

# Culture and Liberty

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**Abstract.** This Article considers the claim that free market legal rules subvert the stock of private virtues on whose survival free markets depend. This concern has been raised by Joseph Schumpeter and Daniel Bell, but has not heretofore been examined from a legal perspective. The “cultural contradictions” claim resonates deeply at a time when America’s material capital increases exponentially but its social capital seems fragile.

On close scrutiny, the virtues of *doux commerce* are incontestable. What remains an issue, however, is whether these virtues come at a price. Does living in a market society require one to sacrifice other ways of encountering the world, as Weber and Heidegger suggested. Nevertheless, this does not supply a reason to impeach individual choice, and this attack on free bargaining therefore fails. Moreover, the individual virtues that plausibly support free bargaining would appear to thrive under free markets.

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While I am greatly honored to participate in this festschrift, I feel very much in a quandry. Traditionally, the essayists who contribute to these ventures say one of two things about the author whose writings are being celebrated. Some abuse the author for having missed a quite obvious point. Not infrequently, the author is chided for having paid insufficient attention to something the essayist himself wrote in an obscure journal twenty years before. Other essayists content themselves with explicating difficulties in the author's work. One of my teachers once did this in a book on Frege, and was rewarded with a notice in *Mind* that said that his essay had the dubious distinction of being more incomprehensible than Frege himself. But none of these options is open to me. So far from disagreeing with Professor Epstein. I likely agree with him more than any of my fellow essayists. Nor is he a difficult author to read, for he expresses himself with the clarity that is politeness in an author. I must therefore try something different. I shall defend Professor Epstein from an attack that has yet to be made. I must first describe the objection, and here it may seem that I am disagreeing with him. I believe we come out in very much the same place, however. For those who come out somewhere else, the prudent course is to reexamine one's reasoning.

## *I. The Cultural Contradictions of Simple Rules*

The objection I should like to evaluate is most closely associated with Joseph Schumpeter and Daniel Bell. Schumpeter's *Capitalism, Socialism and Democracy* (1942) and Bell's *Cultural Contradictions of Capitalism* (1976) both predicted the demise of free markets. The books were written at a time when the West was engaged in a struggle with totalitarian regimes, but the threat they identified was internal rather than external, and cultural rather than military or economic. Both authors believed that free markets depend for their survival on the general acceptance of bourgeois cultural norms that free markets tend to dissolve: solidarity, prudence and fidelity (and fortitude might reasonably be added to the list). These virtues flourished in a pre-capitalist era, and promoted its growth, but capitalism perversely weakens them. The argument turned the Marxist analysis of capitalism on its head. Marx had predicted that capitalism would be destroyed by its economic failure; but Schumpeter and Bell predicted it would be destroyed by its success.

Today the two books read at times like period pieces, since Schumpeter and Bell were troubled by problems that, with the benefit of hindsight, today seem trivial. For example, Shumpeter voiced the then-fashionable concern that free contracting was threatened by standard-form contracts that did not permit consumers to haggle over terms. Nowadays we have a better understanding of the economic purposes served by standard form contracts, and do not see free

contracting endangered by them, although Schumpeter's concern still find a place in the contracts courses of third-rate law schools. Curiously, Schumpeter also subscribed to the theories of managerialism that James Burnham had advanced in *The Managerial Revolution* (1940). Burnham had argued that capitalism and socialism were converging because the techniques of running an enterprise were essentially the same, whether the firm was privately- or state-owned. These theories had an obvious appeal for the New Deal bureaucrats who were itching to run the American economy along "scientific" and "rational" lines, but Burnham repented his views and became a *National Review* contributor and a fierce opponent of communism. What made it so curious that Schumpeter should echo the managerialist thesis is that his book is best known for its trenchant rejection of the Marxist argument that capitalism is self-defeating. Marx thought that free markets would result in "monopoly capitalism," and that we would thereby lose our freedom. Nonsense, said Schumpeter. Look at the world of business, he said, and what one notices instead is the "creative destruction" of capitalism. Old firms die and new firms replace them, an observation which may be verified by looking at the Philco and Studebaker ads in an old *Saturday Evening Post*. That is not the problem, thought Schumpeter. Rather, it is that capitalism's destructive energies also sweep away the values that built it and institutions that sustain it.

Much of Bell's book also seems rather dated, with its worries about seventies' issues such as inflation and the energy supply. Like Schumpeter, however, Bell saw moral collapse as the real danger, and in this Bell was very prescient indeed, for the concern that America has lost its ethical moorings is widely felt today. When polled, most Americans report that the most serious problems facing their country are moral or spiritual, not economic. America is manifestly able to produce material capital, but is thought less able to produce the social capital of cooperative behavior, stable families and safe cities; and, if Bell was right, the decline in social capital might in time threaten the material capital as well. For now, however, America remains wealthy, and the contrast between its material and social capital recalls Sallust's complaint about Imperial Rome's "private wealth and public poverty." That tag was formerly employed by John Kenneth Galbraith to argue for increased government spending. Now, however, the concern for public poverty might more plausibly be voiced by conservatives such as Gertrude Himmelfarb, Robert Bork and William Bennett. Similarly, it was formerly the liberal who asked us to look at the "root causes of crime," back when these were thought to be economic. But now that the root causes seem social, and attributable to the decline in traditional family structures and the weakening of moral norms, we might more profitably seek advice on the causes of crime from David Popenoe or John DiIulio.

Even if there is a social capital deficit, however, what has this to do with capitalism or free markets? Before we agree with Schumpeter or Bell, we must first satisfy ourselves (1) that free markets depend in some way on a shared set of virtues, and (2) that free markets subvert these virtues. The Schumpeter-Bell thesis is surprisingly vague on how all this might happen, and what I should like to do is give flesh to the bare bones of their argument.

Before I do this, however, I should first like to clear away several arguments about the self-defeating nature of capitalism that I propose to leave off the table. Since I am commenting on the private law rules that Professor Epstein defends, I need not trouble myself with such macroeconomic concerns as "monopoly capitalism" and "structural unemployment" (which seem singularly untroubling today, in any event). Nor need I consider the argument that capitalism is politically unstable, in the sense that it creates hostile economic and intellectual classes that eventually will bury it. The specter of underclass revolt is most closely associated

with Marx, of course, though it was first voiced by Edmund Burke. For his part, Schumpeter was more concerned by what Julien Benda called the “treason of the clerks”: the rise of an intellectual class that was hostile to the values of freedom and economic growth, and that carried enough political clout to be worrisome. Benda was on to something, of course, and similar concerns were voiced by José Ortega y Gasset, Irving Babbitt and Whitaker Chambers. Once again, however, this is not the issue before us. Our concern is social norms, not political change. In any event, after the Thatcher-Reagan fiscal revolutions, the Contract with America, and the rise of New Democrats in the United States and New Labour in Britain, the political threat to free markets now seems weaker than it did at any other time in the twentieth century.

Equally, I shall not examine how virtue fares under rival economic systems. Before criticizing one set of rules, one ought to consider the alternatives, and the alternatives to free market virtues are sometimes rather nasty. All the evidence suggests that Soviet efforts to build a new socialist man did not produce people who were more gentle and less opportunistic. Just the opposite, if anything. As for the aristocratic societies that preceded capitalism, “sweet commerce” (Montesquieu’s *doux commerce*) introduced a more pacific set of virtues. In the *Esprit des lois*, Montesquieu said “it is almost a general rule that wherever the ways of man are gentle there is commerce; and wherever there is commerce, there the ways of man are gentle.”<sup>i</sup> Adam Smith recognized this when he observed that “commerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals ... who had before lived almost in a continual state of war with their neighbours and of servile dependency upon their superiors.” The feudal baron might have been heroic, but he was less likely to cooperate in his dealings with others and more likely to resort to violence to achieve his ends. This was no doubt what Johnson had in mind when he said that “There are few ways in which a man can be more innocently employed than in getting money.”<sup>ii</sup> Kant even thought that the rise of commercial virtue would make war obsolete. Come to think of it, war assumes a violation of the Coase Theorem. (All we are saying / Is give markets a chance!)

These arguments resonate with the modern liberal who, while not a warm supporter of commerce, does mistrust religion. In his *Philosophical Letters*, Voltaire praised commercial virtues because they diverted men from sectarian battles. “Enter the Exchange of London, that place more respectable than many a court, and you will see there agents from all nations assembled for the unity of mankind. There the Jew, the Mohammedan, and the Christian deal with one another as if they were of the same religion, and give the name of infidel only to those who go bankrupt.”<sup>iii</sup> Before the temple of Mammon, every enthusiasm that might inflame the passions dissolves like perfuming clouds of incense into benign indifference.

The older set of virtues had their uses, however. In 1942 Schumpeter wondered whether the abandonment of heroic, aristocratic virtues might ultimately doom capitalism, which must always face threats from a foreign enemy. With all such enemies defeated, Schumpeter’s worries might now seem excessive. As for the future, however, who can say? One thing seems clear, to anyone who wanders through an English church and observes the flags and the plaques:

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<sup>i</sup> Esprit de lois XX, 1.

<sup>ii</sup> James Boswell, *The Life of Samuel Johnson* 529 (March 27, 1775) (New York: Everyman, 1992).

<sup>iii</sup> Voltaire, *Mélanges* 17-18 (Paris: Pléiade, 1961).

foreign enemies are defeated not by the virtues of sweet commerce but by a rather more old-fashioned set of virtues. A nation of shopkeepers may possess pluck and courage in abundance, but it did not learn these virtues in its shops; and future battle flags are more likely to adorn churches than shopping malls and office atria. Yet as I am enquiring whether free markets might internally unravel through a change in social norms, I need not consider how well free market armies fare against foreign foes.

#### A. *Solidarity and Alienation*

Solidarity is the sense of fellowship that members of a community share, and is one of life's basic goods. It is not a virtue itself, but is the font of virtue, for we learn to be moral through our dealings with others. We need others to flourish. We are not born virtuous and then corrupted by civilization, as Rousseau thought. It is just the opposite, as Diderot, Freud and Jane Jacobs recognized. Solitude and self-indulgence corrupts; what saves us is the civilization, conversation and laughter of cities.

Let us begin by describing what most people would consider an ideal community. When a child reaches the age of seven in Siena, he takes his First Communion and swears loyalty to his *contrada*. Time out of mind, the city has been divided into seventeen *contrade*--neighborhoods that serve as focal points for local loyalties. Formally, each *contrada* is charged with presenting an entry in the twice-yearly *Palio*, a horse race around the square in the center of the city. There are parades, with flag-twirlers for each *contrada*, immense feasts, and then the race itself--a dangerous affair, in which horse and rider are sometimes hurt. Most of the city attends, packed into the square. When the race is over, members of the winning *contrada* erupt in an explosion of joy. Its name is shouted throughout the city, and both rider and horse are embraced and led to a feast.<sup>iv</sup>

City life in Siena is a far cry from that in decaying American cities, from which the middle class flees to its remote suburbs. The suburban commuter drives along overcrowded roads while listening to talk radio, arriving at last at the cul-de-sac he calls home, miles from any restaurant, shop or sidewalk. Like Palmerston's England, he has interests but no friends. This is a stereotype, but like many stereotypes contains a germ of truth. It was not always thus. A few generations back, local neighborhoods flourished in every American city. While not Sienese *contrade*, these were communities with strong local institutions in which one knew one's neighbors. The loss of such communities has plausibly led to a decline in the civic virtues of cooperation and fidelity and an increase in the civic vices of defection and opportunism.

The lament for the loss of community is strong today, but is not novel. Marx mourned the break-up of feudal hierarchies and communities with the passion of an Edmund Burke. "All that is holy is profaned," said the author of *The Communist Manifesto*. "All that is solid melts into air." It sounds like an Anglican hymn, and so it was treated in a long-ago movie called *Morgan*. But Marx was only echoing Oliver Goldsmith's reaction to the enclosure movement and the rise of free market capitalism in Ireland. "Ill fares the land, to hastening ills a prey / Where wealth accumulates, and men decay!" The line is clumsy, but its meaning is clear enough, and the passion was authentic. Goldsmith was one of Yeats' *Seven Sages*, who walked the roads and mimicked what they heard, and who saw "trade's unfeeling train usurp the land, and dispossess the swain."

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<sup>iv</sup> Matthew Spender, *Within Tuscany* 98-101, 182-83 (London: Penguin, 1993).

It is easy to sentimentalize the ancien regime and to misdiagnose the cause of alienation. Marx's prescription is not one that many would care to follow today, and Goldsmith displays an invincible ignorance of economics throughout his poem. As for the suburbanization of America, most suburbs are perfectly pleasant, with thriving libraries, little theaters and ethnic restaurants. As compared to the range of choices offered all but the richest Americans 40 years ago, the average suburbanite has a wealth of cultural options. Nor are the reasons for the decline in inner cities mysterious. The rise of "diversity" has nothing to do with it. America was more diverse 100 years ago, when immigration levels were far higher; and 150 years ago, when sectional conflict loomed. What is different, between the cities of the past and today, and between modern American cities and those of other countries, are crime levels. That is why many of the laments about the loss of communitarianism seem less than genuine, the hypocritical tribute that a certain kind of liberalism pays to conservative ideals. Yes, let us worry about communities, but not violence, illegitimacy, broken schools, or the obscene graffiti of life that deface communities.

Because people have different tastes, diversity may in fact promote solidarity. It permits people to satisfy their desire for community by choosing to live amongst people who resemble them. Some people foolishly believe that diversity means that every street in every neighborhood in every city must have the same percentage of Hispanics, Mormons, and opera-goers. But that is uniformity, not diversity. When it comes to creating communities, diversity *between* neighborhoods is far more valuable than diversity *within* them. Similarly, solidarity thrives on group rivalries. I choose one religion in preference to another. I leave one Internet discussion group to join another. I root for the local high school, and against the other team. I cannot love any community unless I prefer it to rival communities. It is a mistake to think that, in assessing solidarity, only the most encompassing communities count. What this forgets, in a world of natural rivalries, is that we cannot take the side of one community without taking sides against another. In the *Palio*, we cheer our *contrada*; we hope its rivals lose. We laugh with friends in our *contrada* at butts from other *contrade*, and the between-*contrade* communitarian loss is plausibly dwarfed by the within-*contrada* communitarian gain.

The competition between rival cities for residents often promotes a stronger community sentiment. When we exit a community, we weaken it.<sup>v</sup> But in moving we leave one community to join another. As Tom Stoppard has noted, every exit is an entrance somewhere else. Where the exit community is decayed, its government corrupt and its institutions moribund, the move will strengthen communitarian norms by rooting people more closely to communities that work. Overall, the general pattern of migration will reward flourishing communities and punish those where people have stopped looking after each other. For example, the enormous out-migration from Washington, D.C. in the last ten years, with the resulting loss in tax revenues, has served to discipline a corrupt city government, while neighboring suburbs have attracted migrants by offering less crime, better schools and lower taxes. The move has yielded valuable information about failed urban policies

Quantifying solidarity therefore turns out to be a far more difficult question that might at first appear. Broken inner cities that deserve to fail have failed, but other communities are thriving. We simply did not notice because this takes place in the 'burbs. Nevertheless, there is good reason for the concern about the loss in solidarity. Crime levels are very high in this country, and more than anything this explains the decline of American inner cities as compared to foreign cities. And while crime levels have dropped in recent years, they are still far higher

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<sup>v</sup> A.O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge: Harvard, 1970).

than they were at the beginning of the 1960s, and than they are in other countries. Illegitimacy rates are high in this country (as they are in other countries), but they are extraordinarily high in the inner city, and given what social scientists have taught us about the need for traditional families we must expect the pathologies of American cities to persist through future generations. Finally, America remains a highly mobile country, and migration weakens social norms. In several empirical studies I have found that personal bankruptcy and divorce rates are higher in the high-migration states of the Sunbelt.<sup>vi</sup> Remarkably, bankruptcy levels are higher in the booming states of the south and west, and divorce levels are higher in the Bible Belt and conservative western states. The most plausible explanation is that these are high migration states, and the social stigma of promise-breaking is weaker when one is not rooted in a community.

#### B. *What Have Free Markets To Do with It?*

Assume, therefore, that fears about the loss of community are well-founded. Our two questions remain: how might this weaken free markets, and how might free markets weaken communitarianism? The first question is easier, and we begin with it. What does solidarity have to do with market transactions? Adam Smith famously noted that we owe our dinner to the self-interest of the butcher and baker, and not their benevolence, and if this were a complete answer we might expect markets to flourish in the least virtuous of soils. Yet Smith did not believe that we are motivated solely by interest, and thought that some of our actions are inspired by benevolence. In *The Theory of Moral Sentiments*, the champion of free markets said that “How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.” Smith also rejected Mandeville’s hard-headed contempt for virtue, which Smith thought served as “the fine polish to the wheels of society.” By contrast, vice is “like the vile rust, which makes them jar and grate upon one another.” When the two kinds of societies are compared, there is no mystery about where transaction costs would be lower or where free contracting is more likely to flourish.

To show how vice might weaken free markets, let us look at another Italian town, this time the pre-capitalist city Edward Banfield called “Montegrano” in *The Moral Basis of a Backward Society*. This was a society so riddled with distrust and envy that any form of economic progress was unthinkable. The Montegraneese thought that every politician was on the take, that every priest was corrupt, that every employer cheated his employees. Only the most basic forms of economic cooperation were possible.

All those who stand outside the small circle of the family are at least potential competitors and therefore also potential enemies. Toward those who are not family the reasonable attitude is suspicion. The parent knows that other families will envy and fear the success of his family and that they are likely to do it injury.

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<sup>vi</sup> Margaret F. Brinig & F.H. Buckley, No-Fault Laws and At-Fault People, \_\_ Int. Rev. Law & Econ. \_\_ (1998); F.H. Buckley & Margarete F. Brinig, The Bankruptcy Puzzle, \_\_ J. Legal Stud. \_\_ (1998).

He must therefore fear them and be ready to do them injury in order that they may have less power to injure him and his.<sup>vii</sup>

Where other people's gains are seen to come at one's own cost, the only sensible strategy is to refuse to bargain with the enemy. All gains from joint cooperation would thus be lost. What remains is Max Weber's "universal reign of absolute unscrupulousness in the pursuit of selfish ends" that is wholly destructive of economic growth.<sup>viii</sup>

There is another way in which corrupt social norms might weaken free markets. Even if bargainers are not envious, they might still fear to contract because they expect the other party to behave opportunistically. Many of the basic obligations in a contract cannot be specified in advance, particularly when performance is expected to continue for years. This is especially a problem in the United States, where courts impose liability in all the wrong places and at times have difficulty in enforcing a contract. Since the parties cannot entirely trust the courts to enforce their agreement, they must rely on each other's sense of honor, and that is sometimes a reed that cannot bear much weight. Anticipating the other party's opportunism, bargainers will be reluctant to enter into contracts or to make the same level of reliance investments as they would in a world of trust. In this way, profitable investment opportunities will remain unexploited.

Trust is a crucial element in the social norms that Jon Elster calls the cement of society. Without trust our friendships would become affairs of momentary convenience, on which no plans, no projects for future cooperation, could be formed. We rely so often upon friends and associates that we often forget we are doing so. We scatter our promises about, without paying much attention to what we are doing. We make seemingly trivial promises, to meet for lunch or to return a call, on whose performance deep friendships depend. And we make unspoken promises that are the foundation of trust: I will take your side; I will not betray you.

The need for trust is obvious in social and family promises. Less obviously, trust is of crucial importance in business dealings that cannot be reduced to a single contract. Consider the relationship between a large law firm and one of its major clients that generates millions of dollars a year for the firm. There is no formal long-term arrangement between them, however, but only a series of repeated one-shot retainer agreements. On any day, the size of these billings is dwarfed by the expected value of future business dealings, since clients seldom transfer their business from one firm to another. What gives the relationship stability is not the individual retainers but rather the personal relationships and trust built up over the years between firm and client. When a problem arises, the officer of the client knows whom to call at the firm and what to expect from him. He can hear both what is said and what is left unsaid. For his part, the lawyer can evaluate the seriousness of the problem, and knows how to probe for additional information because long association provides a context for the query. This reduces the cost and strengthens the benefits of legal advice. Most importantly, the mutual expectation that the relationship will continue permits each party to trust the other.

The possibility of exploiting promissory gains often explains why friendships are formed in the first instance. This is obviously true of the professional friendships within a firm (with its

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<sup>vii</sup> Edward C. Banfield, *The Moral Basis of a Backward Society* 116 (Glencoe, IL: Free Press, 1958).

<sup>viii</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism* 182 (T. Parsons trans., 1958).



grim “golf days”), but it is also true of the social networks and clubs that serve as voluntary insurance organizations. De Tocqueville noted that, more than Europeans, Americans were joiners: they appeared to have a penchant to form clubs around the most trivial causes.<sup>ix</sup> A naive explanation is that Americans are simply more gregarious than other people. A more plausible explanation is that Americans have a greater need for self-protection through club membership than members of a more hierarchical society. Within a hierarchy, a person can appeal to higher authorities for protection against opportunism; but in a more egalitarian and transient society, such as the United States, a person must make his own self-protective networks.<sup>x</sup>

What this suggests is that problems of mistrust are to some extent self-correcting. A person can make his own community, so long as he does not breach antidiscrimination laws. He may deal with parties on a repeat basis, so that a sense of trust emerges through their dealings. When each party believes that he will continue to deal with the other, as in the law firm and client example discussed above, the incentive to defect diminishes and the gains from faithful performance increase. Defection gives the parties a one-shot gain, but sacrifices all future contractual gains. A pattern of *reciprocal altruism* may then emerge, through which parties in repeated transactions may rely on one another and confidently adopt cooperative strategies to extract bargaining gains.<sup>xi</sup> One may see this on the Internet, for E-commerce has made it easier to rely on bargainers. For example, one on-line auction company, E-Bay, asks parties to rate their co-contractors for honesty after the sale is completed. Sellers are asked whether the buyer paid promptly, or whether he raised a dishonest warranty claim. Buyers are asked whether the goods were shipped in a timely manner and whether they complied with the contract description. These ratings are tabulated for all traders and publicly posted, so that a party’s reputation can be evaluated at a glance in future trades. While technology can distance us from each other, it also can promote the communitarian virtues of Marshall McLuhan’s “global village.”

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<sup>ix</sup> “Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to contract churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of a great undertaking you see the government of France, or a man or rank in England, in the United states you are sure to see an association.” Alexis de Tocqueville, *Democracy in America* 2, 114 (New York: Vintage).

<sup>x</sup> Which is why it is difficult to rate one society against another on a scale of communitarian spirit. See, for example, the debate between Seymour Martin Lipset and Frank Fukuyama on whether America is more communitarian than Canada. Seymour Martin Lipset, *Continental Divide: the Values and Institutions of the United States and Canada* 46-56 (1990); Francis Fukuyama, *Trust* 279 (New York: Free Press, 1995)

<sup>xi</sup> Reciprocal altruism is a term invented by Robert Trivers and used by evolutionary biologists to explain patterns of cooperation amongst animals. Robert Trivers, *The Evolution of Reciprocal Altruism*, 46 *Quarterly Review of Biology* 35-57 (1971).

Once again, therefore, the problem of communitarianism defies simple slogans. If trust encourages trade, and if America is undergoing a profound communitarian crisis, we might expect to see some evidence of this in a declining economy. But the economy is booming, according to every measure that counts. Evidently, Americans have solved the trust problem, thank you very much. Through local communities, real and virtual, they have wonderfully succeeded in producing the social norms that promote economic growth.

## II. *The Diversity of Virtue*

We have therefore answered the two questions that I posed at the beginning of this Section: free markets have need of a set of social norms that promote trade; but there is no evidence that these norms are threatened by free markets. Which raises the question why we might have thought otherwise. I have four answers.

First, the trade-offs entailed by modernism might produce a sense of regret, even if they were rationally chosen at the time. The sense of regret is particularly strong for choice made when we were young, earlier on our decision trees, when everything was to follow, and where the sense of the road not taken must always be deeper. Then our lives are all before us, and we must choose between radically different choices. Who shall we be: Prince Hal in the tavern or Henry V in the field? It depends, we want to say. On what? On our mood of the moment, since both lives fascinate. Will we be libertines or penitents distinguished by the austerities of our devotions? We are reluctant to choose, and perch, with Hal and with all adolescents, between divergent and incommensurable life-plans, unable to choose. Yet chose we must, and whatever is chosen might later be regretted. Still, only an adolescent would see the sense of regret as a serious problem of philosophy or law. What matters is whether a decision is rightly taken, judged *ex ante* at the time it was made, and not *ex post* at a time when uncertainties are removed. We regret it when our horse fails to come in, but this does not impugn the bet, provided it was rational at the time. Those of us who have moved from one place to another (particularly the *vagrantes*--the wandering scholars of the modern law faculty) might feel regret for the loss of family and early friends left behind in our moves. But the mind tends to play tricks, for we remember better what pulled us to stay rather than what pushed us to leave. In fact, the pain of leaving was always less than the pain of staying put; otherwise we would not have left.

Regret may have a deeper and less wholesome meaning for those whose sense of loss is mingled with a twinge of guilt. "On revient toujours a nos premiers amours." We always come back to the earliest loves, and to the earliest betrayals. We take them from some secret hold in our heart, and light a candle before them. Yes, we behaved like a cad, but now we feel regret, so we are no so bad after all, are we? Our self-love, hungry for an inner triumph, feasts greedily over this sign of our superiority. We permit ourselves to shed a tear for what might have been, and glow with a secret, inner pride. These are the means by which the self-deluding evil man may come to believe in his goodness. In a narcissistic age, those who can weep over their acts, like Rousseau, are our modern saints.

Second, it is not the case that virtues are undivided, and that a society must either possess all or no virtues. There is one set of virtues in the heroic societies described by Alasdair MacIntyre, another in the Middle Ages, yet another in the High Renaissance, and still another in the Victorian era. The virtues of Achilles were very different from those of Thomas à Kempis, which were different from those of Pico della Mirandola, which were different in turn from those of Cardinal Newman. And all of these virtues were different still from the businessman's virtues,

described by Montesquieu as “the spirit of frugality, of economy, of moderation, of work, or wisdom, of tranquility, of order, and of regularity.”<sup>xii</sup> To say that America seems able to produce the latter set of virtues is to make no claim about how it ranks in other measures of virtue, or even how one set of virtues compares with another, *sub specie aeternitatis*. Social and cultural conservatives may well be right about the general decline in moral and aesthetic norms, but as for the economic virtues that support business there’s no arguing with success.

Third, if there are differences between sets of virtues, it may be that we pay a price for gains in one kind of virtue through a decline in other kinds of virtue. Perhaps there is something about the set of virtues in which business flourishes that deadens the soul to other kinds of virtue and joys. This attack on free markets has most trenchantly been made by cultural conservatives such as Martin Heidegger, C.S. Lewis, George Grant, Alexander Solzhenitsyn, Leszek Kolakowski, and Irving Kristol. But the same complaint was voiced by the young Marx, who said that “having is the enemy of being,” and by writers on the left such as F.D. Maurice, John Ruskin and William Morris, as well as the modern academic who objects to the “commodification” of basic goods. On this most fundamental of questions both extremes nudge into each other, without any show of recognition.

The argument, briefly, is that the economic virtues transform us into utilitarian calculators, who barter disinterested moral virtue for the tradesman’s self-interested norms, efficiency for sentiment, and joy for wealth. The complaint was strikingly made by D.H. Lawrence, in a comment on that paragon of commercial virtue, Benjamin Franklin. “Rarely use venery,” advised Franklin. But the point, said Lawrence, is that one should never *use* venery. The *commerçant* is wonderfully able to extract a contractual surplus; he is “calculating and daring at the same time, above all temperate and reliable, shrewd and devoted to [his] business.” But withal something still be lacking, said Weber, if successful businessmen are “specialists without spirit” and “sensualists without heart.”<sup>xiii</sup>

In its origin, the objection was a Romantic one, and concisely stated by Wordsworth. “Getting and spending, we lay waste our powers / Little we see in nature that is ours.” Heidegger’s analysis of technology was similar, if less accessible. The wound of modernity stemmed from the failure to see man as rooted in the world. The rationalist distinguishes between man as a subject and the objects of this world; the technologist in turn asks how objects can be made to serve man. What both miss, said Heidegger, is that we lack direct access to the self, and discover ourselves not through self-reflection but only as part of the world. The pre-moderns saw man in this way, as being-in-the-world (*dasein*), and therefore had a more reverential attitude to the world: it expressed different possibilities of being and was pregnant with life. The rooted man inhabits a world alive with meaning, association and wonder, a world where objects might be heirlooms or relics, a world in which Christ walked and in which holiness might be made flesh in the mystery of the Incarnation. The way back to the earlier sense of a sanctified nature was language, the language of poets and not of *philosophes*, for poetic language magically transmits ineffable values that rootless metaphysics has abandoned. Through poetry we recognize that modernism had left us stranded, like the stranger in the poem of Hölderlin with

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<sup>xii</sup> Esprit des lois V, 7.

<sup>xiii</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism* 69, 182 (New York: Scribner, 1958).

which Heidegger ended his essay on *The Question Concerning Technology*. “You linger on the cold shore / Among your own and never know them.”<sup>xiv</sup>

The modernist’s mistake is sometimes described as “instrumental thinking.” He begins with an impoverished sense of life’s basic goods, and falsely raises one kind of good (commercial success, for example) above all others. Other goods are valued only insofar as they serve this false god. Of course, there is no reason why the utilitarian must take so limited a view of basic goods, or why the pursuit of commercial advantage must sacrifice other goods. The rational man (and rationality is a term of opprobrium for those who subscribe to this line of attack) will not ignore all other sources of joy in a single-minded pursuit of wealth, but will seek a balance amongst all of life’s goods in a way which leaves him best off.

In moral philosophy this objection is known as the “paradox of utilitarianism.” The paradox is said to arise because utilitarianism asks us to conduct ourselves so as to maximize the sum of human happiness. However, utilitarian calculation is a joyless affair, and living our lives for others is not likely to make any one of us happy. So if every everyone follows utilitarian principles, no one is happy! But utilitarianism is not self-defeating in this way: to maximize everyone’s happiness we must each us have a care for our own happiness. Consequently, we should, after a time, put aside our moral scruples and the preachy *New York Times* and pick up Evelyn Waugh. The attack on free bargaining fails for similar reasons. Suppose that, to extract all contractual gains we would have to deaden ourselves to all the joys of solidarity, art and poetry, and that we would be less happy as a result. Obviously, we would not wish to do so. Instead, we would seek to maximize our happiness through a complex set of virtues that permitted us to extract some contractual gains without sacrificing all of life’s other goods.

It will seem odd to imagine a man choosing his virtues as he might choose his ties. Yet character can be chosen, in the sense that we may work upon ourselves so as to render virtues habitual. That was Pascal’s point, when he described the techniques of religious conversion in an age of sophisticated unbelief. Suppose that I have persuaded you on rational grounds that you should believe in Catholicism, said Pascal. (Never mind that his argument--the wager--fails to do the trick.) The problem is that, even if it is rational to believe, I may not believe. I may know that I am better off if I believe, but that knowledge does not create belief. Ah, said, Pascal, then you must go to work on yourself. as you would on an animal. Shape your beliefs in the same way you train your dog, through repeated acts which in time become second nature. Say the beads, and move your lips when you do so. In time your body will produce the change in your sentiments which your reason was powerless to effect.<sup>xv</sup>

This objection to rational calculation, which falsely opposes rationality to sentiment, therefore misses the mark. When ignorance is bliss, it is rational to be ignorant; when calculation is wasteful, it is rational to go with our hunches; when faith ensures salvation, it is rational to believe. Reason supplies us with reasons to act, and with reasons to suspend our reason.

Fourth, our dissatisfaction with rational calculation may express a tragic sense of life. The problem is not that the commercial virtues fail to produce a reign of justice and joy; it is that no set of virtues can do so. Tragedy assumes a normative vision, of virtues and vices, but transcends moral categories. The comic butt receives his just deserts; the tragic hero’s fall is

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<sup>xiv</sup> “Dann am kalten Gestade / Bei den Deinen und kennst sie nie.”

<sup>xv</sup> From the perspective of evolutionary biology, virtues can also be thought of as chosen, in the sense that they are selected so as to maximize chances of genetic success.

quite unwarranted. Lear's flaw is an inability to distinguish sincere affection from strategic fawning, and his punishment vastly exceeds any sanction he might have deserved for a most human blindness. Antigone is entirely without a flaw: she disregards an unjust law to bury her brother, in fulfilment of her moral and religious duties. For this she is sentenced to die, and meets her end without false hopes. The audience must share the playwright's moral vision, since the fall is not tragic if it is deserved. But tragedy requires something more than a shared moral code, since it seeks something more than justice. There is no tragedy when a play merely addresses an injustice or a social problem, like the didactic plays of Ibsen or Shaw. "More pliant divorce laws could not alter the fate of Agamemnon," noted George Steiner. "Social psychiatry is no answer to Oedipus."<sup>xvi</sup> Instead, tragedy requires an audience which knows that, even when every demand for justice is met, life will still break your heart. Tragedy does not seek to change the world; instead it accepts the possibility that injustice may triumph and offers a religious or heroic perspective that ennobles suffering. When this faith is lost, we may speak with Steiner of *The Death of Tragedy*.

The third objection to commercial virtue and modernity was that they slighted other virtues. The fourth objection is more fundamental. It is that the calculating wealth-maximizer has lost sight of life's grandeur. Solemnity, awe, reverence are entirely foreign to such a person, as is the world of Racine's tragic drama, which offers "an image of what life might be like if it were lived at all times on a plane of high decorum and if it were at all instants fully responsive to the obligations of nobility."<sup>xvii</sup> All that is seen is ordinary life, *la vie et rien d'autre*. Perhaps the trade-off leaves one happier, slouched before the television set. But so what? We are called to something more exacting than a base contentment. But in the end or answer to this objection is much the same as that for the third objection. If we ought to seek goods other than wealth or commercial advantage, then let us do so. Why should we suppose that free markets or contract law get in the way? As Stephen Holmes trenchantly puts it, "Antiliberals endlessly berate their enemies for 'instrumental thinking.' But they do not clearly explain the evil of producing better goods at lower cost."<sup>xviii</sup>

### III. A Tory View of the Law

Having come so far, I might wish to rest. I have shown that the conservative and communitarian objections to free markets need not succeed. Yet as I have not shown that they must fail, this is a hollow victory. I have considered extreme positions and ignored the vital middle. I have not asked whether the state should seek to promote virtue.

Suppose that adopting the commercial virtues and the gains of free markets somehow imposes a cost by weakening other moral virtues or aesthetic sensibilities, as some cultural conservatives claim. Should the state then intervene to strike a more proper balance? Might the state, in this way, refuse to enforce a contract for an immoral consideration?

There are a number of ways in which restrictions on freedom of contract might be efficient. I do not seek to consider them, however. Instead, I should like to respond to the

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<sup>xvi</sup> George Steiner, *The Death of Tragedy* 8 (New Haven: Yale, 1996) [1961].

<sup>xvii</sup> George Steiner, *The Death of Tragedy* 77 (New Haven: Yale, 1996) [1961].

<sup>xviii</sup> Stephen Holmes, *The Anatomy of Antiliberalism* 217 (Cambridge: Harvard, 1993).

argument, made forcefully by libertarians left and right, than any interference with free contracting is tyranny .

The most widely accepted libertarian standard for contract enforcement is the “harm-to-others” principle of John Stuart Mill. Under this test, a contract freely agreed to is presumptively enforceable if it does not impose external costs in the form of physical harm on a third party. Even such contracts might be enforced if the contractors take the trouble to include the third party in their agreement, internalizing the externality through free contracting.

The harm to others principle is really two principles in one. First, it is a theory of anti-Paternalism so far as parties to the contract are concerned. That is, it conclusively presumes that the bargainers are the best judges of their own welfare. The contract might be set aside if tainted by a vice of consent, such as misrepresentation, mistake or duress, or if tainted by a vice of capacity, as when one of the parties is a minor or mentally disabled. But that apart, the libertarian would enforce the contract.

Secondly, the harm to others principle is a theory about what counts as a harm. Under the principle, contracts that impose physical harm on a third party will be banned, while contracts that impose non-physical moral or aesthetic external costs will be upheld. Vulgar forms of libertarianism simply deny that such costs exist. More sophisticated versions of libertarianism admit that private contracts may impose moral and aesthetic costs, but nonetheless ignore this because of a fear of excessive interference with personal preferences. Almost anything, it is feared, might count as a third party moral or aesthetic cost or benefit. For example, the well-dressed woman who walks down the street confers external benefits on passers-by, but this does not argue for subsidizing the well-dressed or penalizing the dowdy. To keep Paternalism within reasonable bounds, therefore, the libertarian would require a physical harm before he refused to enforce a contract.

The failure to observe the difference between the two branches of the harm-to-others principle has at times led to confusion. For example, the libertarian would enforce a waiver of divorce rights under the first branch of the principle, and homosexual marriages under the second. That is, he would permit the parties to enter into a Louisiana covenant marriage in which the right to a no-fault divorce is waived, because restrictions on the right to elect the form of marriage are Paternalistic. And he would permit homosexual marriages because their moral costs, as perceived by conservatives, are not a physical harm.

The difference of opinion between conservative and libertarian is then an empirical one about social or non-physical costs. For example, conservatives argue that legalizing homosexual marriages would devalue marriage for heterosexuals, and this would result in a costly decline in marriage rates and in the number of children born into married families. In response, the libertarian might first claim that homosexual marriages would not impose social costs, or that any such costs are exceeded by social benefits. Second, he might claim that, even if such costs exist, it is wiser to disregard them as a matter of public policy.

Let us take the second claim first. To do so, one must assume that homosexual marriages do impose social costs, in just the manner that conservatives claim, and that these costs exceed any possible social benefits. For example, assume that legalizing homosexual marriages would trivialize what had been regarded as a sacrament, and that this would contribute to a decline in family ties and general communitarian sentiments. These are real costs, we assume, yet still the libertarian would ignore them. The economist, and the ordinary citizen, would find this puzzling. If a cost is a cost, the difference between physical and social costs should not matter. Suppose further that the social costs of homosexual marriage lead in turn to physical costs, with violence

more common in fragmented societies where people do not marry. The libertarian who would still ignore social costs would then be driven to a distinction between direct and indirect physical harm. Contracts which imposed direct physical harm would be illegal; but not if the harm was only indirect. Nor would it matter if the indirect physical harm was far more severe than the direct harm.

Unless one is an absolutist and comfortable with metaphysical distinctions, the libertarian's concession of social costs therefore seems fatal. His defense of homosexual marriage would thus appear to rest on the empirical claim that social costs will not arise, or that if they do they are exceeded by social gains. These claims were more frequently heard thirty years ago, when social experiments seemed costless. No-fault divorce laws would not increase divorce levels, and illegitimacy subsidies would not lead to higher unwed birth rates. Those were the days in which a confident H.L.A. Hart could scoff at Lord Devlin's social conservatism. "Confused and confusing," "absurd," and "not deserving of respect," said Hart, and for thirty years we thought he was right. But now the evidence is in, and it is less clear that Devlin lost the debate. Stable marriages are better than broken ones, and illegitimate children fare more poorly than those raised in family structures.

The libertarian's *a priori* assertion that a change in family structures never imposes social costs therefore rings untrue. Still, it does not follow that *every* change in social norms presages the fall of the society and the state. Nor is there much by way of evidence, one way or the other, on the social consequences of legitimizing homosexual unions.

In an empirical vacuum, one falls back on first principles. For the libertarian, the fundamental principle is one of liberty and free contracting, and this amounts to a presumption that bargains do not impose external costs. For such people, Mill's distinction between physical and non-physical costs has enormous appeal. The difference is not between real and imagined harm, but between readily observable and hard to measure harm. Some private choices may impose public costs. But the empirical uncertainties argue for prudence in legislating morality. Since almost anything might count as a social cost, and since such costs are so difficult to measure, taking them into account might result in the adoption of illiberal laws. For example, criminal offences against homosexuals might be revived. The liberal would therefore assign a value of zero to the social costs of private acts, not because they are costless, but because the costs of illiberal laws would exceed their benefits were we to legislate morality so finely.

To the conservative, the liberal's assumption of zero social costs looks suspiciously like a preference for round numbers (there being none rounder than zero). For if the liberal is willing to concede *some* social costs, why assume zero costs rather than a more plausible higher number? But if a higher number, then what should that be? The problem is that no higher number readily suggests itself, and for this reason zero might commend itself as a simple and commonly ascertainable focal point. If we must have a number, but cannot agree on its value, then the virtue of zero is that it is clear and easily operationalized: at zero social costs, all contracts are enforced unless they impose physical harm on third parties. By contrast, if we assume that social costs are some higher but undefined number, then how will we ever have an agreement about what that number is, or what contracts will be enforced?

This is an abstract and philosophical argument. Can the conservative rebut it? I believe he can, with an empirical and not a philosophical answer. The liberal's claim is that *any* attempt to legislate general social norms is costly because it will lead down a slippery slope to a moral tyranny. And this claim is asserted so often and so confidently that the liberal is apt to forget that it is really an empirical claim. If meaningful, it amounts to a prediction that relaxing the

assumption of zero social costs will result in a moral tyranny. Of all people, Canadians should be suspicious of such arguments. For if they were correct, then Canadians would be far less free than Americans, with their absolutist Constitutional guarantees of free speech and free exercise and free mobility and free elections. And yet, when they think on it, Canadians might reasonably conclude that they have no lessons in liberty to take from Americans. Not every power is taken to the limit. Many states confer a broad authority upon lawmakers without thereby losing their liberty.

For this reason, Devlin rejected the slippery slope claim that any effort to enforce morals must lead to tyranny, and for his counter-example gave the common law of England. Common law rules, he said, were concerned with the “minimum and not the maximum.”<sup>xix</sup> Not every moral rule should be legislated, but only those necessary for the preservation of society. Beyond that, “[t]here must be toleration of the maximum individual freedom that is consistent with the integrity of society.”<sup>xx</sup> And this, thought Devlin, the common law did. Where critics such as Hart went wrong was in taking Devlin’s concern for the preservation of society as a philosophical definition of his thesis, rather than as a pragmatic restriction on excessive and illiberal laws.

Suppose, then, that the liberal’s slippery slope argument is rejected, and with it the assumption that social costs should be entirely disregarded. But now the conservative might in turn be faulted for relying on a slippery slope argument. He assumes, without evidence, that the recognition of homosexual marriages will result in a general social decline. But how is a ban on homosexual marriage necessary for the preservation of society? How is *anything* necessary for the preservation of society, save the most basic of physical comforts and legal institutions.

Stating the problem in this way might appear to give Devlin’s opponents a cheap victory. But the conservative case is not so easily defeated. Between extreme and absolutist positions, the moderate conservative’s position is a commonsensical *via media*. He would reject both the libertarian claim that any enforcement of morals must result in a moral tyranny and the extreme conservative’s claim that any relaxation of social norms must destroy society. Homosexual marriage is an example of this, for were it permitted the state would not fall; nor would we lapse into a moral fascism were it not allowed. The stakes are lower than that, all around.

#### IV. Pater et Magister

Let us go, then, from the heavy polemics of modern cultural wars. Let us leave the snide Stephen Holmes and the outraged Robert Bork, for that reign of terror, the American nineteenth century. Gregory Alexander distinguishes between alternative conceptions of property in the early Republic: property as a market commodity, and property as the foundation of social order.<sup>xxi</sup> In the same way, we may distinguish between two ways in which nineteenth century courts regarded bargaining freedom: freedom as a market process, and freedom as a device that promotes virtue. In both cases, the second conception is the older one, and looks back to an era when no one doubted that the state should encourage virtue. If we have almost lost sight of this

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<sup>xix</sup> Partick Devlin, *The Enforcement of Morals* 19 (Oxford: Oxford, 1965).

<sup>xx</sup> *Id.* at 16.

<sup>xxi</sup> Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in Early American Legal Thought 1776-1970* (Chicago: Chicago, 1997).



idea of the state, it is not because the modern state lacks power, compared to its nineteenth century predecessor. Rather, we have lost the idea of virtue itself, of how some choices are base and some heroic, some unworthy and some noble.

In the nineteenth century, a judge would have scoffed at the idea that all choices are equally deserving of respect. He would have laughed to scorn the concern for the scoundrel's self-esteem. He would have assumed that everyone would share his indignation at vice, and support his efforts to promote virtue in the way he applied the law. The modern maternal conception of the state, accepting, forgiving, sheltering, was entirely foreign to the world we left behind us. Then the state was father and teacher, charged with educating its subjects in virtue and punishing the vicious miscreant. To that end, it upheld the Sacrament of Marriage and refused to enforce immoral contracts. It did this because it saw freedom as an instrumental good, valuable not in itself but for its ability to promote virtue.

In what follows, I consider three virtues--fidelity, prudence and fortitude--that usefully promote free markets. If Schumpeter and Bell were right, we might expect free markets to subvert them. Does this happen?

#### A. *Fidelity*

In contract law, fidelity's primary meaning is the promisor's faithfulness to his promisee through the performance of promises. Since the possibility of contractual enforcement levers up the penalties for breach, it is difficult to see how this sense of fidelity is threatened by Professor Epstein's simple rules of contract law. Damages for breach are a rod of correction that imparts wisdom. What threatens contractual fidelity is not enforcement, but rather the excuses for non-performance that may be found in no-fault divorce law, bankruptcy discharges and over-broad doctrines of mistake and frustration. A legal system that better respected the virtue of fidelity would jealously guard the stock of enforceable promises by narrowing the doctrine of excuses and by permitting bargainers to waive them *ex ante* in their agreements.

Yet this gives a restricted meaning to fidelity, as faithfulness to promises. Beyond this sense of fidelity, there is the fidelity to friends that rests of implied promises of support. These are not contractual promises, and quite beyond the scope of simple legal rules. Further afield, we break faith when we betray those to whom we are bound by non-promissory duties. Though the contractarian might seek to ground all moral requirement in consent, many of our most important duties are positional and devolve upon us whether we will them or not. These includes the duty to support our family, our King and country, and our religion. For these duties, the first betrayal comes when the contractarian thinks himself free to break them absent explicit consent.

On this expanded view of the virtue, might free contracting threaten fidelity? It is difficult to see how the contractual enforcement of promises might affect fidelity to friends and family. We bargain with business associates; we support our friends and family. The two inhabit different places in our hearts, like Roberto Unger's Venice and Belmont, and there is little evidence that one realm threatens the other. Were it otherwise, we would expect to see an increased fidelity to non-contractual duties when contractual enforcement is relaxed. In that case, non-contractual fidelity would be stronger in America than in England or Canada, since the contract-breaker is less likely to get a fresh start under Anglo-Canadian than American law. I may well be wrong, but I suspect few migrants to America from those countries would tell you

that is how they see their new country. There is even an empirical study that reports lower levels of opportunism in monarchies, though one can never be sure when monarchists are joking.<sup>xxii</sup>

In sum, there is little reason to think that a move from the complicated American world of contract excuses to the more simple Anglo-Canadian world of contract enforcement would threaten fidelity in any way. It is more plausible to think that increasing the penalties for infidelity in one part of the system would strengthen fidelity overall. What threatens fidelity are contractarian moral theories that deny the existence of non-consensual moral requirements, but these do not correlate with Professor Epstein's simple legal rules. If anything, there is an historical link between the contractarian's political libertarianism and the matrimonial libertarianism of no-fault divorce and the financial libertarianism of Chapter 7 of the U.S. Bankruptcy Code.<sup>xxiii</sup>

## B. Prudence

The most pointed charge that Schumpeter and Bell laid at the door of capitalism was that it subverted prudence by encouraging profligacy. What Schumpeter had in mind was a generational betrayal, in which one generation inherits a patrimony from its ancestors but leaves nothing for its descendants. We are all members of a social contract in which our parents provide for us in consideration for a return promise that we provide for their grandchildren. So long as the promises are kept, the bargain is constantly renewed and persists indefinitely over time. But when one generation is taught to think of itself only, it may break the bargain. A generation of vipers might rebel against its parents and then, when it has children, sedate them with addictive drugs when they show the slightest signs of disobedience. It might study abstract principles of justice in great universities and send its children to broken schools. It might refuse to save for the future and leave its children bankrupt.

Schumpeter considered the family a fundamental mainstay of capitalism. Look at capitalism's creative destruction, he said, and what you see are entrepreneurs driving new, emerging firms. And behind each entrepreneur is a wife and child for whom the entrepreneur seeks to provide. Emerging firms are often family businesses that self-insure and solve problems of opportunism at the same time that they strengthen the incentive to produce. Take away the bequest motive and you have a different kind of *homo economicus*.

Like Max Weber, Bell thought that capitalism flourished in the arid garden of Puritan virtue. "Sobriety, frugality, sexual restraint and a forbidding attitude to life" might not seem quite the recipe for a joyous life,<sup>xxiv</sup> but Webber and Bell did think them a good career move for the rising capitalist. Weber wrote *The Protestant Ethic and The Spirit of Capitalism* in 1904-05, six years before November 1910, when Virginia Woolf said "everything changed." Perhaps Woolf exaggerated a little. But things had certainly changed by 1976, when *The Cultural Contradictions of Capitalism* was published. In Weber's day the Protestant virtues seemed firmly entrenched; in 1976 the world looked very different to Bell, who accepted Weber's analysis of

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<sup>xxii</sup> Lee Sigelman (George Washington University) & Jeremy Mayer, PS: Political Science & Politics (1999).

<sup>xxiii</sup> F.H. Buckley, The American Fresh Start, \_\_ U.S.C. Interdisciplinary L.J. \_\_ (1994).

<sup>xxiv</sup> Bell at 55.

the religious roots of capitalism and who drew what he thought a logical conclusion about its impending decline when he saw the faith of his fathers in crisis.

Besides, said Bell, a new device had arisen to corrupt the prudent saver: installment sales. Easy sales credit persuaded people to buy goods they could ill afford, mortgaging their future earnings in the process. What this gave us, said Bell, was hedonism, a “world of fashion, photography, advertising, television, travel .... a world of make-believe in which one lives for expectations, for what will come rather than what is. And it must come without effort.”<sup>xxv</sup> All this from an Eaton’s Catalogue. Heaven knows what Bell would have said about the weekly credit card in the mail.

Several kinds of mistakes seem to be going on here. First, the pursuit of pleasure does not threaten free markets. Indeed, no one needs markets more than the hedonist, for they supply him with his pleasures. The point is so obvious that Bell must have had something else in mind, likely the competition with the Soviet Union. In 1976 one did not know just how feeble the Soviet economy was, and commentators feared that the cause of freedom would be endangered if the Soviets overtook the West in material production. They need not have worried. Marx, it turned out, was no match for Madonna.

Second, the hedonist may have a robust incentive to save to fund his future consumption. The true modernist is not a surfer but a litigator who docket 3000 hours a year and whose spouse works similar hours as a tax lawyer. As an empirical prediction, Bell had it exactly wrong. People in First World countries work harder than those in backward countries, and people in the United States work hardest of all.<sup>xxvi</sup>

Third, increased personal debt loads do not threaten virtue or free markets in the way that Bell (and Ezra Pound) thought. If they did, one might have thought that Chapter 7 would fix things nicely. Given Chapter 7’s easy discharge, high debt loads are quite understandable, in fact. Why not lever up? If things turn out badly, someone else will pay the bill. Besides, as an incentive to lever up, what do credit cards add? There are other sources of credit, if a Paternalist takes away our cards for our own good (“stop me before I shop again”). If one wants an incentive to lever up, one need not look any further than home mortgage interest deductibility, which makes it rational to assume a huge home mortgage. But that is properly thought a prudent investment, for it ties up one’s earnings and prevents one from frittering away earnings in the purchase of baubles. The large home becomes a source of saving, with retirees cashing in by selling their house and moving to a condo. Bell feared that consumers would borrow against future earnings to fund frivolous present consumption; but when the consumer purchases durables like a house, he ties up present earnings to fund future savings and debt and prudence clasp each other by the hand.

In sum, there is little reason to think that easy access to personal credit weakens the virtue of prudence. Money may be borrowed to fund present, improvident pleasures; money may also be borrowed to fund investment or to fund a savings scheme. In the same way, speech may be used to mislead or inform. Not a strong argument to restrict either borrowing or speech. We should be particularly suspicious of such arguments when raised to justify promise-breaking, as often they are. When one begins by pitying the poor debtor for all the credit cards flung at him, it sometimes seems a short step to blame the creditor; and from there it is a very short step indeed

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<sup>xxv</sup> Bell at 70.

<sup>xxvi</sup> What on Earth?, Washington Post, September 11, 1999, at A15.

to think it just to offer debtors a quick-and-dirty bankruptcy discharge.<sup>xxvii</sup> Or so the Virginia planters thought in 1775; otherwise the American Revolution might have turned out very differently. Yet it is an odd prudence that is purchased through infidelity.

### C. *Fortitude*

A grim literature seeks to convey the awfulness of war by portraying its unrelieved misery. But the greater the suffering, the more we appreciate the war-time jest. The best account of life in the trenches during World War I was Robert Graves' *Goodbye to All That*. Graves described the mindless slaughter, the frightful bombardments, and the pervasive squalor that left him an emotional wreck for years after. At the very end of the book he concluded that, such were the horrors of war, he and his companions would never fight again, "unless it were against the French."

An insufficiency of fortitude is cowardice, together with its symptoms of self-pity and whining. Few things are more devastating than the ridicule a cowardly act attracts. During the confused civil war called the Fronde, the youthful La Rochefoucauld sided with the Prince de Condé and sought to assassinate his patron's enemy, Cardinal de Retz, then Bishop-Coadjutor of Paris. Condé insinuated his men into the Palais de Justice, Retz's stronghold, and at a signal swords flashed out. Retz's men also unsheathed their swords and the two sides faced each other, separated by a sword's-length. No one stirred. Finally, the President of the Parlement arrived and ordered the great hall cleared. The rival leaders bowed and swords were sheathed. However, Retz took alarm at the cluster of enemies and withdrew to another chamber. As he walked through the door, La Rochefoucauld closed it on him, pinning him so he could not escape, and shouted for his friends to stab Retz while he was held fast. But it is not an easy thing to kill a Bishop and no one moved. Retz's partisans arrived; the Bishop was freed; and with all the honors of the contest he sailed past La Rochefoucauld, who stood seething with anger, ready to challenge Retz to a duel. "Be calm, my friend," said the prelate. "You are a coward and I am a priest. There will be no duel between us." La Rochefoucauld had been ridiculous, and as the mature cynic later noted in his *Maxims*, ridiculousness dishonors more than dishonor does.<sup>xxviii</sup>

A want of fortitude weakens a regime of free contracting by expanding the set of excuses for non-performance. Bargains for future performance assign risks, and with risk comes the possibility of regret. From an ex ante perspective, the contract that parties of full capacity have agreed to should be presumed mutually beneficial. From an ex post perspective, however, there may be winners and losers. For example, a supply contract for a commodity may turn out to be very costly for one of the parties if prices fluctuate greatly. If such contracts are unenforceable, then society is the poorer, as the efficiency gains of joint projects may be lost. A court that, lacking fortitude, sympathizes too closely with ex post losers and excuses their breaches will therefore reduce the scope of free contracting and weaken the economy.

In the past, our legal system was more concerned to promote fortitude and to frown on self-pity. Nineteenth century common law courts were skeptical of claims for emotional distress,

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<sup>xxvii</sup> For an example, see Howard M. Metzenbaum, Bad Bankruptcy Bill, Washington Post, Sept. 8, 1999, at A22, col. 3.

<sup>xxviii</sup> *Réflexions morales* at 326.

unless it was a foreseeable consequence of negligent physical harm.<sup>xxix</sup> The rule was an arbitrary one, but served to reduce the number of claims for emotional distress. As late as 1943, in *Bourhill v. Young*, the House of Lords spoke approvingly of fortitude. The plaintiff, descending from a tram, heard a car hit a motorcycle and then saw blood on the street after the motorcyclist's body had been removed. The plaintiff's action against the motorist for nervous shock was dismissed:

It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle even though careless is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.<sup>xxx</sup>

But claims for damages for emotional distress now are commonplace, whether or not accompanied by physical harm. Such claims are popular with law teachers, who note that emotional pain may be deeply felt, and that arbitrary barriers to recovery of damages for emotional pain give plaintiffs less than full compensation for their harm. From an economic perspective, barriers to recovery for emotional distress might also result in inadequate incentives to take care. However, such claims place a premium on self-pity, and subvert the virtue of fortitude.

Fortitude lessens pain. The injured person suffers less himself, and passes on less of his pain to those around him. When the pain is great, he excites the admiration of those who know of his loss, and teaches them how to bear pain. By contrast, the whiner magnifies his own pain and passes it on to those near him. Listening to sob stories may also sap our own fortitude. Some forms of severe emotional distress appear to be a learned response, where we are taught to feel emotional pain by being told of its existence.<sup>xxxi</sup> A state that inculcates fortitude through its legal regime may thus be a happier one than a state which smirks at fortitude and rewards the whiner.

The plea for sympathy imposes a psychic cost on listeners. That is just as it should be, where we ought to respond in a material way to the appeal. But when the appeal is simply to our sentiments, to awaken pity for the sake of pity, and when the demands for sympathy are excessive, we begin to grow edgy. We know we are being played with, and resent it. When the demand is over-the-top, we might even become angry. Or we might laugh, as Mordecai Richler's alter ego does in *Joshua Then and Now* at an emotionally manipulative production of "The Diary of Ann Frank." The Nazis burst into the apartment, practice unspeakable barbarities, and then prepare to leave. They cannot find Ann. "Look up the stairs," yells Joshua from the back row.

We are daily subjected to demands for our pity from the most improbable quarters. Yes, of course, one feels *enormous* empathy for those suffering from attention deficit syndrome, low self-esteem, and bruised feelings. Still, there comes a time, during the umpteenth workshop on

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<sup>xxix</sup> *Victorian Railways Comm. v. Coultas*, 13 App. Cas. 222 (Privy Council 1888).

<sup>xxx</sup> [1943] A.C. 92, [1942] 2 All E.R. 396 (H.L.).

<sup>xxxi</sup> Allan Young, *The Harmony of Illusions: Inventing Post-traumatic Stress Disorder* (Princeton: Princeton, 1995).

the rights of victims, that one wants to ask, But aren't they simply weenies; and our impulse to laugh at them may be benign.

Does this provide a justification for second-guessing consumer choices? Just the opposite. Paradoxically, it argues for *stricter* enforcement of contracts. Ex ante waivers of tort law claims are generally unenforceable and this inflates awards for emotional distress. If given the choice, notes Paul Rubin, consumers never buy insurance for emotional distress.<sup>xxxii</sup> For one thing, the transaction costs of the litigation system make the tort system a poor insurance device, and the consumer will prefer to waive such claims in return for the lower purchase price. Second, when the accident reduces the marginal utility of wealth, the award transfers money from a present state where it is valued more to a future state where it is valued less. With a stronger adherence to free bargaining norms, we would have fewer, not more, claims for emotional distress. But arguments that are compelling for the mass of men will not have universal appeal. Should we then restrict the right of the idiosyncratic bargainer to contract for recovery for emotional distress, in order to promote his sense of fortitude? The question answers itself. Where the principle of bargaining freedom answers so ably in the majority of cases, we need not worry excessively about exceptional ones.

## Conclusion

Free contracting regimes are much more robust than critics such as Joseph Schumpeter and Daniel Bell gave them credit. Schumpeter and Bell correctly noted that the strength of free markets depends on a general acceptance of underlying social norms. Where they went wrong was in thinking that these norms are somehow subverted by free markets. All of the evidence points in the other direction. Moreover, the individual virtues that plausibly support free bargaining would appear to thrive under free markets. This is not to minimize the concern for the wounds of modernism or the need for a revival of humanist traditions. Yet when one considers how free bargaining permits people with different talents to flourish, and how it might promote virtue, it is not too much to claim that capitalism is a humanism too.

## ENDNOTES

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<sup>xxxii</sup> Paul H. Rubin, "Courts and the Tort-Contract Boundary in Products Liability," in F.H. Buckley, *The Fall and Rise of Freedom of Contract* 119, 125 (Durham: Duke U.P., 1999); John E. Calfee and Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Losses*, 21 J. Legal Stud. 371 (1992)..