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William J. Curran III

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AFTER 100 YEARS:  
A DISQUIETING DISCOURSE OF POVERTY AND WEALTH\*

WILLIAM J. CURRAN III\*\*

[T]he world had long . . . possessed . . . a dream which it need only take possession of consciously, in order to possess it in reality.

Karl Marx<sup>1</sup>

I.

One hundred years ago Congress dreamt of an ideal society that was efficient and democratic, productive and open, and that was also competitive and fair.<sup>2</sup> One hundred years later we share that dream, convinced that our society has achieved greatness through an ideal economic system preserved and protected under the Sherman Act.<sup>3</sup> That

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\*\* B.S., The Creighton University (1962); J.D., The Creighton University School of Law (1965). The author is a member of the Nebraska, New York, and Pennsylvania bars.

1. G. LUKACS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 2 (1968) (quoting 1 AUS DEM LITERARISCHEN NACHLASS VON KARL MARX, FRIEDRICH ENGELS UND FERDINAND LASSALLE 382-83 (F. Mehring ed. 1902) (correspondence of 1843)).

2. For a recent history of the enactment of the Sherman Act, see Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263. For comprehensive histories of the antitrust laws, see H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AMERICAN TRADITION (1955); I. H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES 1-23 (1949); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

3. An excerpt from the Supreme Court's opinion in *United States v. Topco Associates*, 405 U.S. 596 (1972), illustrates commonly held views on antitrust: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id.* at 610. As this passage illustrates, the Supreme Court seems to equate democracy with capitalism, and liberty and freedom with economic independence. Such broad claims, however, confuse free enterprise with democracy, and argue for the preservation of capitalism, regardless of the moral and social consequences of merging the two systems. See generally S. BOWLES & H. GINTIS, DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT (1986) (arguing that no capitalist society today can be considered literally "democratic" with regard to securing personal liberty and social

dreams must not govern our lives and our laws we would not question, yet our centennial observance of the Sherman Act is nothing if not a celebration of that very dream. That a society cannot be both democratic and efficient, both competitive and just, are philosophic truths that we easily reject for a reality that a century ago was but a dream.<sup>4</sup>

A democratic society of wealth, beneficial to all through an economic system made efficient by antitrust laws, encompasses our reality.<sup>5</sup> We never question wealth, question its appropriateness as a social goal, or examine its benefits. Like the Congress of 1890, we struggle over the economy, with policies to make it efficient and beneficial for all, and with policies for interpreting laws that will hasten efficiency. But unlike that Congress, we do not struggle through the events and experiences of our own historical epoch, but work through the mind and imagination of the nineteenth century and the problems it identified and the solutions it constructed. We no longer dream of possibilities—of possibilities superior to wealth, or of the liberating possibilities of new dreams. We limit our democratic vistas, restrict our economics, and fix our laws in the imagination and will of legislators whose distant achievement we celebrate and in whose dreams we occupy a space made real in our identification of problems they first identified, but made unreal by our failure to identify problems relevant to our own experiences one hundred years later.

The Congress of 1890 compared capitalism with other economic systems and concluded it was the best economic system in the world.<sup>6</sup> Congress, however, never questioned capitalism's compatibility with democracy,<sup>7</sup> or with the meaning of democracy to a republic that preserves and protects the private ownership and exploitation of capital. Rather, Congress limited its inquiry to a relative comparison of nineteenth

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accountability of the exercise of power).

4. The modern debate over justice and efficiency is presented in such contemporary political classics as R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); J. RAWLS, *A THEORY OF JUSTICE* (1971); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

5. For discussions of efficiency as the primary socioeconomic and legal force in the development of law, see Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

6. See H. THORELLI, *supra* note 2, at 225-34; 1 H. TOULMIN, *supra* note 2, at 11-12.

7. For the purposes of this article, the term "democracy" describes the processes by which members of a society create the form of organized existence within which they live. Further, it refers to both the tasks performed by those members and the actions taken to control the socioeconomic structures that otherwise manipulate them. For compelling discussions of the need for active citizen participation in order to maintain an effective democracy, see B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 251-57 (1984); Pitkin & Shumer, *On Participation*, 2 DEMOCRACY 43 (1982).

century economies, specifically, a comparison with "totalitarian" nations.<sup>8</sup> There were no other "democratic" nations Congress could examine, nor were there any antitrust laws for it to emulate.

Congress embarked on a grand experiment that we seek to understand one hundred years later from a record of legislation that reflects the limits of Congress's collective experience with an economic system unique to it and to the world's history. That Congress was not up to the task is not our most pressing concern today. What should concern us most, however, is our own lack of justification for a law that Congress never justified, and our celebrations that far exceed the nation's muted enthusiasm one hundred years ago. The Sherman Act, like a political icon to some presumed past glory, helps us celebrate ourselves and our images of ourselves as morally decent, enterprising, and democratic people.

Images and icons do rule nations, since how we imagine ourselves determines how we govern ourselves. It was important to Congress one hundred years ago to capture America as a democratic and free-enterprise nation in images—images that still govern us, that still rule our courtrooms and that haunt this centennial symposium. Imagery is often more important than fact, especially the fact that our nation has never been especially free economically or politically, and never purely capitalistic or democratic. We experiment pragmatically with economics and with politics, and with combinations of the two, and that our experiments often fail is not as important as our celebration of and insensitivity to principles we violate. Because our insensitivity reaches enormous proportions, we should suspend our celebration and pause to reflect in this, the one hundred and first year of the reign of images and icons.

## II.

We perhaps have never thought of wealth in terms of poverty. How many thousands of the poor does it take to support a single millionaire? How many more thousands of impoverished has society generated to support its newly minted billionaires? We fail to recognize poverty as the sustenance of wealth. We may see the homeless and occasionally encounter the impoverished, but we never see ourselves as a cause. We are too busy, too preoccupied with ourselves, to reflect upon our collective generation of wealth as a cause of poverty.<sup>9</sup>

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8. See *supra* note 6.

9. For an understanding of poverty, its causes, and its effects, see G. KOLKO, *WEALTH AND POWER IN AMERICA: AN ANALYSIS OF SOCIAL CLASS AND INCOME DISTRIBUTION* (1962); S. MILLER & P. ROBY, *THE FUTURE OF INEQUALITY* (1970); *ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES* (D. Moynihan ed. 1966); K. PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE*

Capitalism's generation of poverty motivates us. It inculcates life's hard lessons, sustains institutions, and supports principles. Thus, we believe that poverty can be avoided, that hard work and determination will always benefit the poor, and that wealth will reward them and poverty will discipline them. Poverty, we well know, can be defeated by every able individual in this, the world's richest, most democratic and open nation.

Yet, poverty flourishes. We perceive wealth as a remedy, yet poverty increased during the 1980s, the nation's longest sustained postwar period of economic expansion.<sup>10</sup> Wealth seems so obvious a remedy that we overlook it and its facilitating institutions like the Sherman Act as causes. That wealth creates poverty and that capitalism thwarts the poor's democratic opportunities may now be obvious truths, but they do not awaken us from our one-hundred-year slumber and dream of a nation prosperous, wealthy, democratic, and free.

No longer fantasy, wealth has become antitrust's new reality and guiding principle, and capitalism has become its jurisprudence.<sup>11</sup> But what is wealth? Is it a valid principle of legal interpretation? What benefits does it bestow upon society? Basic questions, certainly, but we do not have sound jurisprudential answers.<sup>12</sup> Capitalism's only answer is to refer to wealth as "what you have that others value;" capitalism claims that by "fulfilling needs and wants" wealth satisfies valid goals, and by "satisfying

REAGAN AFTERMATH (1990); J. TURNER & C. STARNES, *INEQUALITY: PRIVILEGE & POVERTY IN AMERICA* (1976); W. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

10. See generally K. PHILLIPS, *supra* note 9, at 3-31 (discussing the unprecedented economic expansion of the 1980s).

11. Most academic efforts in antitrust focus on its accommodation with economics, wealth, and efficiency, but not on democracy, justice, equity, and fairness. For surveys of the economic view of antitrust jurisprudence, see Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 369-70 (1965) (using economic analysis to criticize the record of the courts in addressing mergers and other practices that interfere with competition); Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977) (discussing the development of the use of economic analysis in antitrust cases and emphasizing the importance of using a multidisciplinary approach to interpreting the antitrust laws).

12. The conclusion that an assignment of benefits or entitlements is just and fair because it is efficient requires a premise that initial distribution of wealth is just and fair, as well. For a critique of the underlying assumption in economic models that human beings are activated only by self-interest, see Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977). It is no answer to the unfairness of the antitrust laws for accepting wealth's status quo distribution that other laws more effectively combat unethical wealth formations. Current wealth disparities are a function and a responsibility of all laws and of all of society. For a defense of antitrust's ethical neutrality, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (1977) (limiting the economist's role to predicting the effect of legal rules and arrangements on value, efficiency, and the existing distribution of income and wealth).

total social needs and wants efficiently" it benefits society.<sup>13</sup> What is valued, needed, and possessed in order to satisfy society must first satisfy capitalism. Tautological images, ruling icons, and a morally bankrupt jurisprudence are what remains of Congress's dream.

Ruled by image, we resist change. We resist the possibility of democracy and the possibility that our laws relegate some citizens to permanent destitution. We, then, celebrate a law that solidifies our material and social stature by perpetuating the status quo and a permanent underclass against which to measure our status and our advance in material welfare.<sup>14</sup> Without two classes, we could not claim that our wealth has advanced our society and made us the envy of the world. We, therefore, resist redistributing wealth as un-American, and remain determinedly insensitive to the poor and the possibility that wealth's "blessings" are not un-mixed. The status quo perpetuated, we confuse social stability with legitimacy, associate redistribution and equality with radicalism, limit reform to incremental adjustments of capitalism, and never dream about the inequities of an "efficient" capitalist economy.

We honor the Sherman Act for making the economy efficient for everyone's benefit, with minimal governmental interference. Pointing to evidence of our economy's inefficient performance<sup>15</sup> would spoil our fun and our celebration. What if we took a single, first step out of our dreams into democratic reality; what might we discover?

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13. This jargon appears with great frequency in capitalist literature. *See, e.g.,* M. FREEDMAN, *CAPITALISM & FREEDOM* 162-72 (1962) (claiming that capitalism promotes equality, allocates goods and resources with complete efficiency, and thus increases total welfare better than any other system).

14. Economic theory achieves the "common good" through a sacrificial class of "least-well-off" members. In the parlance of economics, welfare can be achieved only by improving some members at cost to others; although the least-well-off ostensibly share in the total social improvement, there must always remain a subordinate class against which "improvements" can be measured. For a popularized expression of modern economics and social welfare theory, see R. POSNER, *supra* note 12, at 341-46.

15. The failure of present policies to achieve anything approaching universal welfare is the subject of intense intellectual activity. For recent attempts to understand capitalism and to remedy its failure, see S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTE LAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE* (1983) (attributing the failure of the U.S. economy to the costs of maintaining a faltering system of private corporate power and proposing a new economic thrust with emphasis on democratic goals as opposed to the supply-side, trickle-down theory of Reaganomics, in order to end the inefficient use of resources in the U.S.); M. CARNOY & D. SHEARER, *ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980s* (1980) (suggesting an alternative economic and social strategy so as to dismantle or restrain corporate power as giant corporations and transfer capital from corporations to the public); S. MILLER & D. TOMASKOVIC-DEVEY, *RECAPITALIZING AMERICA: ALTERNATIVES TO THE CORPORATE DISTORTION OF NATIONAL POLICY* (1983) (citing the failure of Reaganomics and Thatcherism as prime examples of economic theories that incorrectly determined the respective nations' economic problems).

## III.

Democratic reality informs us that we have been duped by economic science. This may immediately embarrass and confound us, but will also energize us to think on our own for solutions to social problems, rather than through the minds and moral sensibilities of a nineteenth century science. Awakened from our dream, we can imagine freedom, plan an escape from our economic bondage, and turn despair into hope. We will recognize poverty as the despair and nightmare that economics has induced.

Economics cannot now grasp the reality of poverty in the world's richest nation, since it cannot live the nightmare that its dream of universal welfare through efficient markets has become.<sup>16</sup> Economists talk of an inevitable world of wealth and capitalism. They trade theories but not life's hard knocks; they have freed the world of anxiety through "scientific" abstractions that conceal poverty, privilege, and power.<sup>17</sup> Economists

16. See generally *supra* note 15.

17. Power as a concept is largely absent from economic analysis, except as manifested through its limited assumptions. German economist Helmut Arndt argues that [n]eoclassical theory has almost eliminated economic power from its object of analysis by the choice of its premises. If cost and sales curves are already "given" before economic activity begins (and all that is left is profit maximization), it follows that:

1. Economic power can exist only in the case of market power. All other types of economic power are eliminated by the artificial restriction of the object of analysis.

2. Firms can only influence sales prices . . . by restricting supply. A situation in which one partner is more powerful than the other and can therefore impose his will on him is impossible . . . [E]conomic power, like any other kind of power, may be based on the superiority of a partner: even in economics it is possible that one partner is in command and the other has to obey.

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. . . [I]t is illogical to transfer the results of these models to the real world because the assumptions do not apply to reality. Economic activity is not identical either with profit maximization or with utility maximization. In real economic life, neither products and production processes nor costs and sales curves are "given," but the result of economic decisions . . . can be used as parameters of action. *The real job of an entrepreneur or top manager begins before cost and sales curves can be drawn and is practically finished by the time costs and sales curves can be presented . . .*

The neoclassical economists believe that economic laws are stronger than economic power. However, the "opposing forces which are purely economic in nature" . . . are in fact only logical conclusions from artificial premises. They are neither "economic" nor are they "natural," but simply metaeconomic.

H. ARNDT, *ECONOMIC THEORY VS ECONOMIC REALITY* 130-31 (W. Kirby trans. 1984) (footnotes omitted).

ignore the poor while dealing with less troubling issues like whether markets are distributing goods and services efficiently, and avoid wealth's maldistribution through a statistical categorization of tragedy and misery that robs the poor of its identity.<sup>18</sup>

Tragedy involves not "scientific" fact,<sup>19</sup> not the poor classified and counted as "homeless," "unemployed," or "malnourished," but people, understood and seen as we see and understand ourselves.<sup>20</sup> Economists only see and concentrate upon property and those who possess it, not the dispossessed. The powerful and wealthy rule this "science" and do not open the window of opportunity sufficiently for altruism and community to escape, and for democratic reform to emerge. Economics' trivialization of poverty validates the selfish pursuance of wealth as both an economic and political principle.

Democracy, unlike economics, sees life not as conflict among people, not as competition pursued relentlessly, but as conversation within communities exploring truth<sup>21</sup> with mutual respect. Communal dialogue

18. See C. SACKREY, *THE POLITICAL ECONOMY OF URBAN POVERTY* 64-73 (1973).

19. *Id.* at 74-76 (noting that American economists tend to use methods of analysis traditionally applied in the physical sciences while neglecting to consider important social issues such as poverty).

20. Economist Joan Robinson has challenged the ability of economics to construct categories, to measure quantities, and to make meaningful comparisons. She writes of economics that

[m]athematical operations are performed upon entities that cannot be defined; calculations are made in terms of units that cannot be measured; accounting identities are mistaken for functional relationships; correlations are confused with causal laws; differences are identified with changes; and one-way movements in time are treated like movements to and fro in space. The complexity of models is elaborated merely for display, far and away beyond the possibility of application to reality.

Robinson, *Introduction* to V. WALSH & H. GRAM, *CLASSICAL AND NEOCLASSICAL THEORIES OF GENERAL EQUILIBRIUM: HISTORICAL ORIGINS AND MATHEMATICAL STRUCTURE* at xi (1980).

21. A debate rages over the possibility of objective assertions about "reality" by the social sciences, or whether reality itself is shaped by cultural and social constructs, and whether acts and relations have intrinsic meaning or are comprehensible only within a shared construct of reality. See generally P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966) (the sociology of knowledge is concerned with the analysis of the social construction of reality). Individuals seemingly share a desire to make reality conform to facts, and facts to reality, to support a comfortable description of the world and a prescription for structural and remedial action. See generally W. BLUHM, *IDEOLOGIES AND ATTITUDES: MODERN POLITICAL CULTURE* (1974) (survey of ideological labels in politics and the complexes of ideas and attitudes for which they are shorthand expressions); M. SELIGER, *IDEOLOGY AND POLITICS* (1976) (critical survey and analysis of the restrictive conception of ideology, which



consists of exchanges between individuals, not antagonistic encounters between manipulators and exploiters, not competition between wealthy and poor, but individuals seeking immediate rapport and sympathetic contact.<sup>22</sup> Economics, however, blocks dialogue by legitimizing competition measured in polarizing terms of wealth and poverty that block both dialogue and community.<sup>23</sup>

Economics' conception of competition obscures that competition is only essential to capitalism, and at that only essential to capitalism as a historically transitory form of social organization that reduces democracy to the efficient pursuit of wealth through private property rationally exploited. The "hard" scientific realities of economics,<sup>24</sup> incompatible

limits the term to specific political belief systems, and arguing for an inclusive conception that includes all political belief systems). Indeed, Karl Mannheim has argued that thought is dependent on social circumstance, and that social theory has no privileged access to objective truth. *See* K. MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* (L. Wirth & E. Shils trans. 1968). Jurgen Habermas claims that through self-reflection, emancipatory knowledge can shatter the illusion that justifies present social arrangements, and can expose the distortion of reason. *See* J. HABERMAS, *KNOWLEDGE AND HUMAN INTEREST* (J. Shapiro trans. 1971); J. HABERMAS, *LEGITIMATION CRISIS* (T. McCarthy trans. 1975).

22. The terms "democracy" and "community" are used here to emphasize that capitalism does not allow us to create for ourselves the type of organization within which we may choose to live. A democracy refers to what people do themselves, and how they control the artificial market and capitalistic structures that otherwise manipulate them. *See supra* note 7.

23. One political theorist has explained the essential nature of a democratic community as follows:

[A]s Rousseau understood, . . . [democratic community] "produces a remarkable change in man"; . . . man's "faculties are exercised and developed, his ideas broadened, his feelings ennobled, and his whole soul elevated." Thin democratic community leaves men as it finds them, because it demands of men only the self-interested bargain and of community only that it provide and protect market mechanisms. . . . Only in strong democratic community are individuals transformed. Their autonomy is preserved because their vision of their own freedom and interest has been enlarged to include others; and their obedience to the common force is rendered legitimate because their enlarged vision enables them to perceive in the common force the working of their own wills.

B. BARBER, *supra* note 7, at 232 (footnotes omitted) (quoting J. ROUSSEAU, *THE SOCIAL CONTRACT*, bk. 1, ch. 8 (1762)).

24. Economics reduces the social reality of our lives to concrete forms in order to make them understandable to theorists. But since concrete terms can never capture reality, they remain vague and subject to manipulation. By juxtaposing human interests with self-interests in this rhetorically manipulative manner, we can see how the artificial devices of economics control our lives illegitimately by reducing ideal economic abstractions like markets, competition and efficiency to the status of tangible things that falsely lead us to believe we can use them for social betterment, when in fact they are used against us in control of our

with democracy's "soft" values,<sup>25</sup> fuel efficiency but detach antitrust from humanity by trivializing those cooperative social relationships based on altruism, respect, and concern, upon which claims for historical validity must be based. History establishes that societies based on competition and strife sacrifice their citizens in pursuit of wealth, power, and glory, and have no claim to moral legitimacy,<sup>26</sup> but economics makes no attempt to validate its social and historical bases and conducts its studies in historical isolation.<sup>27</sup>

Economists should focus on context. They should apply social and historical analyses, and not study human economic relations as if they were an independent field for inquiry. To understand humanity in its economic aspect is to understand it in its concrete and multifaceted reality, free of erroneous and mystifying concepts and theories; but, today, as economics' fantasy world crumbles about us, its false constituents become more visible, revealing an impoverished world with needs very different from the efficiency requirements of universal welfare—needs that were there all the time.

#### IV.

Poverty's ineluctable essence, indissolubly linked as it is with capitalism,<sup>28</sup> has been exacerbated by the last decade's foolish antitrust

humane desires for social harmony and unity. The literature on our false consciousness is vast. See, e.g., J. GABEL, FALSE CONSCIOUSNESS: AN ESSAY ON REIFICATION 3-41 (M. Thompson & K. Thompson trans. 1975); Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); G. LUKACS, *supra* note 1, at 83.

25. For a discussion of the relative policy merits of "hard" or efficient versus "soft" or human values in antitrust enforcement and interpretation, see Barnes, *Antitrust Dialogue on Social Science, Cultural Values, and Merger Law*, 33 ANTITRUST BULL. 623, 629-46 (1988).

26. See F. NUSSBAUM, A HISTORY OF THE ECONOMIC INSTITUTIONS OF MODERN EUROPE 61-156 (F.S. Crofts ed. 1937) (tracing the roots of capitalism and its role in the development of wars, slavery, imperialism, etc.). But see CAPITALISM AND THE HISTORIANS (F. Hayek ed. 1954) (disputing the historical view that capitalism has harmed the common man and proposing that freedom of economic activity has been beneficial to the citizenry).

27. For among the best accounts of the political primacy of an economic view of capitalism and an individualistic view of the world, see J. BAUDRILLARD, THE MIRROR OF PRODUCTION (M. Poster trans. 1975); L. DUMONT, FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY (1977); A. HIRSCHMAN, THE PASSIONS, AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1977); C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (1962); M. SAHLINS, CULTURE AND PRACTICAL REASON (1976).

28. For excellent historical accounts of capitalism and the economic view of the modern world, see *supra* note 27.

policies. Mistaken antitrust policies would not be worth discussing if they had not been adopted by the Supreme Court a generation ago to correct the logical fallacies of politically liberal Sherman Act interpretations.<sup>29</sup> Regrettably, our society's problems not rooted in logic and reason are immune to the Court's epistemologically flawed solutions, whether liberal or conservative.<sup>30</sup> There simply is no proof that a liberal policy of governmental intrusion into private economic affairs, or the last decade's conservative antigovernmental policies, can do anything other than conceal wealth's generation of poverty.

The Supreme Court, whether through adoption of liberal or conservative policies, promotes an economic ideal of capitalism.<sup>31</sup> The Court's narrow idealism ignores differences between antitrust's rules of reasonable capitalism and our world's imperviousness to reason, and reduces democracy to the free pursuit of efficiency. Democracy, however, would recoil against idealism; it would reject any single dictating reality, and would abandon both liberal and conservative policies as idealistic failures to confront the world's problems. Economics' detachment of humanity from society, its mechanistic perspective of human activity and its antipathy toward social cooperation, may be reasons for its repudiation,<sup>32</sup> but the Court's wholehearted adoption of economics makes

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29. See Peritz, *supra* note 2, at 300-11.

30. For a critical review of antitrust policies, see Barnes, *supra* note 25.

31. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) (noting the "fundamental importance to American democratic capitalism of the regime of the antitrust laws"); *Unites States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (calling antitrust laws the "Magna Carta of free enterprise" guaranteeing "the right to compete").

32. Economist Warren J. Samuels has written about economists' epistemological difficulties:

First, economic theory is dominated by an absolutist and deterministic mode of analysis. . . . Economists have sought absolutes: absolute values, absolute answers . . . [with] the belief that "scientific" work involves, indeed requires, deterministic analysis and results. All this has been exacerbated by another form of absolutism, in the nature of exclusivism, which has ruled the unconventional out of analytical bounds.

Second, this has been a concentration on equilibrium conditions which has neglected several arguably more important features of economic life: the processes of determination and adjustment . . . ; the consequences of space and time differences; the actual processes of choice at work in the economy . . . ; the people with respect to whom scarcity exists; and so on.

Third, there has been a narrowness and stylization of theory. . . . Although causation often is acknowledged in passing to be complex, economic analysis typically has a narrow focus on monocausation and single direction causation. Conclusions drawn from specialized assumptions or from the consideration of certain variables or relationships often are generalized to cover a topic as a

its repudiation highly unlikely. The Court only understands economics as an autonomous "objective" entity, untainted by "dirty" politics, and misunderstands economics' understanding of itself as conceptually superior to the actual, historical world and hence to democracy and the problems of poverty and justice.

The Supreme Court could strike some small balance between justice and capitalism by not further abstracting from the facts and concrete realities of life. Economics' fatal error—its eternalization of the transitory—only concretizes the fleeting empiricism of isolated acts and singular events, and by ignoring history's enfolding context it denies changes wrought by time that should be analyzed.<sup>33</sup> Thus, the Court idealizes efficiency and markets, isolates them from concrete acts of trading and exchange, and deems them essential to our idealized economy beneath which lurks a very different reality.

Exploitation and advantage, not efficiency and competitiveness, distort economic processes and push many enterprises beyond their ability to service the debt of improvident actions that have sapped their competitive strength.<sup>34</sup> The Court, for all its concerns with rules that generate efficient results, ends up weakening this nation competitively through rules that

whole. . . . Experience relating only to a temporary historical situation often is generalized as universal. . . . All in all, theorizing tends to focus on a number of traditionally accepted and understood variables and to treat them in limited, conventional ways, which renders nugatory the breadth, diversity, and complexities of the real world.

Fourth, in addition to incorrect observations and oversimplifications, there are manifest logical inconsistencies and other dubious practices which severely restrict the putative value of analysis. For example, formalization reifies aspects of reality and transforms hypothetical statements into absolute truths functioning to obscure the substantive robustness and relativism of real life.

Fifth, through the elimination . . . of human beings from economic theory, economists have severely neglected human choice, expectations, experience, learning historical circumstances and opportunities, and power.

Samuels, *Introduction* to H. ARNDT, *supra* note 17, at 13-14; *see also* W. SAMUELS & A. SCHMID, *LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE* (1981) (discussing economic decision-making processes and the interaction of economic and legal forces).

33. *See generally* L. BOLAND, *THE FOUNDATIONS OF ECONOMIC METHOD* 13-43 (1982) (suggesting two difficulties with efficiency as an economic concept: (1) the problem of induction, that is, how do we know economic truth, and (2) the problem of methodological individualism, that is, how can a science of society be constructed on individual behavior). For an excellent analysis of the phenomenon of individualism as the highest social principle, *see* Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive or Feeble?*, 20 *J. ECON. LITERATURE* 1463 (1982).

34. *See* W. ADAMS & J. BROCK, *DANGEROUS PURSUITS: MERGERS & ACQUISITIONS IN THE AGE OF WALL STREET* 143-82 (1989).

disallow economic action that do not fit the Court's preconceived and abstract embodiments of efficiency.<sup>35</sup>

The Court's Paretian principles limit efficiency to individualistic and noncooperative forms of economic conduct that distort efficiency and limit economics to exclusive forms of corporate capitalism.<sup>36</sup> The Supreme Court must not sacrifice democracy but must promote more diversity in economic organizations, whether cooperative or competitive, corporate or communal. History may confirm the inefficiency of wholly private organizations, as it has confirmed the inefficiency of wholly public firms,<sup>37</sup> but the Court dedicates antitrust to an unachievable ideal. The Court should not equate success with efficiency, and should realize that efficiency as an engineering concept operates without regard to its impact on society.

As the machinery that powers efficiency and generates wealth now sputters, what we require is neither lubricant nor overhaul, but a repudiation of the old metaphorical ways of thinking that block our recognition of poverty as a problem of wealth. A return to the liberalism of a generation ago and to its insensitive and ignorant attitudes toward poverty would only lock us into capitalism and wealth as a remedy. What we need are humane ways to discuss human needs, to discuss what it means to be linked politically and socially, and to understand history and the recent past's mistakes.

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35. Abstract terms can never capture all aspects of reality. The reduction of ideal economic abstractions to the status of things, as if they were ideals themselves, creates the illusion that people's lives are equivalent to the world in which they know themselves and their relationship to others. For literature on false consciousness, see *supra* note 24.

36. See Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 ST. LOUIS U.L.J. 349, 353-54 (1987). Modern antitrust economists use Pareto superiority as the appropriate standard of welfare measurement. See E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 384-439 (2d ed. 1975); F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 595-96 (1971); Phelps, *Introduction to ECONOMIC JUSTICE* 9, 11 (E. Phelps ed. 1973). Under that standard, a change that harms no one and improves at least one person is a social improvement. See generally V. PARETO, *MANUEL D'ECONOMIE POLITIQUE* (1927). But cf. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 73-74 (1982) (challenging the thesis that the goal of efficiency is the sole basis for antitrust laws). But since any change is likely to disadvantage at least one person, a Pareto improvement includes a change that can benefit a single person and, through transfer payments, presumably eliminate harm to others. For a critical discussion of the Pareto measurement, see Sager, *Pareto Superiority, Consent and Justice*, 8 HOFSTRA L. REV. 913 (1980).

37. See *supra* note 15.

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Democracy is far too fragile to survive the Supreme Court's insensitive antitrust interpretations based upon its ahistorical belief in wealth and efficiency as social guarantors of universal welfare.<sup>38</sup> Since efficiency cannot be achieved, the Court might at least temper its open belief in economic science; it might resist the temptation to reduce reality to even greater abstraction and metaphor, and focus on how economic conduct should fit within a democratic society of diverse forms of economic organizations. For the next centennial we do not want another celebration of images and icons, but a celebration of concrete achievements in economics and law. At the least, the celebration will hopefully commemorate a sensibility morally aware of poverty and the realities that constitute capitalism.

Surely, we all yearn for more democracy than images and dreams can provide, but we cannot easily reform our politics to improve our lives.<sup>39</sup> Conditioned by economic privilege and material advantage, we fear democratic political reform, and preserve and celebrate laws like the Sherman Act to help us maintain our social stature. We may support liberal reforms, but they only increase social discontent while increasing poverty. We may even grant more concessions to capitalism as current recessionary pressures build, but since we are always gridlocked in one or another of capitalism's repressive cycles of fear and reform, we will never escape our political structures or collectively elevate our consciousness.

We will watch events passively, deluded by economic theories about the practical and the possible. Content with our lives' material fulfillment, we abjure any responsibility for the tragedies and travails of capitalism. Through our political passivity, we preclude the poor from political activity and deny them any semblance of control over their lives. We deny them property, thereby subjugating them to our wills and our needs as property owners, basing our denial on moral grounds while denying our own hypocrisy.

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38. For an example of such a ruling, see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), where the Court overruled a long line of cases and held that a corporation and a wholly-owned subsidiary are per se incapable of conspiracy under § 1 of the Sherman Act despite the fact that the two entities had made concerted efforts to keep another competitor from entering the market on the basis of a noncompetition agreement to which the new competitor was, admittedly, not a party. *Id.* at 757-58, 777. According to the Court, "[a]n efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Id.* at 767.

39. See generally *supra* note 15.

As capitalists we can never live democratic lives.<sup>40</sup> If we did, capitalism would collapse. It tolerates neither altruists nor humanitarians, only the selfish assessment of personal interests as dictated by the Sherman Act. Indeed, recent large mergers and acquisitions again reveal capitalism as a system specially designed for the few, with huge entities supplanting any equality between market participants and destroying the last vestiges of a politically liberal economic system.<sup>41</sup>

Can we live lives beyond capitalism's influence? Can we sell less of ourselves in the marketplace, reserving more of ourselves for ourselves and others? What can we rationally do to improve the plight of the poor and the dispossessed?

Paradoxically, it is not possible to construct a rule or principle from which democracy might emerge. No "idea" of an action can direct all actions, since all such ideas as abstractions will lead to distortion and will worsen consequences.<sup>42</sup> Democracy, rather than consisting of a priori rules

40. For a discussion of the difficulty of reaching some tolerant accord within a complex and contradictory world, see Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1193-1217 (1983).

41. See generally W. ADAMS & J. BROCK, *supra* note 34 (discussing how the merger and acquisition frenzy of the 1980s has stifled the creation of new wealth and investment in research and development, and hampered America's global competitiveness).

42. With respect to the distorted model of Pareto optimality, English economist Robert Neild asked:

"What conditions need to be fulfilled if an economy is to produce a Pareto optimum . . . ?"

The answer [Paretian economists] produce is fantastical in an extraordinary degree.

They start from a world populated with atomistic individuals . . . who are assumed to be endowed with innate tastes, uninfluenced by those around them. They are assumed to possess a given "factor endowment," meaning given human skills and capital . . . [and] in every trade there is no space—for if there is space every . . . enterprise enjoys some degree of monopoly, caused by the costs of reaching another supplier. It is assumed there is not time, since if you admit time the machines . . . from the past may not fit . . . today. On the basis of these . . . fantastic assumptions, you then postulate a population so large that no one can influence any price and a society where people respond only to price signals. . . There is then a massive series of auctions . . . in which the "agents" decide what to produce and what to buy . . . scurrying timelessly from one market to another deciding how many shirts to buy once . . . [the] price [emerges] in the shirt auction, how many shoes to buy, once they have seen the price in that market, and how many hours of work to offer when they have seen what wages is being paid and how that compares with the prices of goods they propose to buy. To overcome the difficulty that all the markets interact and people might be rushing . . . endlessly revising what they did . . . it is necessary further to postulate a mighty super-auctioneer who arranges recontracting so that ultimately everyone is satisfied.

and principles, would be an attitude, a perspective, an approach to life as an endless quest by individuals who, through mutual admiration and respect, cross barriers to interpretation over bridges to meaning built rationally through consensual processes.<sup>43</sup> Can we accomplish such a democracy? Obviously, yes, but not without the disquieting prospect of rejecting familiar economic institutions that we have elevated to principle and now celebrate.<sup>44</sup>

....

Why do economists behave like this? Why do they chase such a bad model of economy? I think the best explanation is that they have been trying to be like physicists. They have been trying to be "real scientists."

....

But in economics that approach has been hopelessly unscientific. In physics the assumed premisses [sic] are realistic. If there is evidence that they are not realistic, or not close approximations to reality, they will be rejected; and at every step the propositions derived from the theory will be tested. . . . In general-equilibrium economics, by contrast, the assumptions are the extreme opposite of realistic. They are mad . . . .

Neild, *The Wider World and Economic Methodology: The Public Case for the Reconstruction of Economics*, in *ECONOMICS IN DISARRAY* 37, 39-42 (P. Wiles & G. Routh eds. 1984).

43. The notion of life through meaning and interpretation was first articulated by Hans-Georg Gadamer. See generally H. GADAMER, *TRUST AND METHOD* (1975). It is a theory of interpretation developed in opposition to the generally accepted assumptions of the social sciences. For more on this theory, see, for example, J. BLEICHER, *THE HERMENEUTIC IMAGINATION* 3-33 (1982); D. HOY, *THE CRITICAL CIRCLE: LITERATURE, HISTORY AND PHILOSOPHICAL HERMENEUTICS* (1978); P. RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES* (1981).

For applications of hermeneutics to legal theory, see Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. REV.* 204 (1980); Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982); Hermann, *Phenomenology, Structuralism, Hermeneutics and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 *U. MIAMI L. REV.* 379 (1982); McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 *OKLA. L. REV.* 1 (1982).

44. Ed Sparer noted the difficulties of transforming society, but perceptively observed that a possible prescription for positive change is "to build cooperative institutions which meet the real and current needs of people and thereby demonstrate that people can work for *mutual* rather than separate interests. The theoretical and practical questions surrounding any such social action are sitting and waiting for serious contributions to be made toward their answer." Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 *STAN. L. REV.* 509, 571 (1984). For discussions of popular cooperative movements in history, see L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* (1976); D. ZWERDLING, *WORKPLACE DEMOCRACY* (1980).



