true to a certain extent, it is also probably true that they are less of a burden on society than the average American. Many immigrants abhor being on welfare, whereas the average American does not.

¹¹MALDWYN A. JONES, *AMERICAN IMMIGRATION* 283 (1960).

¹²For a discussion of the reasons for restrictions during this period, see JONES, *supra* note 11, at 247-77.

¹³Muller, *supra* note 10, at 106.

¹⁴MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* 39-40 (1970).

¹⁵Lisa A. DiPoala, *Immigration Reform and Control Act of 1986: A License for Warrantless Searches*, 40 SYRACUSE L. REV. 817 (1989).

¹⁶*Immigration Enforcement: Problems in Controlling the Flow of Illegal Aliens Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) (statement of Laurie E. Ekstrand, Associate Director, Administration of Justice Issues, General Government Division) available through U.S. General Accounting Office, GAO/T-GGD-93-39.

Immigrants tend to be younger than the general American population, and thus are less of a burden on Medicare and Social Security than is the average citizen.¹⁷ Immigrants who work in the official sector (not the underground economy) pay taxes, either directly or indirectly, to support the school system. An argument can be made that this overburdening of the public service sector can be prevented by prohibiting immigrants from partaking of these services, but such arguments raise equal protection questions. Perhaps a better solution, and one that has been suggested often in recent years, is to eliminate many of the services presently provided by government by privatizing them. The private sector can do a better job at a lower cost in practically every area of government activity.¹⁸ The entire concept of the government having a role in the redistribution of income through the welfare and tax systems is ethically suspect as has been pointed out elsewhere.¹⁹

Restrictions on immigration have other economic effects as well.²⁰ If immigrants are allowed to flow into a community, there may be downward pressure on wage rates²¹ because, as the supply of something increases, the price tends to go down. But is that necessarily a bad result? If wage rates drop, the cost of production also drops. This expands businesses' profit margins, making it possible to plow back more profits into their businesses, thus increasing the rate of expansion and making it possible to hire more workers. Increased profit margins also enable businesses to lower prices, which benefits consumers and the general public. It also makes American businesses better able to compete internationally.

¹⁷Llewellyn H. Rockwell, *Immigration and Private Property*, in *THE ECONOMICS OF LIBERTY* 216, 219 (Llewellyn H. Rockwell ed., 1990).

¹⁸For a number of studies that document this thesis, see RONALD S. LAUDER, *PRIVATIZATION FOR NEW YORK: COMPETING FOR A BETTER FUTURE*, REPORT OF NEW YORK STATE SENATE ADVISORY COMMISSION ON PRIVATIZATION (1992); RANDALL FITZGERALD, *WHEN GOVERNMENT GOES PRIVATE: SUCCESSFUL ALTERNATIVES TO PUBLIC SERVICES* (1988); *PRIVATIZATION* (John C. Goodman ed., 1985); E.S. SAVAS, *PRIVATIZING THE PUBLIC SECTOR: HOW TO SHRINK GOVERNMENT* (1982); JAMES T. BENNETT & MANUEL H. JOHNSON, *BETTER GOVERNMENT AT HALF THE PRICE: PRIVATE PRODUCTION OF PUBLIC SERVICES* (1981); ROBERT W. POOLE, JR., *CUTTING BACK CITY HALL* (1980). All of these studies share a common documented view that the private sector is capable of accomplishing nearly anything in a more efficient manner than the government—and in some cases, in a manner more than 50 percent cheaper.

¹⁹BERTRAND DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* (1990).

²⁰For a critique of the effect the Immigration Reform and Control Act of 1986 has had on peace, prosperity and liberty, see Annelise Anderson, *Immigration Policy*, in *THINKING ABOUT AMERICA: THE UNITED STATES IN THE 1990'S* 391 (Annelise Anderson & Dennis L. Bark eds., 1988).

²¹There is evidence to suggest that the restriction of immigration puts upward pressure on wage rates, at least in some industries and occupations. See BENJAMIN M. ANDERSON, *ECONOMICS AND THE PUBLIC WELFARE: A FINANCIAL AND ECONOMIC HISTORY OF THE UNITED STATES 1914-1946* 87, 495-97 (1979).

Another factor to consider is that immigrants not only add to the supply of labor but they also increase the demand for goods and services. As demand increases, so do sales, which in turn, increases the profits of the businesses in the community. So having immigrants invade a community is also good for business. As demand for goods and services increases, there is upward pressure on wage rates, as employers have to hire additional personnel to handle the increased demand for their products and services. As a result, the net effect on wage rates for companies may be negligible. Further, if allowing immigrants to invade a community results in an increased division of labor, economic resources will be allocated more efficiently,²² increasing the general standard of living. Therefore, from a utilitarian standpoint, allowing immigration may be more beneficial than harmful to the vast majority of the domestic population.

Attempts to justify on economic grounds the policy of restricting immigration are . . . doomed from the outset. There cannot be the slightest doubt that migration barriers diminish the productivity of human labor. When . . . trade unions . . . hinder immigration, they are fighting not only against the interests of the workers of the rest of the countries of the world, but also against the interests of everyone else in order to secure a special privilege for themselves.²³

Public choice economists call this use of the power of government in order to feather one's own nest, at the expense of the general public, "rent-seeking".²⁴ Rent-seeking behavior can be seen everywhere, from restricting immigration to imposing tariffs and quotas on foreign-made products²⁵ and advocating the passage of occupational licensure laws.²⁶ Both the antitrust laws²⁷ and the antidumping laws²⁸ are also good examples of rent-seeking behavior.

²²ROTHBARD, *supra* note 14, at 40.

²³LUDWIG VON MISES, *THE FREE AND PROSPEROUS COMMONWEALTH* 139 (1962). This book was first published as *LIBERALISMUS* in Germany in 1927, and has been published under different titles in a number of languages. For a detailed history of this book's publication, see BETTINA BIEN GREAVES & ROBERT W. MCGEE, *MISES: AN ANNOTATED BIBLIOGRAPHY* 14-15 (1993).

²⁴For expositions of the public choice rent-seeking thesis, see GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* (1989); *THE POLITICAL ECONOMY OF RENT-SEEKING* (Charles K. Rowley et al. eds., 1988); *PUBLIC CHOICE* (Julien Van Den Broeck ed., 1988); GORDON TULLOCK, *PRIVATE WANTS, PUBLIC MEANS* (1987); *TOWARDS A THEORY OF A RENT-SEEKING SOCIETY* (James M. Buchanan et al. eds., 1980).

²⁵ROBERT W. MCGEE, *A TRADE POLICY FOR FREE SOCIETIES: THE CASE AGAINST PROTECTIONISM* (1994); JAMES BOVARD, *THE FAIR TRADE FRAUD* (1991).

²⁶S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* 15-21 (1987); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 137-60 (1982); *OCCUPATIONAL LICENSURE AND REGULATION* 13-25 (Simon Rottenberg ed., 1980).

²⁷DOMINICK T. ARMENTANO, *ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE* (2d ed. 1990); WILLIAM F. SHUGHART II, *ANTITRUST POLICY AND INTEREST-GROUP*

Much more could be said about the economic benefits and detriments of the various immigration policies. The purpose of this essay is not to look at the economic issues per se, but to look at the relationship between property rights and immigration policy. Before such an analysis can be accomplished, it is first necessary to discuss two arguments that have been put forth to restrict immigration: the balancing of interests argument and the public policy argument.

III. SHOULD THE BALANCING OF INTERESTS RATIONALE BE APPLIED TO IMMIGRATION POLICY?

Justice William O. Douglas has articulated one of the best arguments against the use of the balancing of interests approach:

In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been "balancing" the right of speech and association against other values in society to see if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights. *Dennis v. United States*, 341 U.S. 494, 508-509; *Communications Ass'n. v. Douds*, 339 U.S. 382, 399-400; *NAACP v. Alabama*, 357 U.S. 449, 463-466; *Uphaus v. Wyman*, 360 U.S. 72, 78-79; *Barenblatt v. United States*, 360 U.S. 109, 126-134; *Bates v. Little Rock*, 361 U.S. 516, 524; *Shelton v. Tucker*, 364 U.S. 479; *Wilkinson v. United States*, 365 U.S. 399; *Braden v. United States*, 365 U.S. 431; *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82. This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation" (see Hand, *The Spirit of Liberty* (1960 ed.), p. 278), runs counter to our prior decisions.²⁹

The balancing of interests argument has been applied in a number of situations to determine both policy and law.³⁰ The argument is that the interests

POLITICS (1990); DOMINICK T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (1986).

²⁸Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491 (1993).

²⁹*Scales v. United States*, 367 U.S. 203, 270-271 (1961) (Douglas, J., dissenting). For a discussion by Justice Douglas of the right of association and the balancing test, see William O. Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963).

³⁰See generally *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, rehearing denied, 339 U.S. 990 (1950) (regulating conduct in the interest of public order); *Saia v. New York*, 334 U.S. 558 (1948) (balancing community interests when determining the constitutionality of local regulations); *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976) (balancing free expression rights against disruption); *Lewis v. Baxley*, 368 F. Supp. 768 (M.D. Ala. 1973) (balancing individuals rights against government interests); Joseph H. Hart, *Free Speech on Private Property—When Fundamental Rights Collide*, 68 TEX. L. REV. 1469 (1990); Gordon G. Keyes, *Health-Care Professionals with AIDS: The Risk of Transmission Balanced Against the Interests of Professionals and Institutions*, 16 J.C.U.L. 589

of one person or group must be balanced against the interests of another person or group, or that the interests of one person or group must be balanced against the interests of society in general.³¹

This argument suffers from at least two fatal weaknesses. When the argument is applied to balance the interests of an individual or group against the interests of society, it must be pointed out that "society" has no interests, only living, breathing individuals have interests. If one wants to determine "society's" interests, one must resort to a surrogate. Society's interests can be estimated by adding together the unique interests of the individuals who comprise the particular society. The utilitarian argument, "the greatest good for the greatest number," is an example of this approach being applied. But there are several problems accompanying the application of the utilitarian approach. For example, there is no sure way to measure how much someone or some group is either helped or harmed by a certain policy. Economists use a surrogate they refer to as "utils" to do this, but the use of utils is nothing more than an arbitrary method of solving a problem that is basically incapable of solution.³² If Jane stands to lose five units of utility (utils) if a certain policy is implemented, but James would gain eight utils of benefit, a utilitarian would conclude that the policy should be adopted because the gains are larger than the losses. Of course, there is no method by which it can be ascertained how Jane's negative five utils or James' positive eight utils were determined. Such examples are only practical in textbooks.

Policymakers may get around this problem by assuming that all affected individuals have equal utility regarding various policies.³³ It then becomes a matter of taking a head count. If 40 million people stand to gain as a result of

(1990); Sherry L. Evans, Casenote, *Price Waterhouse v. Hopkins: Balancing Employees' Rights and Employers' Prerogatives: Allocation of the Burdens of Proof in a Title VII Mixed-Motive Case*, 43 Sw. L.J. 1149 (1990); Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J.C.U.L. 573 (1990); Thomas C. Marks, Jr., *Three Ring Circus Revisited: The Drift Back to Lochner Continues*, 19 STETSON L. REV. 571 (1990); Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 STETSON L. REV. 301 (1989); Clare H. Stebbing, *Privacy Rights and Discovery Rights: An Emotional Scale to Balance in AIDS-Related Litigation*, 5 ADELPHI L.J. 69 (1987); Ken Jennings & Melissa Clapp, *A Managerial Tightrope Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases*, 40 LAB. L.J. 756 (1989).

³¹*Id.*

³²MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* 260-68 (1970).

³³Making this assumption simplifies the model but also makes it less realistic. In the real world, different individuals place different values on various options, and the same individuals place different values on identical options at different times. Consumers are not identical. One consumer might place a value of 200 utils on a piece of cake whereas another individual would value it at only 10 utils. One individual might value the first piece of cake at 200 utils and the second piece at 150 utils because of the law of diminishing marginal utility, which holds that utility decreases with additional consumption. For more on this point, see WILLIAM BOYES & MICHAEL MELVIN, *ECONOMICS* 503-07 (2d ed. 1994).

a certain policy, but only 500,000 people stand to lose, the policy should be adopted because the gains resulting from the policy outweigh the losses. But such an approach ignores the fact that some people might stand to gain a little while others stand to lose a lot. If voters decide by a large majority to kill anyone who has red hair, the majority may be served by killing them if the society's population consists of only one percent redheads. The one percent who are redheads, however, stand to lose a lot if such a policy is implemented.

The major flaw with using a utilitarian approach, of which the balancing of interests argument is one example, is that a utilitarian approach ignores rights. If only the interests of the majority are to be served, someone's rights will occasionally (or frequently or always) have to be stepped on.

Another fatal weakness of the balancing of interests argument is that the purpose of government is to protect rights, not interests. There is a difference between rights and interests. While it is in the best interests of a 'mom and pop' grocery store that a supermarket not open across the street, they have no right to prevent the store from opening, since doing so would deprive the owner of the supermarket from exercising his rights to property and contract. There is a big difference between having rights violated and merely being harmed by the activity of others. Competitors who cannot compete because consumers would rather do business with the competition may suffer harm as the result of free trade; however, no matter how great this harm, it does not give the ousted competitors the right to prevent other businesses from selling to customers who might otherwise be doing business with them.

There is confusion about terminology that warrants clarification. The main confusion revolves around the concept of rights. There are two basic conceptions of rights. The "negative" concept asserts that individuals have the right not to be murdered, confined or robbed. These rights are inborn and may also be stated in positive terms as the rights to life, liberty and property. America's founding fathers, and others, have referred to these rights as inalienable. Some would argue that these are the only legitimate rights,³⁴ because they are the only rights that do not conflict with each other.

The other view of rights is the positive view. Positive rights are those granted by the government. Advocates of positive rights assert that there exist rights other than merely the rights to life, liberty and property. The problem with this view is that, when rights are expanded to include more than just the rights to life, liberty and property, "rights" can conflict. The negative rights of life, liberty and property (one might also include contract and association to this list) can never conflict. I have the right not to be murdered and so do you. We both have the right not to be robbed. And we all have the right not to be confined.

When positive rights are asserted, though, there opens up the possibility of conflicting rights. If one asserts that there is the right to a job, for example, such an assertion necessarily implies that someone has the obligation to provide a job. Some employer's property rights in its own business must be sacrificed so

³⁴See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

that another may claim this "right" to a job. When someone argues that there is a right to "free" education, someone (the taxpayers) must foot the bill. When someone claims that welfare is a right, then someone else's property must be confiscated (taxed) to pay for it. One person gains at the expense of someone else. Such rights are not really rights at all, but merely a grant by government to live at the expense of another.

There is no right to a job if claiming the right restricts someone else's right. So the argument that immigration should be restricted because a liberal immigration policy "takes" jobs away from Americans does not hold up under analysis. While it might be true that allowing cheap labor from Mexico or elsewhere to enter the United States might cause some citizens to lose their jobs, it does not follow that anyone's rights are being violated as a result. Employers should be able to select those persons they want to employ. If a law prevents such choice, then employers' rights to property, contract and association are violated, as are the contract, property and association rights of the immigrant.

The confusion between "interests" and "rights" can result in policymakers choosing incorrect policies. While citizen workers may have an interest in keeping foreigners out of the country, they have no right to do so. Discussion regarding "balancing" the interests of citizen workers against the interests of immigrant workers focuses not on interests, but rights. Once it is realized that the balancing of interests argument is just another positive rights argument, the argument quickly falls apart.³⁵

IV. IMMIGRATION AND PUBLIC POLICY

Immigration is sometimes viewed from a public policy perspective. Proponents and opponents debate whether a policy is in the public interest or the national interest.³⁶ But there can be no common good or common interest because individuals have different interests.³⁷ It is not possible to merely add the interests of the individual citizens together because there is no way of measuring such interests. Furthermore, a head count cannot be taken to determine the nature of the public interest either, since doing so would violate rights of some minority. If two wolves and one sheep vote on what they should have for dinner, the sheep's interest (and rights) would likely have to be sacrificed to the will of the majority under a public policy or balancing of interests approach. The error in such an approach would not change if it were a majority of a thousand wolves to a single sheep. There are cases where majority opinion or interests have no place. Voting to have a sheep for lunch is one such case, and restricting immigration is another.

³⁵See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987).

³⁶For a discussion from this perspective, see Pamela S. Cowan, *Immigration Law, Business and the National Interest: the New Debate*, 43 WASH. ST. B. NEWS 6 (1989).

³⁷MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* 19-22 (1989).

Since there is no such entity as "the public," since the public is merely a number of individuals, any claimed or implied conflict of "the public interest" with private interests means that the interests of some men are to be sacrificed to the interests and wishes of others. Since the concept is so conveniently undefinable, its use rests only on any given gang's ability to proclaim that "The public, *c'est moi*"—and to maintain the claim at the point of a gun.³⁸

[A]ll "public interest" legislation (and any distribution of money taken by force from some men for the unearned benefit of others) comes down ultimately to the grant of an undefined undefinable, non-objective, arbitrary power to some government officials.

The worst aspect of it is not that such a power can be used dishonestly, but that *it cannot be used honestly*. The wisest man in the world, with the purest integrity, cannot find a criterion for the just, equitable, rational application of an unjust, inequitable, irrational principle.³⁹

The only way to resolve the immigration issue without violating anyone's rights is to allow open immigration, since any other solution would violate the rights of property, contract and association. Individuals must be free to pursue their own interests as long as they do not do so at the expense of anyone else's rights. Any governmentally imposed restriction of this movement or ability violates rights.

The public policy argument is based on the false assumption that some people should be able to impose their will on others as long as rights are not violated. Those who advocate that immigration (or prostitution, ticket scalping, dwarf tossing, painting one's house purple or other victimless crimes) should be restricted want to use the force of government to accomplish something that would be a crime if they committed it as individuals. If an individual tried to prevent consenting adults from entering into a contract, that person could be sued for interfering with contract, harassment, nuisance or trespass. However, if the legislature passes a law that has the same result, then somehow the interference is justified. Frederic Bastiat, the nineteenth century French political philosopher, would argue that such actions would be the illegitimate use of government power. His litmus test for the illegitimate use of government power is as follows:

See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits

³⁸AYN RAND, *THE VIRTUE OF SELFISHNESS* 116 (1964); *THE AYN RAND LEXICON: OBJECTIVISM FROM A TO Z* 396 (Harry Binswanger ed., 1986) [hereinafter *THE AYN RAND LEXICON*].

³⁹AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* 171 (1966); *see also* *THE AYN RAND LEXICON*, *supra* note 38, at 396.

one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime.⁴⁰

V. A PROPERTY RIGHTS APPROACH TO IMMIGRATION POLICY

An analysis of immigration policy that ignores the property rights issue is seriously deficient. In fact, it might not be an overstatement to say that property rights are *the* issue to be examined in any immigration policy. Utilitarian arguments and the balancing of interests argument—which is utilitarian based—suffer from fatal weaknesses, as does the public interest/public policy argument.

The present immigration policy of the United States encroaches on a number of freedoms, such as the right to travel⁴¹ and the right to marry.⁴² In addition, there is the possibility that individuals will be denied entrance on the basis of their associations, which violates the basic freedom of association.⁴³ Potential immigrants must also watch what they say, since saying the wrong thing may be cause for exclusion.⁴⁴ The main problem with the present policy, however, is that it violates basic property and contract rights.

⁴⁰FREDERIC BASTIAT, *THE LAW* 21 (1968).

⁴¹Most people concede that individuals have the right to leave a country if they do not approve of its political system. A strong case would be the right of Jews to leave Nazi Germany or the right of persecuted religious sects to leave a certain country when staying would mean a high probability of death. Yet people are less than unanimous regarding the existence of a right of entry. They recognize the right to leave one country, but not the right to enter another country. See Suzanne McGrath Dale, Comment, *The Flying Dutchman Dichotomy: The International Right to Leave v. The Sovereign Right to Exclude*, 9 DICK. J. INT'L L. 359 (1991).

⁴²While it is possible for an immigrant to remain in the United States simply by marrying a United States citizen, perceived "abuses" of this practice have led government officials to pry into the reasons for such marriages. The result is that some recently-married immigrants have been expelled notwithstanding their marriage to a United States citizen. For more information on this point, see Nancy Whinnery, Comment, *Constitutional Law—The Immigration Marriage Fraud Amendments: Substantive or Procedural Provisions?—Azizi v. Thornburgh*, 908 F.2d 1130, 64 TEMP. L. REV. 1081 (1991); Kristin Garner, Comment, *Immigration Law—Domestic Relations—Section 5 of the Immigration Marriage Fraud Amendments May Abridge the Fundamental Right To Marry*, *Azizi v. Thornburgh*, 908 F.2d 1130, 15 SUFFOLK TRANSNAT'L L. J. 379 (1991); Kristi J. Spiering, Comment, *Irrebuttable Exile under the Immigration Marriage Fraud Amendments: a Perspective from the Eighth Amendment and International Human Rights Law*, 58 U. CIN. L. REV. 1397 (1990).

⁴³For more on this point, see T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990).

⁴⁴For more on this point, see Alexander Wohl, Note, *Free Speech and the Right of Entry into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act*, 4 AM. U. J. INT'L L. & POL'Y 443 (1989).

The legal system treats property as a bundle of rights.⁴⁵ One owns property to the extent that one can utilize it as one sees fit. The body is the most basic form of property.⁴⁶ Once the government restricts what one can do with one's own body, the government encroaches on property rights. If one cannot transport one's body to the country of one's choice (immigration), rent it for purposes of sex (prostitution⁴⁷ or surrogacy⁴⁸), use it to read what one wants (censorship laws), say what is on one's mind⁴⁹ (freedom of speech—the vocal cords are one's property), associate with whomever one wants for purposes of marriage or companionship, then individual property rights are violated.

There is an argument that property rights are not absolute, and that they must sometimes be restricted because restriction is in the public interest. However, there is no such thing as the public interest because individuals have different and conflicting interests; thus, the public interest argument does not withstand analysis. As long as the rights of others are not violated, people should be able to do whatever they want with their body, including ingesting

⁴⁵63A AM. JUR.2D *Property* § 1 (1984).

⁴⁶John Locke has pointed out, "Every man has a 'property' in his own 'person.' This nobody has any right to but himself." JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* Chap. V, 26 (1690). For a detailed account of Locke's views on property, see Catherine Valcke, *Locke on Property: A Deontological Interpretation*, 12 HARV. J.L. & PUB. POL'Y 941 (1989). For a more modern treatment of the body as property, see RUSSELL SCOTT, *THE BODY AS PROPERTY* (1981).

And courts have said that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Bouvia v. Superior Court*, 179 Cal. App.3d 1127, 1139, 225 Cal. Rptr. 297, 302 (2d Dist. 1986) (citations omitted).

⁴⁷It has been argued that prostitution is a victimless crime. See WALTER BLOCK, *DEFENDING THE UNDEFENDABLE* 19-22 (1976); Note, *Criminal Law—The Principle of Harm and its Application to Laws Criminalizing Prostitution*, 51 DENVER L.J. 235 (1974) (where there is no legal harm, there should be no crime). A utilitarian argument for the legalization of prostitution rests on the premise that the costs of keeping it illegal are too high. Marvin M. Moore, *The Case for Legitimizing the Call Girl*, 5 COOLEY L. REV. 337 (1988); Julie Pearl, *The Highest Paying Customers: America's Cities and the Cost of Prostitution Control*, 38 HASTINGS L.J. 769 (1987).

⁴⁸Some legal theorists argue that surrogacy should be prohibited on public policy grounds. See Robert D. Arenstein, *Is Surrogacy Against Public Policy? The Answer Is Yes*, 18 SETON HALL L. REV. 831 (1988). But this argument does not withstand analysis. Surrogacy—the renting of one's womb for purposes of allowing a fetus to reach the stage at which it can be born—is a win-win situation. Nobody loses. The natural parents win because surrogacy enables them to have a baby they would not otherwise be able to have. The surrogate wins because she is paid for her services. She may also receive a psychic benefit as a result of her participation. And the baby benefits because it is given the opportunity for life.

⁴⁹*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

unhealthy food, selling body parts,⁵⁰ or donating them, either before or after death.⁵¹

Property rights theory can be applied to the problem of restricting immigration. Individuals have a right to do with their bodies as they see fit to the extent they do not violate the rights of others. However, they cannot place their bodies on the property of another without the owner's permission. To do so would be trespassing. So, although individuals have the freedom to travel, they cannot go where they are not wanted. As Senator Alan K. Simpson has said, "We must distinguish between the right to leave the Soviet Union and the right to enter the United States."⁵² The "human right" to travel and immigrate is limited in the sense that individuals cannot place their property (their bodies) on the property of others unless the owners of such land do not object.

The immigration problem could be solved if all land were privately owned because the landowners could decide who they want on their property and they could exclude all others.⁵³ But this solution becomes complicated when the government owns a large percentage of the land, as is the case in the United States. The federal government owns nearly 61 percent of the land in California, more than 67 percent of Alaska, and more than a third of Colorado.⁵⁴ Thus, the federal government can legally restrict immigration by prohibiting foreigners from setting foot on federal land. In fact, the government can (and does) go even further, by also prohibiting foreigners from setting foot on privately owned land. Shopping mall owners, landlords and numerous other groups have their property and contract rights violated under present immigration policy because the government prevents potential customers, tenants or employees from entering onto their property. Business owners are prohibited from hiring such foreigners. Such restrictions violate the business owners' right to contract, as well as the rights of the foreigners who might want to do business with (or work for) the business owners.

⁵⁰William D. Noonan, *Ownership of Biological Tissue*, 72 J. PAT. & TRADEMARK OFF. SOC'Y 109 (1990); Jennifer Lavoie, *Ownership of Human Tissue: Life After Moore v. Regents of the University of California*, 75 VA. L. REV. 1363 (1989).

⁵¹For example, why should it be illegal to give away or sell one's kidneys, heart, bone marrow, lungs, and so forth? Why should individuals not be allowed to sell their body parts or give some parts to science, or allow the surviving spouse to sell one's cadaver? For more on these points, see Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); *Enos v. Snyder*, 63 P. 170 (1900) (holding that there is a law to the contrary in that there is no property in a dead body, it is not part of the estate of the deceased person, and a man cannot by will dispose of that which after death will become his corpse). Of course, one now can donate body parts or even one's whole body to science, a hospital or some other group.

⁵²DOUG BANDOW, *THE POLITICS OF PLUNDER: MISGOVERNMENT IN WASHINGTON* 457 (1990).

⁵³MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 119 (1982).

⁵⁴Doug McInnis, *Higher Grazing Fees Have Ranchers Running Scared*, N.Y. TIMES, Sept. 12, 1993, at F5.

By what right does the government of a territory proclaim the power to keep other people away? Under a purely free-market system, only individual property owners have the right to keep people off their property. The government's power rests on the implicit assumption that the government *owns* all the territory which it rules. Only then can the government keep people out of that territory.⁵⁵

Lew Rockwell sums up the property rights position as follows:

Our ultimate goal should be to make our country a network of private neighborhoods. There is no right of public access on private property. If commercial districts were like malls, and communities had access restricted to the people the residents wanted—as some do today—we would not have to worry about bums and felons infesting our streets, nor about unwanted immigrants . . . *That* is the kind of society we ought to work for.⁵⁶

The only immigration policy that does not violate individual rights is an unrestricted immigration policy. Thus, it is the one that should be adopted. The immigration "problem" can be solved by recognizing, enhancing and protecting property rights and permitting consenting adults to enter into contracts with whomever they want. The "problem" is not immigration; it is the disparagement of property and contract rights.

⁵⁵ROTHBARD, *supra* note 14, at 60-61.

⁵⁶Rockwell, *supra* note 17, at 220.