



## Case Western Reserve Law Review

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Volume 56 | Issue 3

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2006

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### Recommended Citation

Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 Case W. Res. L. Rev. 569 (2006)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol56/iss3/5>

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

Steven J. Eagle<sup>†</sup>

In contemporary America, there is a widespread sense of anxiety. Personal safety cannot be taken for granted in an age of terrorism.<sup>1</sup> Dangers to children appear to lurk at every turn.<sup>2</sup> Lurid interest in molestation proxies concerns about youthful sexuality and adult erotic impulses.<sup>3</sup> 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.<sup>4</sup> Economic insecurity grows apace, both among those with lower incomes<sup>5</sup> and the middle class.<sup>6</sup>

Although Americans purport to be as religious as ever, they hardly are dogmatic about their faith.<sup>7</sup> 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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<sup>1</sup> 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”).

<sup>2</sup> See, e.g., Tonya L. Brito, *Paranoid Parents, Phantom Menaces, and the Culture of Fear*, 2000 WIS. L. REV. 519 (2000).

<sup>3</sup> 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”).

<sup>4</sup> See, e.g., Suein Hwang, *Pre-K Prep: How Young Is Too Young for Tutoring?*, WALL ST. J., Oct. 13, 2004, at D1.

<sup>5</sup> 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”).

<sup>6</sup> See, e.g., Jacob S. Hacker, *Middle-Class Tightrope: It’s More Dire than the Numbers Show*, WASH. POST, Aug. 10, 2004, at A19.

<sup>7</sup> See generally, ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION* (2003).

least among the educated elites—that organized religion is not the answer to growing personal concerns.<sup>8</sup>

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.<sup>9</sup> Even Fabian Socialism was not able to deliver the goods.<sup>10</sup>

The last named vehicle for salvation, immersion in the self, has faded too.<sup>11</sup> In his briefly famous *The Greening of America*,<sup>12</sup> then-Yale law professor Charles Reich earnestly observed that those reach-

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<sup>8</sup> 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.

<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> CHARLES A. REICH, *THE GREENING OF AMERICA* (1st ed. 1970) [hereinafter, REICH, *GREENING*]. The book rose to the top position in *The New York Times* best seller list on December 27, 1970. See [http://www.hawes.com/no1s\\_nf.htm](http://www.hawes.com/no1s_nf.htm) (last visited Oct. 22, 2004). Reich subsequently recounted his quest in a painfully revealing autobiography, CHARLES A. REICH, *SORCERER OF BOLINAS REEF* (1976).

ing the advanced "Consciousness III" would know that "[p]eople all belong to the same family, whether they have met each other or not."<sup>13</sup> As a postmodernist compliment (or, perhaps, insult) to the sensibilities of its readers, the *Michigan Law Review* presented a 229-page article on "Pomobabble."<sup>14</sup> Personalized religion, what Robert Bellah and his colleagues referred to as "Sheilaism,"<sup>15</sup> 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.<sup>16</sup> While what one might call overt narcissism appears to be declining,<sup>17</sup> it might have become sublimated into the search for authenticity<sup>18</sup> and aesthetic experience.<sup>19</sup>

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.

#### 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

<sup>13</sup> REICH, GREENING, *supra* note 12, at 227 (quoted in Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 FLA. ST. U. L. REV. 233, 251 n.136 (1999)).

<sup>14</sup> Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997) (footnote within title omitted).

<sup>15</sup> See 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 yourself" and to listen to one's own little voice. *Id.* at 235. Under this approach, the authors conclude, God simply becomes "the self magnified." *Id.*

<sup>16</sup> See Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 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." *Id.* (citing WADE CLARK ROOF & WILLIAM MCKINNEY, *AMERICAN MAINLINE RELIGION* (1987)).

<sup>17</sup> See CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* (1980).

<sup>18</sup> 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).

<sup>19</sup> See 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).

schools of economics. In his book *Economics as Religion*,<sup>20</sup> economist Robert Nelson examines this quest. Building upon his earlier book, *Reaching for Heaven on Earth*,<sup>21</sup> Nelson burnishes and expands upon his earlier thesis that contemporary schools of economics are, in some sense, successors to earlier theological movements.

In *Economics as Religion*, Nelson focuses primarily on two archetypal figures. Paul Samuelson wrote the enormously influential introductory text, *Economics*,<sup>22</sup> that brought the Progressive ethic and Keynesian thought to countless thousands of college classroom. 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.<sup>23</sup> 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."<sup>24</sup> Macroeconomics was king, and the traditional economics of the firm was relegated to the second half of the book. After Alvin Hansen<sup>25</sup> 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."<sup>26</sup>

Samuelson's credentials as "scientist" have continued to grace his work.<sup>27</sup> Such statements often preface subjective public policy

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<sup>20</sup> ROBERT H. NELSON, *ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND* (2001).

<sup>21</sup> ROBERT H. NELSON, *REACHING FOR HEAVEN ON EARTH* (1991).

<sup>22</sup> PAUL A. SAMUELSON, *ECONOMICS* (1st ed. 1948). Nelson uses this First Edition as his "benchmark" of Samuelson's views. NELSON, *supra* note 20, at 49.

<sup>23</sup> NELSON, *supra* note 20, at 52.

<sup>24</sup> *Id.* at 53.

<sup>25</sup> See, e.g., Richard A. Musgrave, *Alvin Hansen*, in 2 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 591 (John Eatwell et al. eds., 1987). Like Samuelson, Hansen's "social philosophy was expressed 'in the democratic ideal of providing for all individuals a reasonable approach to equality of opportunity.'" *Id.*

<sup>26</sup> See MILTON FRIEDMAN & ROSE D. FRIEDMAN, *TWO LUCKY PEOPLE* 231 (1998) (quoting Nixon's statement from a 1965 article in *Time* magazine).

<sup>27</sup> See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* (16th ed. 1998). The

prescriptions, not the least those of lawyers.<sup>28</sup> 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.”<sup>29</sup> Samuelson’s philosophy is articulated perhaps most plainly in his preface to the 1998 fiftieth anniversary Sixteenth Edition.<sup>30</sup>

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.”<sup>31</sup>

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.”<sup>32</sup> 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.”<sup>33</sup>

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

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publisher’s one-paragraph description of Professor Samuelson at the beginning of the 50th anniversary edition notes his “many scientific writings,” and states that he is “[o]ne of those rare scientists who can communicate with the lay public.” *Id.* at v.

<sup>28</sup> See, e.g., Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 25 (1993) (noting that traditional lawyers were happy to be considered as “a kind of scientist, even as a kind of social scientist,” thereby “surrendering any claim to originality, vision, or audacity in exchange for society’s acknowledging his possession of unchallengeable expertise within however narrow a sphere of social governance”).

<sup>29</sup> NELSON, *supra* note 20, at 75 (quoting SAMUELSON, *supra* note 22, at 127).

<sup>30</sup> SAMUELSON & NORDHAUS, *supra* note 27, at xxiv-xxvii. Nordhaus, who served on President Jimmy Carter’s Council of Economic Advisers and who taught at Yale, had joined as coauthor several editions earlier. The statement, “A Golden Birthday,” is signed solely by Samuelson.

<sup>31</sup> *Id.* at xxiv.

<sup>32</sup> *Id.* at 7. While the text is coauthored, Samuelson makes it clear that he selected Nordhaus as his collaborator in part because Nordhaus admired his views. *Id.* at xxvi.

<sup>33</sup> *Id.* at 37.

pervasive as market failures, concluding that "for some, government is the problem rather than the solution."<sup>34</sup>

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.<sup>35</sup>

In spite of Samuelson's invocation of "market failure," he devotes only a skimpy two paragraphs to social choice theory and public choice theory.<sup>36</sup> 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,<sup>37</sup> and that the problem of determining a method of aggregating collective welfare is intractable.<sup>38</sup> This lends considerable doubt to the proposition that legislative bodies are competent to legislate for what truly is the general welfare.<sup>39</sup> 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."<sup>40</sup>

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<sup>34</sup> *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.

<sup>35</sup> SAMUELSON & NORDHAUS, *supra* note 27, at 39.

<sup>36</sup> *Id.* at 287-88.

<sup>37</sup> See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); Maxwell L. Stearns, *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").

<sup>38</sup> 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).

<sup>39</sup> 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).

<sup>40</sup> Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 *U. CHI. L. REV.* 263, 265 (1982).

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,'"<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

#### 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.<sup>45</sup> 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.<sup>46</sup>

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<sup>41</sup> SAMUELSON & NORDHAUS, *supra* note 27, at 38-39 (quoting Joseph Schumpeter).

<sup>42</sup> *Id.* at 39 (emphasis deleted).

<sup>43</sup> *Id.*

<sup>44</sup> NELSON, *supra* note 20, at 17-18.

<sup>45</sup> See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* 25 (1992).

<sup>46</sup> *Berman v. Parker*, 348 U.S. 26 (1954).



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<sup>47</sup> as well.<sup>48</sup>

As might be expected, some dissented from government steering of the market on the ground that government could not formulate coherent and effective policy.<sup>49</sup> 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."<sup>50</sup> "[T]he market" came to be interpreted functionally, as if something called "the economy" existed for the purpose of value maximization.<sup>51</sup> "The polity" came to be viewed in a similar manner.<sup>52</sup> The nature of the process is such that the values of individual participants are maximized, "without the necessity of introducing an external evaluative criterion."<sup>53</sup> 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."<sup>54</sup>

#### CHICAGO AS PROSELYTIZER OF PRACTICAL REFORM

While Samuelson termed Keynes the twentieth century's "greatest economist,"<sup>55</sup> he has given Milton Friedman relatively little recognition.<sup>56</sup> Others, as Nelson relates, did give Friedman the "economist of

<sup>47</sup> U.S. CONST. amend. V (stating "nor shall private property be taken for public use, without just compensation").

<sup>48</sup> *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (sustaining as "public use" condemnation of sound residential area for redevelopment as office and research facility, hotel, and upscale residences).

<sup>49</sup> 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").

<sup>50</sup> James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243, 244 (1987).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> SAMUELSON & NORDHAUS, *supra* note 27, at 734.

<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup>

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,<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup>

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eral Reserve as lender of last resort during the Great Depression”).

<sup>57</sup> 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*).

<sup>58</sup> *Id.*

<sup>59</sup> GARY S. BECKER, *A TREATISE ON THE FAMILY* (1991).

<sup>60</sup> 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.

<sup>61</sup> Raymond J. Friel, *Blair’s Third Way—Thatcher’s Enduring Legacy*, 48 U. KAN. L. REV. 861, 862 n.3 (2000).

## 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.<sup>62</sup> While markets build individual virtue,<sup>63</sup> they also weaken the practice of virtue by catering to the illusion that consumers always deserve to have their demands fulfilled.<sup>64</sup> Also, at least for those who acquired a comfortable level of material success, the old saw seems true—money does not buy happiness.<sup>65</sup>

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.<sup>66</sup> By depressing the income of low-skilled workers competing against those in other countries, factor-

<sup>62</sup> SAMUELSON & NORDHAUS, *supra* note 27, at 735-36.

<sup>63</sup> 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).

<sup>64</sup> 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).

<sup>65</sup> See Robert E. Lane, *Friendship, Consumerism, and Happiness*, 8 *CRITICAL REV.* 521 (1994) (collecting studies).

<sup>66</sup> Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *HARV. J. ON LEGIS.* 1, 18 (2004). Barriers to trade, such as transportation costs and protective legislation, however, will reduce the equalizing effects. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 *U. PA. L. REV.* 1147, 1150 & n.7 (1997) (discussing barriers and their costs in the world economy). Interestingly, the concept of factor-price equalization was developed in part by Paul Samuelson contemporaneously with publication of the first edition of *Economics* in 1948. Paul A. Samuelson, *International Trade and the Equalisation of Factor Prices*, 58 *ECON. J.* 163, 165-84 (1948); Paul A. Samuelson, *International Factor-Price Equalisation Once Again*, 59 *ECON. J.* 181, 181-97 (1949).

price equalization is a contributing cause of the rising disparity of income in the United States.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> Gated communities have developed in a “secession of

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<sup>67</sup> 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).

<sup>68</sup> See generally, MICHAEL WALZER, *SPHERES OF JUSTICE* (1983) (criticizing market forces for encouraging inequality and domination).

<sup>69</sup> Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1860 (1987).

<sup>70</sup> See, e.g., ROBERT REICH, *THE FUTURE OF SUCCESS* 174-75 (2000) (noting how families

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.”<sup>71</sup>

Similarly, leading universities are becoming more commercially engaged. As an indication of their changed orientation, the “experimental use exception” that universities have enjoyed from patent infringement actions for almost two-hundred years<sup>72</sup> may be ending. Schools are now viewed as commercial competitors.<sup>73</sup> In *Madey v. Duke University*,<sup>74</sup> 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 licensing program from which it derive[d] a not insubstantial revenue stream.”<sup>75</sup>

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

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

<sup>71</sup> EVAN MCKENZIE, *PRIVATOPIA* 186 (1994) (quoting Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16).

<sup>72</sup> 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 doctrine 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).

<sup>73</sup> 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.”).

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

<sup>75</sup> *Madey*, 307 F.3d at 1362 n.7.

<sup>76</sup> 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).

<sup>77</sup> See, e.g., U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 459 No. 688 (123d ed. 2003), available at <http://www.census.gov/prod/2004pubs/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.*

<sup>78</sup> 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,<sup>79</sup> Robert Frank and Philip Cook have written a book attempting to demonstrate that it is increasingly true that the “winner takes all.”<sup>80</sup>

The purpose of this litany is not to suggest that these criticisms are necessarily valid,<sup>81</sup> or even that there is some inherent connection between people’s preferences and their well-being.<sup>82</sup> 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.<sup>83</sup> Also, intrinsic in the nature of a pursuit or relationship might be the “belief that certain options are not comparable in value.”<sup>84</sup> 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.”<sup>85</sup> 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.<sup>86</sup> This is a view that utilitarians do not share.<sup>87</sup>

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ity in client wrongdoing).

<sup>79</sup> Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981).

<sup>80</sup> 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).

<sup>81</sup> See, e.g., TYLER COWEN, *IN PRAISE OF COMMERCIAL CULTURE* (1998) (arguing that the expanding scope of markets adds to human well-being).

<sup>82</sup> See, e.g., David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351, 365-66 (2002) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002)) (noting the problems that exist in connecting people’s well-being with their individual preferences).

<sup>83</sup> 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.”).

<sup>84</sup> *Id.* at 356 (terming such beliefs “constitutive incommensurabilities”).

<sup>85</sup> *Id.* at 352.

<sup>86</sup> 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.”).

<sup>87</sup> See, e.g., Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y 713, 715 (1989) (“Laws are something made by men for the governance of mankind.”).

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.<sup>88</sup> Although CBA intuitively seems desirable, the concept is controversial, with some asserting that the methodology of cost-benefit analysis is flawed.<sup>89</sup> 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.<sup>90</sup> The frustration incurred by those suffering such costs has considerable political consequences.<sup>91</sup>

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.<sup>92</sup> 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.”<sup>93</sup>

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.”<sup>94</sup> Others assert that future generations have “inviolable

<sup>88</sup> See, e.g., Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1344-45 (2002) (discussing the growth of cost-benefit analysis in legislative rulemaking).

<sup>89</sup> See, e.g., Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 929-30 (2000) (suggesting that bias exists in much cost-benefit analysis methodology).

<sup>90</sup> 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.”).

<sup>91</sup> 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).

<sup>92</sup> 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).

<sup>93</sup> Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL. STUD. 1005, 1005 (2000).

<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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.<sup>97</sup>

### RATIONAL DECISION-MAKING

A key to salvation in the secular society is that decisions be based on reason.<sup>98</sup> 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.<sup>99</sup> As public choice theory informs us, government agencies are not to be relied upon either, for the same reason.<sup>100</sup>

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

to Health, 10 J. ENVTL. L. & LITIG. 389, 436-37 (1995) (citing ARNE NAESS, ECOLOGY, COMMUNITY AND LIFESTYLE (David Rothenberg trans., & ed., 1989)). McCollough notes that "Naess coined the term 'deep ecology' in 1973." *Id.* at 415.

<sup>95</sup> *Id.* at 437 n.180 (quoting Clive L. Splash, *Economics, Ethics, and Long-Term Environmental Damages*, 15 ENVTL. ETHICS 117, 127 (1993)).

<sup>96</sup> *E.g.*, Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 494 (1994); *see also* John M. Heyde, *Is Contingent Valuation Worth the Trouble?*, 62 U. CHI. L. REV. 331 (1995) (presenting a thorough account of the uses and limitations of the technique).

<sup>97</sup> Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 145 (1999).

<sup>98</sup> *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").

<sup>99</sup> *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (stressing that agents do not make optimal decisions from the principal's viewpoint).

<sup>100</sup> *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.<sup>101</sup> In part, this is because Arrow's Theorem demonstrates that "no social choice mechanism can be both rational and democratic."<sup>102</sup> 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."<sup>103</sup>

If social institutions are not reliable guides to rational decisions, might an individual trust his own analysis? Departing from the traditional Chicago model of people as rational seekers of their own self-interest, an increasing number of economists are saying "no." For instance, 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 reputational 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.<sup>104</sup>

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.<sup>105</sup> The discipline of experimental economics, which conducts experiments to test economic interactions, was pioneered by Vernon Smith, whose work "has repeatedly demonstrated that markets do not operate as traditional economics assumes."<sup>106</sup> Contrary to traditional eco-

<sup>101</sup> See, e.g., David Luban, *Social Choice Theory as Jurisprudence*, 69 S. CAL. L. REV. 521, 521 (1996).

<sup>102</sup> *Id.* (citing KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963)).

<sup>103</sup> *Id.* at 521-22 (citing AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970)).

<sup>104</sup> Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEG. STUD. 1059, 1059 (2000).

<sup>105</sup> 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 the Framing of Decisions*, 59 J. BUS. S251 (1986).

<sup>106</sup> Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 *VAND. L. REV.* 1663, 1775 n.585 (2003) (noting that Smith shared the Nobel Prize with Daniel Kahneman); see *supra* note 105 and accompanying text.

conomic assumptions, "people do not behave in accordance with rational man theory."<sup>107</sup>

Delving beneath these insights developed from behavioral observations, the new research field of neuroeconomics<sup>108</sup> utilizes neuroimaging to examine behavior in economic games.<sup>109</sup> In one experiment, 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 significantly greater where the unfair offers were made by human partners as opposed to computer partners.<sup>110</sup>

From neurology, it is a short skip into the study of the more general 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.<sup>111</sup> There has been a rich interplay between economics and biology,<sup>112</sup> 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 competitors. The success of the more efficient practice or law allows it to prosper, while its less efficient competitors wither and die.<sup>113</sup>

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

<sup>107</sup> Prentice, *supra* note 106, at 1175 n.585 (citing Chris Giles, *Economists Get the Idea*, FIN. TIMES (London), Oct. 15, 2002, at 13, available at 2002 WLNR 6766995).

<sup>108</sup> 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 "neuroeconomics" was coined by Kevin McCabe in 1996).

<sup>109</sup> Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501, 1541 n.214 (2004).

<sup>110</sup> *Id.* (citing Alan G. Sanfey et al., *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCIENCE 1755 (2003)).

<sup>111</sup> See, e.g., Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001) (discussing the interaction of human behavior, economic theory, and the law).

<sup>112</sup> See, e.g., GEOFFREY M. HODGSON, *ECONOMICS AND EVOLUTION* (1993) (discussing how human behavior meshes with and influences economic theory).

<sup>113</sup> Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996).

<sup>114</sup> 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*.<sup>115</sup> 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."<sup>116</sup> Theorists can claim to answer vexing questions, or to lead us to the "promised land."<sup>117</sup> "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."<sup>118</sup>

While economists are not gods, they are worldly philosophers.<sup>119</sup> As such, their words are to be heeded, but warily.

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*Legal Imperative*, 20 J. CONTEMP. HEALTH L. & POL'Y 367, 383 (2004).

<sup>115</sup> MODERN TIMES (Image Entertainment 1936).

<sup>116</sup> Emily Eakin, *The Theory of Everything*, R.I.P., N.Y. TIMES, Oct. 17, 2004 § 4, at 12 (quoting Stanley Fish discussing the decline of the "era of big theory" upon the death of Jacques Derrida).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., ROBERT L. HELBRONER, 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 . . . [mans's] drive for wealth").