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ECONOMIC SALVATION IN A RESTIVE AGE: THE DEMAND FOR SECULAR SALVATION HAS NOT ABATED

Steven J. Eagle†

In contemporary America, there is a widespread sense of anxiety. Personal safety cannot be taken for granted in an age of terrorism. Dangers to children appear to lurk at every turn. Lurid interest in molestation proxies concerns about youthful sexuality and adult erotic impulses. In an era of meritocracy, the need for status and wealth to be revalidated in each generation leads parents to seek for their offspring a toehold on success through one-on-one prep courses for their nursery school admissions exam. Economic insecurity grows apace, both among those with lower incomes and the middle class.

Although Americans purport to be as religious as ever, they hardly are dogmatic about their faith. They eschew imposing their religious values on others, and thus largely forego invoking religious norms as a basis for societal organization or public policy. It would seem—at

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1 See, e.g., Kirk Johnson, A Nation Challenged: The Mood; Vigilance Is Personal When Threat Is Invisible, N.Y. TIMES, Oct. 19, 2001, at B1 (describing one post-September 11, 2001 interviewee as “see[ing] government as the only institution powerful enough to protect him and other Americans,” and another as stating: “[y]ou need to take your own precautions, I don’t think the government can do anything”).


3 See, e.g., Christopher G. Brown, Book Note, Erotic Innocence: The Culture of Child Molesting, 2 J.L. & FAM. STUD. 199, 200 (2000) (describing the author, James R. Kincaid, as asserting that society is “balancing its view that children are icons of eroticism with its view that any sexual response toward children is reprehensible” and that “[t]his balancing allows the eroticism of children to be viewed and experienced under the guise of the search for justice against the molesting monsters of society”).


5 See, e.g., Frank Munger, Can We Save the Safety Net?, 69 BROOK. L. REV. 543, 543 (2004) (arguing that welfare programs that should protect citizens from “the ravages of the market increasingly link economic security and relief from poverty exclusively to successful employment”).


least among the educated elites—that organized religion is not the answer to growing personal concerns.  

How does a troubled and operationally secular educated society find the good life? For most of the last century, the most commonly proffered answers were the inexorable march of history, the helping hand of altruistic expertise, the creation of institutions that liberate individuals' capacity for action, and immersion in the self.

The first vehicle to earthly salvation, "scientific" socialism, achieved inevitability in the form of its own implosion. Marxism was no more able to propagate the "New Soviet Man" through indoctrination of members of society than Stalin's scientist Lysenko was able to propagate the new breeds of improved plants by modifying living specimens. Even Fabian Socialism was not able to deliver the goods.

The last named vehicle for salvation, immersion in the self, has faded too. In his briefly famous The Greening of America, then-Yale law professor Charles Reich earnestly observed that those reach-

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8 See, e.g., John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 281 (2001) (noting "the pervasive secularism that came to dominate American public life, especially among educated elites, a secularism that does not so much deny religious belief as seek to confine it to a private sphere"); see also William P. Marshall, The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 Notre Dame L. Rev. 11, 28 (2002) (stating that "a regime of secularism ... works as if it is the chosen ideology"). Marshall notes that 87 percent of Americans believe that religion is "very important" or "fairly important." Id. at 15.

9 Trofim Lysenko, the agronomist in charge of Soviet agriculture, advocated the doctrine that characteristics acquired through environmental influences are inherited. While consistent with Marxist orthodoxy, his views were rejected after Stalin's death in favor of more conventional genetics. See Bert Black et al., Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge, 72 Tex. L. Rev. 715, 769-71 (1994) (discussing the rise of Lysenko under Stalin and the disastrous impact of his theories on Soviet agriculture).

10 The notion that centralized planning could coordinate satisfying the needs of entire societies demonstrated the intellectual's tendency towards "the fatal conceit that man is able to shape the world around him according to his wishes." F.A. Hayek, The Fatal Conceit 27 (1988). Its implementation on a more local and neighborly basis was not successful either. As Oscar Wilde observed, "The trouble with socialism is that it takes too many evenings." BARRY DAY, OSCAR WILDE 238 (2000). That the naturally talented people of India were held back from developing a vibrant economy for fifty years by Fabian doctrines and the conversion of India from a bastion of socialism to a nation more receptive to individual enterprise has been widely commented upon. See, e.g., Deirdre McCloskey, Thomas L. Friedman, The Lexus and the Olive Tree: Understanding Globalization (1999); John Gray, False Dawn: The Delusions of Global Capitalism (1998), 9 Minn. J. Global Trade 121, 132 (2000) (book review).

11 For an entertaining illustration of the after-glow of that mellow age, see DAVID B. SENTELLE, JUDGE DAVE AND THE RAINBOW PEOPLE (2002) (detailing the author's, a conservative federal judge, account of his mediation between park police and an unauthorized week-long encampment of thousands of naked hippies).

ing the advanced "Consciousness III" would know that "[p]eople all belong to the same family, whether they have met each other or not."\textsuperscript{13} As a postmodernist compliment (or, perhaps, insult) to the sensibilities of its readers, the \textit{Michigan Law Review} presented a 229-page article on "Pomobabble."\textsuperscript{14} Personalized religion, what Robert Bellah and his colleagues referred to as "Sheilaism,"\textsuperscript{15} comforts its adherents but the very quality of its personalization makes them disinclined to proselytize. It might be that shopping for a befitting religion is just another shopping experience.\textsuperscript{16} While what one might call overt narcissism appears to be declining,\textsuperscript{17} it might have become sublimated into the search for authenticity\textsuperscript{18} and aesthetic experience.\textsuperscript{19}

That leaves us with only the second and third visions of the good life on earth. One might describe them explicitly through the lenses of Progressivism and Libertarianism. But Americans generally are not sticklers for labels, and delivering the goods means delivering the consumer goods. The cornucopia is filled with possessions.

\textbf{Is Cambridge or Chicago the Fourth Rome?}

In past eras, a priestly class guided our passage towards salvation and away from eternal fires. Given the need to combine our desire for increasingly available material comforts with a coherent story around which the good life could be fashioned, it should not be a surprise that leading contenders for the modern priestly class are competing

\begin{thebibliography}{9}
\bibitem{13} \textsc{Reich, Greening, supra note 12, at 227} (quoted in Arthur Austin, \textit{The Top Ten Politically Correct Law Review Articles}, 27 \textit{Fla. St. U. L. Rev.} 233, 251 n.136 (1999)).
\bibitem{15} See \textsc{Robert N. Bellah et al., Habits of the Heart} (1996). "Sheilaism" is the name the authors ascribed to the faith of a woman they interviewed, Sheila Larsen, who professed to believe in God, but stated that one's goal should be to "love yourself and be gentle with your- self" and to listen to one's own little voice. \textit{Id.} at 235. Under this approach, the authors conclude, God simply becomes "the self magnified." \textit{Id.}
\bibitem{16} See \textsc{Rebecca French, Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law}, 51 \textit{Buff. L. Rev.} 127, 164 (2003). French notes that "[s]hopping for a new church, temple, or religious affiliation is now commonplace." Furthermore, "polls indicate that one half of those responding have changed their religious denominations at least once during their lifetimes." \textit{Id.} (citing \textsc{Wade Clark Roof \& William McKinney, American Mainline Religion} (1987)).
\bibitem{17} See \textsc{Christopher Lasch, The Culture of Narcissism} (1980).
\bibitem{18} The search to emulate those who unselfconsciously are what they are leads the consciously striving well-off to buy homes in such places as Charlottesville, Virginia (prototypical home of gentry who are natural aristocrats of talent) and Bozeman, Montana (home of laconic ranchers who eke out a living among majestic mountains and bracing winters).
\bibitem{19} See \textsc{David Brooks, Bobos in Paradise: The New Upper Class and How They Got There} (2000) (noting that "bobos," the contemporary meld of bourgeoisie and bohemians, lead the expansive upper-middle class life of business executives and professionals while professing devotion to the verities of the simple life through consumption of very expensive kitchen equipment, primitive art, and eco-tourism).
\end{thebibliography}

In *Economics as Religion*, Nelson focuses primarily on two archetypical figures. Paul Samuelson wrote the enormously influential introductory text, *Economics*, that brought the Progressive ethic and Keynesian thought to countless thousands of college classrooms. Milton Friedman is the leading popularizer and a leading theorist of the Chicago school of economics, which champions free markets. In juxtaposition, Samuelson and Friedman illustrate both the promise and perils of big government and rugged individualism.

**SAMUELSON’S OLD TIME RELIGION OF PROGRESSIVISM**

As Nelson notes, post-Depression trauma and the horrors of World War II led to popular disillusionment with the old Christian idealist style of Progressivism. Idealism needed a more scientific basis. Samuelson filled the bill, substituting for direct governmental action "scientific management of the market," while retaining the Progressive belief that "the material conditions of a person’s existence will shape his or her behavior in ethical and other dimensions beyond economics." Macroeconomics was king, and the traditional economics of the firm was relegated to the second half of the book. After Alvin Hanson and Samuelson brought John Maynard Keynes to America in the immediate aftermath of World War II, the notion that experts could regulate the economy, thus eliminating bubbles and panics, grew in apparent infallibility. This culminated in Richard Nixon’s famous 1971 declaration: "We are all Keynesians now."

Samuelson’s credentials as “scientist” have continued to grace his work. Such statements often preface subjective public policy
prescriptions, not the least those of lawyers. In spite of this antiseptic description, however, Samuelson was sometimes not adverse to applying moral judgments to the conduct of economic actors, even in the First Edition. Thus, monopoly pricing was not merely wasteful, it was “evil.” Samuelson’s philosophy is articulated perhaps most plainly in his preface to the 1998 fiftieth anniversary Sixteenth Edition.

Because of “the poor we have always with us,” the modern democratic state has evolved everywhere into a “mixed economy”—neither pure laissez-faire market mechanism nor Robin Hood utopia. Alas, only by their study of the rudiments of economics can the citizenry understand and decide about where should lie the golden mean between the selfishness of individual initiative and the regulatory, stabilizing, and redistributive functions of government. The mixed economy must, perforce, be the “limited mixed economy.”

In the body of the Sixteenth Edition, Samuelson makes plain the normative purposes of economics: “Society must find the right balance between the discipline of the market and the generosity of the welfare state. By using cool heads to inform our warm hearts, economic science can do its part in ensuring a prosperous and just society.” By a “just society,” Samuelson means at least a largely egalitarian society. “Markets do not necessarily produce a fair distribution of income. A market economy may produce unacceptably high levels of inequality of income and consumption.”

At the twilight of his career, Samuelson seemed determined to rebuke critics of government. He summarized their concerns, such as that the state is overly intrusive and that government failures are as
pervasive as market failures, concluding that "for some, government is the problem rather than the solution."34

These views remind us how easy it is to take the achievements of the last century for granted. They remind us of the tendency to credit ourselves for successes while blaming others—particularly the government—for failures. . . . Diatribes against government forget the many successes of collective action over the last century.35

In spite of Samuelson’s invocation of "market failure," he devotes only a skimpy two paragraphs to social choice theory and public choice theory.36 Social choice considers the fact that, when faced with more than two choices, with no clear majority for any one of them, no rational way of determining a group preference may exist,37 and that the problem of determining a method of aggregating collective welfare is intractable.38 This lends considerable doubt to the proposition that legislative bodies are competent to legislate for what truly is the general welfare.39 Public choice theory posits that legislators, executive branch officials, and agency administrators are in business for themselves; that is, they are motivated by the same types of incentives that motivate their counterparts in the private sector. It is not surprising that Samuelson, and others who believe in the power of government to accomplish important goals, have trouble accepting the view that "legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare."40

34 Id. at 39 (citation omitted). Notably, Samuelson cites only PAUL KRUGMAN, PEDDLING PROSPERITY (1994), which is congenial to his views, and not to individual critics of expansive government. The first two-thirds of Krugman’s somewhat polemical work was a harsh critique of Reaganomics, and the last third a critique of Clintonomics. The subtext of the entire book was a warning against the intellectual corruption that besets professors who venture from academia to engage in public policy battles. Krugman subsequently became a columnist for the New York Times, with predictable results.

35 SAMUELSON & NORDHAUS, supra note 27, at 39.

36 Id. at 287-88.

37 See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); Maxwell L. Steams, The Misguided Renaissance of Social Choice, 103 YALE L.J. 1219, 1221-22 (1994) (arguing that without a "clear majority" there is no "rational means of aggregating individual preferences").

38 See DENNIS C. MUELLER, PUBLIC CHOICE II 2-3 (1989) (arguing that it is problematic to try to aggregate social choice to satisfy a normative criteria).

39 See, e.g., Lynn A. Stout, Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications, 80 GEO. L.J. 1787, 1822 (1992) (declaring that Arrow’s Impossibility Theorem “cautions” that democratic rule might not be inherently desirable).

In Nelson’s view, the eclipse of Cambridge was due to a change in the American ethos. If, in the aftermath of the Great Depression, “the United States was ‘capitalism living in an oxygen tent,’” then according to Samuelson, the “most impressive economic performance ever recorded” occurred in the third-quarter of the twentieth century, and was due to increased government involvement. It may well be true, as Samuelson added, that the return to normal growth and prosperity was accompanied by “increased skepticism” about government’s proper role. Nelson expressed the change in the direction from which people would seek economic salvation more broadly:

From the 1960s onward, social values in American life would change rapidly. The value system of Economics no longer fit the prevailing American ethos as well as it had in the first two decades of its existence. It was not a coincidence that Chicago replaced Cambridge as the focal point for American economics. Chicago exhibited a hostility to many of the projects of the American progressive tradition just as progressive ideas and institutions were losing favor in American society. If MIT had been the center in the United States for the evolving self-concept of economics as a “science,” the founder of the Chicago school, Frank Knight, rejected both the goal itself and the practical feasibility of the scientific management of society.

THE QUEST FOR REIFICATION OF "THE MARKET" AND "THE GOVERNMENT"

In the last decades of the twentieth century, some policy experts and public officials were proposing that traditional government programs be replaced with ventures in which public agencies and the market would work in tandem. Samuelson’s “limited mixed economy” largely would be instantiated through projects in which, as the captivating phrase put it, government would steer and the market would row. An important illustration is the morphing of “slum clearance” into “urban revitalization.” The eradication of blighted neighborhoods through condemnation and retransfer to private developers won accolades from the Supreme Court a half-century ago.

41 SAMUELSON & NORDHAUS, supra note 27, at 38-39 (quoting Joseph Schumpeter).
42 Id. at 39 (emphasis deleted).
43 Id.
44 NELSON, supra note 20, at 17-18.
Recently, the Supreme Court held that the condemnation of sound housing and retransfer for private projects for the more expansive purpose of economic development passes muster under the Public Use Clause as well. As might be expected, some dissented from government steering of the market on the ground that government could not formulate coherent and effective policy. However, there is a more fundamental ground for objection. In his Nobel economics prize address in Stockholm, James Buchanan noted that our satisfaction with the beneficial results produced by individuals who trade within markets and who utilize the political process have been subject to a "subtle shift toward a teleological interpretation." "[T]he market came to be interpreted functionally, as if something called 'the economy' existed for the purpose of value maximization." "The polity" came to be viewed in a similar manner. The nature of the process is such that the values of individual participants are maximized, "without the necessity of introducing an external evaluative criterion." However, "[t]his 'value-maximization' perspective cannot be extended from the market to politics since the latter does not directly embody the incentive compatible structure of the former."

CHICAGO AS PROSELYTIZER OF PRACTICAL REFORM

While Samuelson termed Keynes the twentieth century's "greatest economist," he has given Milton Friedman relatively little recognition. Others, as Nelson relates, did give Friedman the "economist of

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47 U.S. CONST. amend. V (stating "nor shall private property be taken for public use, without just compensation").
49 See, e.g., Richard A. Posner, Reply: The Institutional Dimension of Statutory and Constitutional Interpretation, 101 Mich. L. Rev. 952, 958 (2003) (asserting that, largely due to problems in the procurement and analysis of information, "[F.A.] Hayek's theory of law... is based on a profound skepticism about the institutional competence of both courts and legislatures relative to that of the market, even in advanced modern societies").
51 Id.
52 Id.
53 Id.
54 Id.
55 Samuelson & Nordhaus, supra note 27, at 734.
56 Samuelson does not mention, for instance, Friedman's contribution that led to his Nobel Prize, Milton Friedman & Anna J. Schwartz, A Monetary History of the United States 1867–1960 (1963). See also Daniel R. Fischel et al., The Regulation of Banks and Bank Holding Companies, 73 Va. L. Rev. 301, 312 n.36 (1987) (describing Friedman & Schwartz's A Monetary History of the United States, as the "seminal critique of the performance of the Fed-
the century” accolade, for his books “articulat[ing] the importance of free markets and the dangers of undue government intervention.”

Friedman’s public personality is that of proselytizer. Nelson asserts, however, that although Samuelson and Friedman would utilize different means, they advocated similar ends. Noting that liberal politicians had taken up such Friedmanite ideas as charter schools (a variant on tuition vouchers) and the negative income tax, he concludes:

Besides having a greater zeal for political combat, Friedman had also thought more deeply than Samuelson about many of the practical problems of governing. If Samuelson was the leading preacher of neoprogressive values in his textbook Economics and other writings, Friedman was the master technician. In terms of doing concrete, practical things to make the system work, as opposed to making symbolic statements of ideals, in the end it was Friedman, not Samuelson, who was the truer progressive.

If Friedman was the advocate of harmonizing a higher material standard of living with individual freedom, the work of his Chicago colleague, Gary Becker, touched much closer to the nerve of social concern at the beginning of the twenty-first century.

In his seminal examination of the family, and in other areas including discrimination, the basis for individual tastes, and human capital, Becker has applied economic analysis to areas of life that are removed from those traditionally associated with the marketplace.

Since economics considers methods to maximize achievement of one’s goals in a world of scarcity, Becker’s insights have proven analytically powerful in many contexts and captured the public imagination. One result is to rouse the concern of some in modern industrial nations that their lives are becoming more impoverished even as their societies are becoming materially richer. This fear was summed up by the Socialist former French Premier Lionel Jospin, who often is quoted as saying that he is in favor of a market economy, not a market society.

57 NELSON, supra note 20, at 150 (quoting Norman Pearlstein, a former managing editor of the Wall Street Journal and later editor-in-chief of Time).
58 Id.
60 Richard A. Posner, a former Chicago law professor and now a Seventh Circuit federal judge, also has found this field a fertile one, considering the economics of old age, sex, and adoptions, among other topics.
CONTEMPORARY ISSUES OF COMMODIFICATION AND RATIONALITY

The Progressive and Keynesian movements were ascendant during the first two-thirds of the last century and the ideas of free markets and individual autonomy that were in resurgence during the last third. Together, they provide Americans with an ambivalent sense about the role of economics in determining the path to salvation in the twenty-first century. Markets lead to distributions of wealth that are unequal, and perhaps inequitable. However, even Samuelson notes the consequent improvement in economic performance, and that the European welfare state has led to "hardening of the economic arteries" and high unemployment.\(^6\) While markets build individual virtue,\(^6\) they also weaken the practice of virtue by catering to the illusion that consumers always deserve to have their demands fulfilled.\(^6\) Also, at least for those who acquired a comfortable level of material success, the old saw seems true—money does not buy happiness.\(^6\)

The materials that follow discuss some issues of contemporary importance that bear upon sources of secular salvation in this century.

THE DISPLACEMENT OF INDIVIDUALS AND SOCIAL INSTITUTIONS BY MARKET TRANSACTIONS

While the technical concepts remain arcane for most, Americans are increasingly troubled by the combined effects of factor-price equalization and commodification. Factor-price equalization posits that trade will bring about an equalization in relative and absolute returns to "factors of production" (such as labor, capital, and land) across the relevant trading area.\(^6\) By depressing the income of low-skilled workers competing against those in other countries, factor-

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\(^6\) Samuelson & Nordhaus, supra note 27, at 735-36.
\(^6\) See, e.g., Michael Novak, Business as a Calling (1996) (analyzing the intersection between market forces, wealth creation, and virtuous behavior); Hayek, supra note 10 (arguing that market efficiency encourages the practices of virtue and high-quality production).
\(^6\) See, e.g., Irving Kristol, Two Cheers for Capitalism ix-xiv (1978) (denying the third cheer because of the alleged amoral character of free market societies).
price equalization is a contributing cause of the rising disparity of income in the United States.\footnote{See, e.g., LESTER THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE AND AMERICA 52-53 (1992) (noting that low-skill wages have fallen as per capita GNP has risen).}

While it was the concern de jour of the 2004 presidential election, outsourcing has been an ongoing process. A century ago, an upper-middle-class family would have its live-in cook and maid. Now those functions are outsourced to restaurants and contract cleaning services. Likewise, firms increasingly are outsourcing non-core components of their business, such as payroll and cleaning. Outsourcing abroad is the latest wrinkle. In all of these cases, one element is to reduce the interaction of employer and employee (or, now more accurately, vendor employee) to a nexus of contracts. Of course, this process aids the economy in the aggregate and factor price-equalization is a fact of life. However, while some favor the entrepreneurial life, many workers—perhaps most—prefer personal security.

Related to the tendency towards equilibration of wages in the United States with those of less developed countries is the perception that the notion of a sphere in which the market reigns has become overextended.\footnote{See generally, MICHAEL WALZER, SPHERES OF JUSTICE (1983) (criticizing market forces for encouraging inequality and domination).} In a well-known analysis, Margaret Jane Radin posited a world of “universal commodification”:

[A]nything some people are willing to sell and others are willing to buy in principle can and should be the subject of free market exchange. Moreover, universal commodification means that everything people need or desire, either individually or in groups, is conceived of as a commodity. “Everything” includes not only those things usually considered goods, but also personal attributes, relationships, and states of affairs. Under universal commodification, the functions of government, wisdom, a healthful environment, and the right to bear children are all commodities.\footnote{Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1860 (1987).}

As one commonplace example of items not generally considered in the stream of commerce a generation ago not being commodities, civic fora like arts centers, which might have been named for a locality or major donor, have become the subject of “naming rights.” With naming rights, people seek the best possible deal for themselves and their families.\footnote{See, e.g., ROBERT REICH, THE FUTURE OF SUCCESS 174-75 (2000) (noting how families} Gated communities have developed in a “secession of
the successful," so that "[i]n many cities and towns, the wealthy have
in effect withdrawn their dollars from the support of public spaces
and institutions shared by all and dedicated the savings to their own
private services." 71

Similarly, leading universities are becoming more commercially
engaged. As an indication of their changed orientation, the "exper-
imental use exception" that universities have enjoyed from patent
infringement actions for almost two-hundred years 72 may be ending.
Schools are now viewed as commercial competitors. 73 In Madey v.
Duke University, 74 the U.S. Court of Appeals for the Federal Circuit
observed that "Duke, . . . like other major research institutions of
higher learning, [was] not shy in pursuing an aggressive patent licens-
ing program from which it derive[d] a not insubstantial revenue
stream." 75

Also, public confidence in various American institutions seems to
be decreasing. 76 Disparities in income are increasing. 77 Even within
individual professions or occupations, the fraternal spirit of the part-
nership or guild largely has given way to the admonition that "you eat
what you kill." 78 Building upon an article by the Chicago economist

are making rational choices in light of the changing modern economy).

71 EVAN MCKENZIE, PRIVATOPIA 186 (1994) (quoting Robert B. Reich, Secession of the

72 See Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,600)
(explaining that an exception exists to use an inventor's patent where an actor is determining
whether the invention actually works as claimed by the patent holder); Deuterium Corp. v.
United States, 19 Cl. Ct. 624, 631 n.12 (Cl. Ct. 1990) (characterizing the experimental use doc-
trine as both an "exception" and a "defense"); Richard E. Bee, Experimental Use as an Act of
Patent Infringement, 39 J. PAT. & TRADEMARK OFF SOC'Y 357, 363-75 (1957) (detailing the
history of the development of the exception).

73 See Bernard Wysocki Jr., A Laser Case Sears Universities' Right To Ignore Patents,
WALL ST. J., Oct. 11, 2004, at A1 ("These days, big research universities use their formidable
powers for far more than teaching and scholarly inquiry. They invest in top scientists, create big
labs, team up with companies and spawn commercial spinoffs.").

74 307 F.3d 1351 (Fed. Cir. 2002). On remand, the university could not prove its entitle-
ment to the exception. 336 F. Supp. 2d 583, 590 n.2 (M.D.N.C. 2004).

75 Madey, 307 F.3d at 1362 n.7.

76 See, e.g., Jay Tolson, The Media on Trial, U.S. NEWS & WORLD REP., Sept. 6, 2004, at
78 (noting that although a Gallup survey in 1976 found that about seven in ten Americans
trusted the media, a recent study by the Pew Research Center for the People and the Press found
that 53 percent do not trust what news organizations report).

77 See, e.g., U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES:
03statab/income.pdf (noting that the percent distribution of aggregate income received by the
lowest fifth of families went from 5.3 percent in 1980 to 4.2 percent in 2001). Between 1980
and 2001, the percentage received by the top 5 percent of families went from 14.6 percent to
21.0 percent. Id.

78 See, e.g., Thomas D. Morgan, Creating a Life as a Lawyer, 38 VAL. U. L. REV. 37, 42-
43 (2003) (discussing how "eat what you kill" and the pressure for producing more billable
hours may lead to professional dissatisfaction); Mark A. Sargent, Lawyers in the Moral Maze,
49 VILL. L. REV. 867, 882-83 (2004) (describing how "eat what you kill" may lead to complic-
Sherwin Rosen, Robert Frank and Philip Cook have written a book attempting to demonstrate that it is increasingly true that the “winner takes all.”

The purpose of this litany is not to suggest that these criticisms are necessarily valid, or even that there is some inherent connection between people’s preferences and their well-being. It is simply to point out that those perceiving a greater need for salvation from society’s ills are more apt to seek economists and others sharing their worldview as secular redeemers.

INCOMMENSURABILITY AND COST-BENEFIT ANALYSIS

We should engage in an act if the value of the act exceeds its costs. Putting this axiom into effect, however, requires the ability to compare the values and costs of performing (and not performing) the act using the same metric. Market goods are commensurable because their value might be compared by the same metric, price in dollars.

Sometimes, however, the value of things might be incommensurate. Also, intrinsic in the nature of a pursuit or relationship might be the “belief that certain options are not comparable in value.” Joseph Raz concluded that “[o]nly those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are capable of having friends.” Similarly, Ernest Weinrib has argued that private law, including the law of property and torts, is, like love, valuable in itself and not merely functional. This is a view that utilitarians do not share.

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80 ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 6 (1995) (arguing that the increase in disproportionately high salaries is closely tied to the growth of competitive forces).
81 See, e.g., TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE (1998) (arguing that the expanding scope of markets adds to human well-being).
83 See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 322 (1986) (“A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.”).
84 Id. at 356 (terming such beliefs “constitutive incommensurabilities”).
85 Id. at 352.
86 ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 6 (1995) (“Love is its own end. My contention is that, in this respect, private law is just like love.”).
Their issue of commensurability is important partly because cost-benefit analysis (CBA) increasingly is used under legislative mandate to determine if the benefits derived from government regulations exceed their costs.88 Although CBA intuitively seems desirable, the concept is controversial, with some asserting that the methodology of cost-benefit analysis is flawed.89 One reason, of course, is simply that CBA is often hard to do accurately.

Economically traded goods are valued in terms of the opportunities foregone in creating them. As Nelson notes, this would mean that Samuelson regarded the trip of a van moving the goods of a dislocated worker as entailing economic costs. Although, the “psychic pain” incurred by the uprooted worker would not be treated as a “real” cost.90 The frustration incurred by those suffering such costs has considerable political consequences.91

CBA will not take into account systematic errors in cognition or that differences in “willingness to pay” might reflect only the fact that some people have less money than others.92 Beyond that, concentration on the metric of market value can distract society from significant issues, such as the “tragic question” of what to do when the available choices require “serious moral wrongdoing.”93

Along these same lines, deep ecologists have completely rejected the use of cost-benefit analysis in fashioning environment regulations. They argue, for example, “that if access to nature is a right, then cost-benefit analysis breaks down. In other words, there is no amount of money which can compensate for irreversible and irreparable damage to nature.”94 Others assert that future generations have “inviolable

90 NELSON, supra note 20, at 66; see SAMUELSON & NORDHAUS, supra note 27, at 735 (“Ours is the ‘ruthless economy’ . . . [o]ld-fashion loyalty to firm or community counts for little.”).
91 Indeed, former Republican presidential candidate Patrick Buchanan criticized fellow Republican conservatives for accepting without question the full costs of the “market process,” stating that “unbridled capitalism is . . . an awesome destructive force” making people “obsolete as rapidly as . . . the products they produce and the plants that employ them.” NELSON, supra note 20, at 66 n.* (quoting Patrick Buchanan, Schism Beyond Repair on the Right?, WASH. TIMES, Mar. 25, 1998, at A19).
92 See Matthew D. Adler & Eric A. Posner, Rethinking Cost-Benefit Analysis, 109 YALE L.J. 165, 168 (1999) (arguing that agencies may need to modify or depart from their traditional understanding of cost-benefit analysis where parties exhibit unequal values of wealth).
94 Edwin R. McCullough, Through the Eye of a Needle: The Earth’s Hard Passage Back
rights” to environmental resources, thus attacking the familiar practice of discounting future enjoyment when determining the present value of environmental amenities.95

Since many environmental amenities are not traded, no prices indicate their benefits. Passive enjoyment of amenities do not generate output that might be measured. The contingent valuation method has been used by some researchers to survey how much a representative sample population values passive environmental uses.96 These passive uses include “option value,” which measures willingness to pay to reserve the right to use the resource in the future, and “existence value,” which measures satisfaction derived from the resources continued existence.97

RATIONAL DECISION-MAKING

A key to salvation in the secular society is that decisions be based on reason.98 However, choices seem more complicated and less reliable than ever. This is due to a lack of reliable mechanisms to analyze information and make decisions within society. It may also be due to a lack of reliable cognitive mechanisms within individuals.

While professional advisers ought to bring to bear objective expertise, their self-interest as independent market actors clearly makes them unreliable sources of counsel.99 As public choice theory informs us, government agencies are not to be relied upon either, for the same reason.100

Indeed, continuing from public choice theory to social choice theory, we learn that there is no satisfactory way that the preferences of

95 Id. at 437 n.180 (quoting Clive L. Splash, Economics, Ethics, and Long-Term Environmental Damages, 15 ENVTL. ETHICS 117, 127 (1993)).
98 See, e.g., Steven J. Burton, Reaffirming Legal Reasoning: The Challenge from the Left, 36 J. LEGAL EDUC. 358, 368 (1986) (declaring that “[i]n a society that cares about justice . . . decision making based on reason . . . not preference or faith, is crucial for legitimacy”).
100 See, e.g., Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 229 (1986) (noting that market forces provide incentives for politicians to enact laws that serve the highest-bidding private interests).
members of a democratic society could be amalgamated into a single
social choice. 101 In part, this is because Arrow's Theorem demon-
strates that "no social choice mechanism can be both rational and de-
102 mocratic." In part also, it is because "no minimally rational social
choice mechanism can simultaneously respect liberal rights and the
Pareto principle—the principle that if at least one person prefers a
state of affairs to the alternatives and no one opposes it, the social
choice mechanism should pick that state of affairs." 103

If social institutions are not reliable guides to rational decisions,
might an individual trust his own analysis? Departing from the tradi-
tional Chicago model of people as rational seekers of their own self-
interest, an increasing number of economists are saying "no." For in-
stance, Professor Cass Sunstein asserts that cost-benefit analysis is
most plausibly justified on cognitive grounds—as a way of
counteracting predictable problems in individual and social
cognition. Poor judgments, by individuals and societies, can
result from certain heuristics, from informational and reputa-
tional cascades, from thinking processes in which benefits are
"on screen" but costs are not, from ignoring systemic effects
of one-shot interventions, from seeing cases in isolation, and
from intense emotional reactions. 104

One array of cognitive errors is explored by "prospect theory,"
which suggests that individuals value things that they possess more
than things that they do not possess, but are in fact of equivalent
value, and that they take irrational gambles on prospective losses. 105
The discipline of experimental economics, which conducts experi-
ments to test economic interactions, was pioneered by Vernon Smith,
whose work "has repeatedly demonstrated that markets do not operate
as traditional economics assumes." 106 Contrary to traditional eco-

102 Id. (citing KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed.
1963)).
103 Id. at 521-22 (citing AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE
(1970); Amartya Sen, The Impossibility of a Paretoian Liberal, 78 J. POL. ECON. 152 (1970)).
104 Cass R. Sunstein, Cognition and Cost-Benefit Analysis, 29 J. LEG. STUD. 1059, 1059
(2000).
105 See generally Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of
Decision Under Risk, 47 ECONOMETRICA 263 (1979) (introducing prospect theory as a critical
response to utility theory). See also Amos Tversky & Daniel Kahneman, Rational Choice and
106 Robert A. Prentice, Chicago Man, K-T Man, and the Future of Behavioral Law and
Prize with Daniel Kahneman); see supra note 105 and accompanying text.
nomic assumptions, "people do not behave in accordance with ra-
tional man theory."107

Delving beneath these insights developed from behavioral obser-
vations, the new research field of neuroeconomics108 utilizes neuroi-
maging to examine behavior in economic games.109 In one exper-
iment, for instance, magnetic resonance imaging indicated that some
brain areas showed greater activation for unfair compared with fair
(money split 50:50) offers, with the magnitude of activation signifi-
cantly greater where the unfair offers were made by human partners
as opposed to computer partners.110

From neurology, it is a short skip into the study of the more gen-
eral biological bases for human behavior and the adaptability of man
to more efficient survival behaviors and changing conditions. The
field of evolutionary biology deals with this terrain.111 There has been
a rich interplay between economics and biology,112 and Chicago-style
economists and lawyers remain fascinated with Darwinism, both in its
social version and straight from the source:

The classical evolutionary paradigm has a strong grip on law
and economics scholarship. What survives is presumptively
efficient: if it were inefficient, the practice, the law, or the
custom would be challenged by its more efficient competi-
tors. The success of the more efficient practice or law allows
it to prosper, while its less efficient competitors wither and
die.113

The suggestion is that the forces of biology and economics are in-
tertwined. Indeed, if the "market can decide if genetic modifications
should be rewarded" when it comes to crops,114 is the next step far in
the distance?

107 Prentice, supra note 106, at 1175 n.585 (citing Chris Giles, Economists Get the Idea,
108 See Terrence R. Chorvat, Perception and Income: The Behavioral Economics of the
Realization Doctrine, 36 CONN. L. REV. 75, 110 n.232 (2003) (noting that the term "neu-
roeconomics" was coined by Kevin McCabe in 1996).
109 Raffaele Caterina, Comparative Law and the Cognitive Revolution, 78 TUL. L. REV.
1501, 1541 n.214 (2004).
110 Id. (citing Alan G. Sanfey et al., The Neural Basis of Economic Decision-Making in the
Ultimatum Game, 300 SCIENCE 1755 (2003)).
111 See, e.g., Owen D. Jones, Time-Shifted Rationality and the Law of Law's Leverage: Be-
the interaction of human behavior, economic theory, and the law).
112 See, e.g., GEOFFREY M. HODGSON, ECONOMICS AND EVOLUTION (1993) (discussing
how human behavior meshes with and influences economic theory).
113 Mark J. Roe, Chaos and Evolution in Law and Economics, 109 HARV. L. REV. 641, 641
(1996).
114 Carlos Scott López, Intellectual Property Reform for Genetically Modified Crops: A
CONCLUSION

It might be that the next generation of economists will work toward man's salvation by making conventional improvements in efficiency of productive processes. Or, the imperialism of economic forces might make each of our lives resemble that of the Charlie Chaplinesque assembly line worker in the industrial dystopia *Modern Times.* Then again, economists might explain how humanity biologically should be redesigned. Perhaps this will lead to salvation, but it is all heady stuff.

As Professor Stanley Fish recently noted in an interview with the *New York Times*: "Once theoretical questions cease to be questions in the realm of philosophy and become questions about how to live our lives, that places a great burden on theory." Theorists can claim to answer vexing questions, or to lead us to the "promised land." "The first is, of course, the appropriate claim and necessary claim made by scholars and theorists. The second is the language of prophets or even of gods. And theorists, thankfully, are neither prophets or gods." While economists are not gods, they are worldly philosophers. As such, their words are to be heeded, but warily.

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113 *MODERN TIMES* (Image Entertainment 1936).


117 Id.

118 Id.

119 See, e.g., ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS (rev. 7th ed. 1999) (contending that history's greatest economists can be called worldly philosophers because they "sought to embrace in a scheme of philosophy . . . [man's] drive for wealth").