



## My Most Regretted Statements: A Symposium Prologue

Daniel B. Klein<sup>1</sup>

For the symposium presented here, we invited several leading intellectual figures to tell of their most regretted statements and to reflect on why they now regret those statements. We suggested a maximum length of 1,500 words.

Imagine that Jane Jacobs or Elinor Ostrom had written a 1,500-word reflection, “My Most Regretted Statements.” That would tell us about the doubts she had about her own beliefs, the risks she took, how her thinking evolved, and how she felt about her own published statements. It might illuminate her attitude toward other statements not included as among her most regretted statements. The symposium invited the contributor to open up to the reading public, to help the reading public to get to know the contributor. Also, it gives the contributor an opportunity to qualify some of the discourse she has put on the record.

The following passage from Adam Smith expresses the spirit of the project:

Frankness and openness conciliate confidence. We trust the man who seems willing to trust us. We see clearly, we think, the road by which he means to conduct us, and we abandon ourselves with pleasure to his guidance and direction. . . . The great pleasure of conversation and society, besides, arises from a certain correspondence of sentiments and opinions, from a certain harmony of minds, which like so many musical instruments coincide and keep time with one another. . . . We all desire, upon this account, to feel how each other is affected, to penetrate into each other’s bosoms, and to observe the sentiments and affections which really subsist there. The man who indulges us in this natural passion, who invites us into his heart, who, as it were, sets open the gates of his breast to us, seems to exercise a species of hospitality more delightful than any other. No man, who is in ordinary good temper, can fail of pleasing, if he has the courage to utter his real sentiments as he feels them, and because he feels them. (TMS, 337)

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1. George Mason University, Fairfax, VA 22030.

Smith also describes the sentiments of one “who, from false information, from inadvertency, from precipitancy and rashness, has involuntarily deceived”:

[I]f he is a real lover of truth, he is ashamed of his own carelessness, and never fails to embrace the first opportunity of making the fullest acknowledgments. If it is in a matter of some consequence, his contrition is still greater; and if any unlucky or fatal consequence has followed from his misinformation, he can scarce ever forgive himself. Though not guilty, he feels himself to be in the highest degree, what the ancients called, *piacular*, and is anxious and eager to make every sort of atonement in his power. (TMS, 338–339)

In the symposium, seven authors generously share their reflections on their most regretted statements:

- Monique Bégin tells of a statement she often repeated in her time as Canada’s Minister of National Health & Welfare: “Canada is the Sweden of the Americas.”
- Michael Boskin reflects on his time as Chairman of the Council of Economic Advisers and the hazards of misattribution, of not controlling op-ed titles, and of equations going missing.
- Tyler Cowen reflects on his circa 2007 underestimation of the likelihood of a major financial crisis.
- Jon Elster draws from his work on defective belief formation, illustrating with his own past errors, including about the electorate binding itself and about thinking of anti-communists “as a clock that is always one hour late rather than as a broken clock that shows the right time twice a day.”
- Richard Epstein tells of his conversion to consequentialism.
- Sam Peltzman relates his hardy forecast in 1988 of Michael Dukakis’s impending victory over George H. W. Bush.
- Cass Sunstein begins: “I have said a lot of things that I regret.” And he ends: “A main job of academics is to float ideas and take risks, and if they do not make mistakes, or learn enough to change their minds, well, that’s really something to regret.”

We hope that the symposium will be of interest to everyone who takes public discourse seriously. Any leader in intellectual life has a personality, a character, that reflects higher-order interpretations, beliefs, and judgments. For those, she has to answer to her own conscience. Sharing insight into such matters might advance understanding and cohesion in public discourse. We are grateful to the

seven contributors for their generosity and for their openness in sharing their regrets.

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# My Most Regretted Statements: Canada as a Welfare State

Monique Bégin<sup>2</sup>

I was among the first women elected from Quebec to Member of Parliament, with a large majority, and I was re-elected three times, serving as an MP from 1972 to 1984. During that time, in mid-September 1977, Prime Minister Pierre Trudeau appointed me to Cabinet as Minister of National Health and Welfare, the biggest Department of the Canadian government, with its 25 percent of the federal budget. I was also responsible for the Medical Research Council. I was Minister during 1977–1979 and 1980–1984.

We revel in thinking of Canada as a great place to live, a society not afraid of offering both a universal ‘medicare,’ prepaid for all through general taxation, and a safety net to its people. We see that as our trademark in North America. But how much of a reality is that, and how much a myth?

Just before my appointment in 1977, a major restructuring of the federal funding formula for health care for the provinces had been unanimously agreed upon. The new formula shifted federal funding determinations almost entirely to Finance, rather than Health Canada. I had not really been briefed on our Medicare system. The feds were covering roughly 50 percent of all costs related to hospitals and to doctors practice, based on universal, free access.

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So, I immediately got involved with social policies. My dream, which I innocently announced to the media, was to institute a “guaranteed annual income” under one form or another (negative income tax, ‘mincome,’ etc.). When I was apprised by my Deputy Minister of the real state of the economy, and when observing the rapid success of Milton Friedman’s monetarist policies, I concluded for myself that I would be lucky if I could, at the most, save the universality of Family Allowances and of Old Age Pensions.

Over more than seven years, 1977 to 1984, I managed to save the universality of these federal programs, create a federal new Child Tax Credit for families most in need (lone mothers with children), and increase pensions and adapt them to the various conditions lived, in particular by new Canadians and by women alone. I was very proud of my very last piece of legislation in the House of Commons, at the end of June 1984, which included several improvements to our pensions system such that our universal pensions system, for the first time in our history, would be lifting all seniors above the poverty line, which it did.

When in 1984 Pierre Trudeau left politics for good, I had long before, without saying a word to anyone except to him, decided to quit as well. I recycled as an academic, at the University of Notre Dame, as Joint Chair in Women’s Studies Ottawa and Carleton Universities, and as Dean of Health Sciences and Visiting Professor in Health Administration at the University of Ottawa. The numerous speaking engagements and participation in networks, committees, and commissions became so time-consuming that I had to drop social policies from my agenda, focusing on protecting our universal Medicare—what I am known for in Canada—which was then under serious attacks.

Sometime in 1993, University of Toronto political scientist Carolyn Tuohy, an expert on Canadian institutions and on health care systems, had written:

Canadian social policy presents a puzzle. On the one hand, it comprises a relatively niggardly set of policies directed at income security—notably public pensions and social assistance. The one relatively generous income-maintenance program, unemployment insurance, has been the focus of ongoing controversy. On the other end, Canada has adopted a system of national health insurance that is both generous and outstandingly popular. Why have Canadians been so parsimonious and chary in protecting individuals and families against poverty, and so generous and enthusiastic in protecting them against the cost of health care? (Tuohy 1993, 275)

I discovered that text years later. I did not know its author personally although she had a name and would become Deputy Provost and Vice President, Government and Institutional Relations, at the University of Toronto.

I couldn't believe my eyes when I came to that text. As social security was not her specialty, I thought at first that she was wrong. When giving speeches in the U.S., I had—repeatedly, and in complete good faith—started by stating that “*Canada is the Sweden of the Americas.*” No one, ever, either in America or back home, had confronted me, let alone questioned it.

Then, in 1998, a study by the Centre for International Statistics prepared for the Canadian National Forum on Health was published, giving a comparative table of total public social expenditures for 1990–1993 for several countries, as a percentage of their GDP (Centre for International Statistics 1998, 163). Sweden, Denmark, Norway, Canada, the U.S., and others were being compared for their total spending for income security, education, unemployment insurance, and smaller other programs, income security being by far the largest component of this statistical picture. It clearly illustrated the point: Canada was way below the Nordic countries, and in fact only somewhat better than the U.S., for total social expenditures. Where Sweden invested some 39.6 percent of GDP, we spent 21.9 percent, and the U.S. spent 15.6 percent. And that was before Canada's major reductions to unemployment insurance benefits, and before the 1995 cuts by Prime Minister Chrétien of some \$30 billion in transfers to the provinces, of which a major share was applied by the latter to reduce social assistance and social services and programmes.

I still had trouble believing it. Later I checked an OECD report on total public social expenditure as a percentage of GDP for 29 countries, 1980–2001. The same pattern was there: Canada was 24th in welfare spending, followed by Japan, the U.S., Mexico, and Korea. Ahead of us were 23 European countries, including Poland, the Czech Republic, Hungary, and Slovakia.<sup>3</sup>

By then and for the years after (March 2005–August 28, 2008), I was involved with the WHO International Commission on Social Determinants of Health, of which I was a member and which was a unique and enriching experience. I did my best to repair my seriously erroneous statements of the past, waking us to the poverty in our midst, trying to create images I had never used before. I ask, for example, why Montreal West Island's or Hampstead's life expectancy for males is 79.5 years while it falls to 68.6 years in the Maisonneuve-Rosemont neighbourhood, and to only 66 years in the downtown south area (CLSC des Faubourgs, from Sherbrooke Street down to the old harbour, east of Drummond and McGill Streets)? How come that in 1981 there were 30 higher-poverty neighbourhoods in the City of Toronto, and 120 by 2001?<sup>4</sup> How is it that, in the country of lakes and

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3. Current data is available through the OECD Social Expenditure Database ([link](#)).

4. See United Way of Greater Toronto and Canadian Council on Social Development (2004, 20).

rivers, of the 600 First Nations reserves of Canada, some 100 still do not have safe, clean water?

One problem is that Canadians like to believe they are a very egalitarian society, a classless society. We are not. Canada is a country that is so rich that it manages to mask reality, making poverty invisible. Inner-city neighbourhoods have been gentrified or marginalized. Homelessness has been normalized. So have food banks.

In December 2008, while in Vancouver talking of the causes of poorer health, I was interviewed by *The Province* and I suddenly decided to apologize. The headline read: “Former health minister says she was wrong—Monique Begin: Says Canada not a model of social and economic justice.” The opening paragraphs follow:

Monique Begin considers the human tragedy playing out daily in Vancouver’s Downtown Eastside and shudders at the memory of her once firmly held view of Canada as “the Sweden of the Americas.”

Not only did she believe it, Begin says, she used to spout it regularly as Pierre Trudeau’s feisty minister of health and welfare from 1977 to 1984—proudly comparing Canada with the European country many experts held up then, as they do now, as a model of social and economic justice and well-being.

“Well, I made a huge mistake,” Begin says now. “Canada’s the least bad of the Americas, but it’s not Sweden by a long shot.”

A quarter century later, Begin is on her latest mission to erase the rosy image once and for all by telling anyone who will listen that inequities in Canada’s social underpinnings—involving everything from education and family income to jobs and housing—have more of an impact on the health of Canadians than medical treatment. (*Province* 2008)

So the route towards tackling ‘the causes of the causes’ of poor health in Canada is certainly not that of investing more money into the health care system. We have one of the most expensive health-care systems of the world, and we cover only hospitals and physicians, with some 30 percent of total health care costs (drugs, therapies, rehabilitation, chronic care, etc.) having to be borne by individual Canadians. Re-balancing the budgets away from health spending in favour of welfare and social policies is what is needed. And the need is urgent.

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## Fewer Than Sinatra: Three Quasi-Regrets

Michael J. Boskin<sup>5</sup>

When invited to participate in this issue of *Econ Journal Watch*, devoted to the subject “My Most Regretted Statements,” my initial impulse was to decline. First, even in the latter stages of my career, I try to look forward, not backward. Second, as Frank Sinatra croons in “My Way,” “Regrets, I’ve had a few, but then again, too few to mention.” Of the three items that fall even remotely into that category, two involve things I never actually said or wrote, but still may provide useful perspective for others.

First, in one of the unusual Washington rituals where your opponents put words in your mouth, I was alleged to have opined that it doesn’t matter whether the U.S. economy produces computer chips or potato chips. A clever quip, but I never said it. Indeed, after being misquoted a few times, including by some Silicon Valley friends and in several business magazines, I wrote a correction that was published in *Fortune* magazine (Boskin 1991). But that didn’t stop people from continuing to ‘quote’ me, putting the alleged quotation on Wikipedia, and the like.

It is likely the quip came from someone objecting to my strong resistance to the government picking winners and losers among technologies and firms by the granting of special subsidies. I was an opponent of industrial policy throughout my CEA Chairmanship for President George H. W. Bush, and was glad to see it also mostly rejected by the Clinton Administration. And I remained opposed

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5. Stanford University, Stanford, CA 94305.

to industrial policy thereafter, including to its extensive use by the Obama Administration, which—despite internal doubts, including those of Larry Summers (see Lipton and Wald 2011)—produced such marvels as a bankrupt Solyndra and a multibillion-dollar subsidy that was used as the excuse to launch California’s (no longer fast enough to be called a) ‘bullet train,’ which will be the biggest white elephant in the state’s history.

If my first ‘regret’ above is over something I never said, the second one is over something I never wrote. Later in my career, I have taken more to writing op-eds. I have written frequently for the *Wall Street Journal*, which reserves authority over the published title of an op-ed, and the author only sees the title upon publication. While the *Journal* usually does an excellent job of providing a catchy title that nevertheless conveys the essence of what is said, I am sure I am not alone among its authors who on rare occasions wince at the chosen title. One of the very few, in many years of writing, was “Obama’s Radicalism Is Killing the Dow” (Boskin 2009). Several on the left have used the title to argue that I and others who disagreed with President Obama’s economic policies didn’t know what we were talking about. I certainly don’t mind being held accountable for what I write, and in fact what I wrote in this op-ed had exactly one-half of one sentence about the stock market. The other 99.5 percent was what I saw as the likelihood that President Obama’s attempts to radically re-engineer large swaths of the American economy, using regulation, tax subsidies, and industrial policy, would slow the recovery.

While I certainly did not foresee that the stock market’s rebound would be as large as it was (though I did predict a rebound), I believe that the extent of the rebound mostly reflected natural economic forces, plus the Federal Reserve’s monetary policy of zero interest rates—year after year—with the explicit goal of pushing people into the stock market to ‘reach for yield.’ Also, recall the 2010 Republican election sweep and subsequent fiscal compromises. But I’m very leery of using the stock market as a reliable forecasting instrument. As Paul Samuelson (1966) famously quipped, “Wall Street indexes predicted nine out of the last five recessions.” It’s one noisy input. But after the 2009 trough, the stock market certainly did rebound quite strongly.

The stock market aside, the economy recovered only slowly. There is substantial research evidence that the Obama-era regulation and uncertainty were two of the prime causes of the abnormally slow recovery. My only discussion of forecasts in the article was to excoriate the Obama Administration for its optimistic economic growth forecasts. Despite all the government micromanagement, President Obama’s team projected a much shallower recession and much stronger recovery than what transpired and what made sense to me. In fact, the Obama Administration was wildly optimistic *year after year*, projecting 4 percent growth in the following two or three years that never got much above half that. So I think

what I wrote holds up well, despite the easily caricatured title the *Journal* gave the piece.

These two episodes of things I neither said nor wrote are not quite personal regrets, but are more regrets over how the dominant style of policy discussion has evolved away from substantive debate into social-media attacks and counterattacks. I learned from these two episodes that in the highly politicized, instant-communication Internet age, you need to develop a thick skin. Otherwise you can spend a lot of time just adding to the continual barrage of tweets and posts.

My one real regret stems from an early draft of a paper I wrote that not only was never published, but was never even put out as a working paper. I developed a simple accounting model of the effects of deferred taxes such as 401(k)s and IRAs and how these effects depended upon numerous economic parameters, such as: how much of the saving flowing into such programs was new saving and how much was diverted from other saving, expectations of rates of return, inflation and future tax rates, eventual consumption propensities, and so on. I wrote out a simple eight- or ten-equation model, calibrated it to the data, and had an extremely capable research assistant run alternative scenarios. When the results came back with effects quite a bit larger than I'd originally anticipated, I told the RA to give the model to another one of my research assistants to run independently, from scratch. The results came back the same and so, after including much sensitivity analysis, I wrote it up and sent a draft around for comment to some scholars who I thought would have useful advice.

This occurred just as academic economists started to circulate work electronically, and it was the first thing I had written after returning to work following a near-fatal accident. It was certainly a lesson for me, for one of the equations had inadvertently been dropped when my admin typed it up for my RA from my handwritten model, and thus it was dropped also in the coding. The error wound up compounding the effects to a large overestimate. I started getting calls and messages that something was wrong, and I went back and did things from scratch again, when I discovered, painfully, that the equation had been inadvertently dropped. So I immediately sent out a note to everyone that, while the part of the paper that dealt with the size and implications of the current deferred taxes was fine, there was an error in the simulations, they should be disregarded, and I was withdrawing the paper. Even in the world of 2002, it became politicized fodder for a short period.

There are two lessons there. First, don't just double-check results, especially those that look unusual; triple-check them. If necessary, do it yourself. That means going over every step in the chain of evidence. While my assistants were embarrassed and deeply upset, I would not let them blame themselves. This was all on me. It was my responsibility; I very publicly said so, and it was the right thing to do.

A number of people subsequently told me that they thought that such screw-ups were less uncommon in academe than generally supposed and that they suspected many people just cover up their mistakes and bury them with their data. I urge any reader who might be looking for some career guidance on this never to do anything other than get the truth out, whatever the consequences. This was a mistake, not a calamity.

Second, and this is a lesson common to all three regrets, is to accept accountability for your words and actions. Clarify others' mistakes about things you've said or written (note: this does not include legitimate criticism) and realize that, unfortunately, any serious piece of research, let alone an op-ed, pertaining to any aspect of economic policy, is now highly politicized in the mosh pit of instant Internet communications and social media.

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## My Biggest Regret

Tyler Cowen<sup>6</sup>

I define regret as not necessarily implied by error. Regret is the sentiment that, ex ante, I should have been more careful, given what I either knew or should have known at the time. Not thinking Donald Trump would be elected president

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6. George Mason University, Fairfax, VA 22030.

clearly was an error of mine, but I still think at the time it was a pretty reasonable thing to believe, so it is an example of error without regret.

My biggest intellectual regret is not having assigned a greater likelihood to the financial crisis circa 2007.

Here is part of a *Marginal Revolution* blog post I wrote on November 19, 2007:

Paul Samuelson, pessimist: “Today, Federal Reserve Chairman Ben Bernanke admits that nobody, including him, is able to guess how near to bankruptcy the biggest banks in New York, London, Frankfurt and Tokyo might be as a result of the real estate crisis.”

Taken literally, Samuelson is correct. No one can say how near to bankruptcy those banks are but that is because they are not very near to bankruptcy. Subprime crisis or not, most people are still paying off their mortgages quite comfortably. Many [bank share prices are down](#) but the major banks are not hovering close to  $p = 0$ .

I’m not sure what Samuelson counts as “today,” but using Google News I cannot find any such statement by Bernanke and if it had been made it would be a) grossly irresponsible, b) headlines, and c) the market would have plunged dramatically. The most likely possibility is that this passage is a simple untruth, not representing what Bernanke said.

Samuelson draws an analogy between today’s subprime crisis and Herbert Hoover claiming the Great Depression would end soon. It’s worth noting that Hoover faced high unemployment, radical deflation, incompetent monetary policy, bank runs, and a lack of automatic stabilizers, none of which are the case today.

It is amazing how pessimism and the desire to blame will cloud men’s minds. (Cowen 2007)

The post’s closer was a bit of a saving grace for me:

It can be said, however, that if further bad things were to happen, “the crisis so far” would mean we have much less room to maneuver. So I’m not telling you that everything is fine, I am simply putting this piece in perspective.

Now, to be sure, most of my claims in the blog post were literally accurate. Bank share prices, at the time, were not close to zero. And Samuelson (2007) was deeply irresponsible to fabricate this sentiment and attribute it to Bernanke—consider that an early example of ‘fake news.’

Still, at the time I badly underestimated the chance that something systemic had gone wrong in the American economy. I remember thinking there was a very real chance of a real-estate bubble, but I thought it would be like the real-estate bubble of the late 1980s, in which case it would lead to a slight recession but not an event to be remembered in the broader scheme of history.

One mistake I made was to think too little about the fragility of America's shadow banking system, but unfortunately my mistakes ran deeper than that. The more general mistakes I made took a few forms. First, I had too much confidence in observed market prices. Second, I had too much confidence in the quality of corporate governance within banks. At the time, I thought, "Those are sophisticated managers and CEOs with a lot of their own money on the line. There is no reason to think they will let things get out of control." I just didn't think that a real-estate bubble could be so far along and so extended as to endanger bank solvency. Third, I just had too much confidence in my judgments.

On all counts I was wrong! And so when 2008 came along, I felt rather silly. I had to perform a major revision of my views on quite a few matters. My underlying ignorance was not just a lack of understanding of some details about shadow banking.

That all said, I think we (and I) need to be very careful. We should not overreact and now assume that all precarious situations will blow up financially. Most of them still will not, and to presume otherwise would be to show that no real lesson had been learned from the history of our own errors. We shouldn't assume that the most recent events are always the best predictors of what lies around the corner.

I also think, in retrospect, that too much reliance on the notion of a real-estate bubble is misleading. In so many of the affected areas, real estate prices are now higher than they were in 2006! There was a real-estate bubble, and a huge one, near Las Vegas, near Orlando, and in much of Arizona. But was there a real-estate bubble in America's high-productivity cities such as New York and San Francisco? Probably not, even though for a while prices took quite a tumble. The high prices in fact seem to have proven themselves sustainable. And so, looking back, we have to question just how general the real-estate bubble was. Arguably the financial system had some fragility issues that intersected with some regional real-estate bubbles but were not merely reducible to real-estate problems. To put it in other words, the real mystery is the 'negative price-movement bubble,' in many regions, starting in 2008–2009 but lasting only a few years.

Overall, there is still quite a bit we don't understand about the crash of 2008. But in 2007, I thought I knew pretty well what was going on. I didn't. I regret that. I regret that I was wrong, and I regret that I was overconfident in my belief that I was right.

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# My Most Regretted Statements

Jon Elster<sup>7</sup>

*[Editor's note: Upon receiving the invitation to contribute to the present symposium, Jon Elster responded by noting that in his published work he had illustrated defective belief formation by sharing some of his own regrets about his own past statements. He kindly authorized us to reproduce the following passages, as part of the symposium.<sup>8</sup>]*

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Because it is often easy to detect the operation of motivated belief formation in others, we tend to disbelieve the conclusions reached in this way, without pausing to see whether the evidence might in fact justify them. Until around 1990 I believed, with most of my friends, that on a scale of evil from 0 to 10 (the worst), Communism scored around 7 or 8. Since the recent revelations I believe that 10 is the appropriate number. The reason for my misperception of the evidence was not an idealistic belief that Communism was a worthy ideal that had been betrayed by actual Communists. In that case, I would simply have been victim of wishful thinking or self-deception. Rather, I was misled by the hysterical character of those who claimed all along that Communism scored 10. My ignorance of their claims was not entirely irrational. On average, it makes sense to discount the claims of the manifestly hysterical. Yet even hysterics can be right, albeit for the wrong reasons. Because I sensed and still believe that many of these fierce anti-Communists would

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7. Columbia University, New York, NY 10027.

8. The sources for the three passages are Elster 2015, 125 n.11; Elster 2015, 475; and Elster 2000, ix.

have said the same regardless of the evidence, I could not believe that what they said did in fact correspond to the evidence. I made the mistake of thinking of them as a clock that is always one hour late rather than as a broken clock that shows the right time twice a day. Later, I made the same mistake about members of the ecology movement.

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Scholars sometimes go wrong because of the strong tendency of all human beings to find meaning and order in the world, causing them to search for agency, objective teleology, and analogy. ... [I]t seems appropriate, in a chapter where I criticize other scholars, to recount some of my own failings. On three occasions in the 1970s, I fell victim to the lure of analogy, and perhaps also of teleology. In a book in Norwegian from 1971, I drew a parallel between the impossibility of predicting technical change and Gödel's incompleteness theorem. When a logician colleague at my university raised his eyebrows, I realized the foolishness of the analogy. In a book in French from 1975, I approvingly cited Jacques Lacan's analogy between Marx's concept of surplus-value (*Mehrwert*) and Freud's concept of surplus-pleasure (*Mehr von Lust*). I did not need help to quickly realize how stupid that comparison was. In a book from 1979, I claimed that the system of periodic elections without the possibility of recalling representatives "can be interpreted [as] the electorate's method of binding itself and of protecting itself against its own impulsiveness." Needless to say, no electorate ever did anything of the kind. In that case, the flaw in my reasoning may have been due either to a misplaced analogy between individual and collective self-binding or to objective teleology. In getting rid of my confusion, I was assisted by a history professor who told me bluntly, "In politics, people never try to bind themselves, only to bind others." An irony is that I proposed this "interpretation" in a book, *Ulysses and the Sirens*, which among other things was a crusade against functionalist explanations.

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Chapter II [of *Ulysses Unbound*] reflects a change in my view about *constitutions* as precommitment devices. I have been much influenced by a critical comment on *Ulysses and the Sirens* by my friend and mentor, the late Norwegian historian Jens Arup Seip: "In politics, people never try to bind themselves, only to bind others." Although that statement is too stark, I now think it is closer to the truth than the view that that self-binding is the essence of constitution-making. Ulysses bound *himself* to the mast, but he also put wax in the ears of the rowers.

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# My Methodological Flip-Flop on Individual Liberty

Richard A. Epstein<sup>9</sup>

I have always been a small-government thinker. At the most general level, that position is captured in Aaron Director's maxim that the laissez-faire system starts from the assumption that government intervention is an evil until it is proved to be a good. As a general rule of thumb, this proposition is hard to beat. But as a guide to individual decisions, it does not tell you when or why that presumption should be overcome. One obvious area involves the commission of torts by one person against another. At least in the simple cases of trespass—the direct application of force by one person to the body or property of another—the presumption against legal intervention seems to be overcome. But it is important to understand just how far this kind of exception runs. It is easy to invent indirect-harm cases, as every legal system from Roman law to the present has done, in which a defendant is held responsible for setting hidden traps or supplying poison to someone else who in ignorance ingests it. It takes only a little more imagination for

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the notion of a tort to cover the transfer of a good that contains a latent defect that manifests itself when the good is used in a normal and proper fashion and in its original condition.

It is thus possible to elaborate a theory of causation that covers a lot of the familiar cases. The one class of cases that resists easy incorporation into this basic pattern consists of those situations where the omission of a common precaution leads people to harm each other. This duty to take affirmative action is narrowly accepted in those cases where there is some independent duty to act, the two most common of which are status-based relationships, such as that between parent and child, and consensual arrangements, such as when a school or camp takes a child into its charge for daycare or an outing.

The far more difficult cases are those involving an asserted duty to rescue a stranger in need, often subject to the proviso that this duty arises only when the rescue can be easily accomplished. Yet we find that this expanded notion of responsibility—a duty to rescue strangers—has been stoutly resisted by common-law judges. Moreover, modern state legislatures are uniformly reluctant to impose such a duty by statute. Such reluctance is found even in cases of “easy rescue,” where one person, at no risk to himself, need only throw a line to a person drowning in the waters below a bridge. What explains the widespread reluctance to recognize the duty?

In an early article on the theory of strict liability, I challenged the utilitarianism that seemed to call for duty-to-rescue in these “easy cases.” At that time in my life I was, or at least thought I was, a libertarian who believed that an abiding respect for individual liberty was the explanation for the reluctance and that the liberty-based reluctance rested on ‘deontological’ reason—a word that I have come not to understand. I have thus come to regret a passage that I wrote in 1973 in which I played off a famous article by James Barr Ames (1908), who famously proposed the “easy rescue” duty. My 1973 passage follows:

Under Ames’ good Samaritan rule, a defendant in cases of affirmative acts would be required to take only those steps that can be done “with little or no inconvenience.” But if the distinction between causing harm and not preventing harm is to be disregarded, why should the difference in standards between the two cases survive the reform of the law? The only explanation is that the two situations are regarded at bottom as raising totally different issues, even for those who insist upon the immateriality of this distinction. Even those who argue, as Ames does, that the law is utilitarian must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—is a good in itself not explainable in terms of its purported social worth. It is one thing to allow people to act as they please in the belief that the “invisible hand” will provide

the happy congruence of the individual and the social good. Such a theory, however, at bottom must regard individual autonomy as but a means to some social end. It takes a great deal more to assert that men are entitled to act as they choose (within the limits of strict liability) even though it is certain that there will be cases where individual welfare will be in conflict with the social good. Only then is it clear that even freedom has its costs: costs revealed in the acceptance of the good Samaritan doctrine. (Epstein 1973, 198–199)

This passage rested on two premises. The first was that individual liberty, if it was to be taken seriously at all, must be a trump before which all utilitarian considerations fell. The second was that the utilitarian calculus, as reflected in a sound cost-benefit analysis, would indeed deem it socially desirable to impose a duty of rescue, at least if it could be confined to some narrow set of circumstances.

Today, I think that both of these premises are wrong. Instead, I would ground my rejection of Ames's rule in a kind of rule-utilitarianism. I do not believe that any narrow act-utilitarian theory works as a moral (much less a legal) theory: It is not easy to make interpersonal comparisons of utility, and it is extremely difficult to do so collectively. Individual actors may make private assessments of relative interpersonal utilities—such as when one makes a charitable gift—but such calculations are difficult to make or validate on a society-wide basis. Instead, the appropriate standard is a rule-based approach which asks, in the *ex ante* position, whether any reform made to the prior state of affairs constitutes a Pareto improvement, so that at least one person is left better off and no one is left worse off than before.

It is not clear that imposing an affirmative duty to rescue represents a Pareto improvement. The explanation requires a much closer look at the institutional and social arrangements around rescue. Imposing a duty of this sort may deter people from going to places where they think danger lurks. Even if the duty is only one of *non-risky* rescue, there remains the risk of the courts misidentifying non-riskiness! The best work on this issue is from David Hyman, who writes:

During the past decade, there have been an average of 1.6 documented cases of non-rescue each year in the entire United States. Every year, Americans perform at least 946 non-risky rescues and 243 risky rescues. Every year, at least sixty-five times as many Americans die while attempting to rescue someone else as die from a documented case of non-risky non-rescue. If a few isolated (and largely unverified and undocumented) cases of non-rescues have been deemed sufficient to justify legislative reform, one would think a total of approximately 1,200 documented cases of rescue every year should point rather decisively in the opposite direction. When it comes to the duty to rescue, leaving well enough alone is likely to be sufficient unto the day. (Hyman 2006, 712)

In other words, the larger social problem is risky rescue, not non-risky non-rescue. The issue requires institutional and not individual responses. For example, police and firefighters, trained for their jobs, keep crowds at a distance, lest they make any rescue efforts more difficult. So while there is good reason to believe that a generalized prohibition against the use of force and fraud does produce huge social improvements, once that baseline is established there is no reason to think that there is any social gain to be had from upsetting the standard rules on individual liberty in rescue cases.

But the way in which the problem is stated does not preclude the possibility that other deviations from the no-force-or-fraud baseline might help. At this point, the common suggestion is that the law provide a reward for individuals who engage successfully in rescues that they are not otherwise required to undertake. That rule, it turns out, has no application to casual rescues. No one ever claims the money; what usually happens is that the grateful rescuee sends some flowers or a gift certificate to the rescuer. But if the stakes are high, such as in the salvage of ships, now the incentives matter, and the standard practice is to award substantial sums for a successful rescue, often through an institutional tribunal like the Lloyds Insurance Company. Such institutional frameworks for recurring high-value rescue situations give more instructive rationales than does the general invocation of an abstract conception of liberty.

The liberty rationale is also dangerous for another reason. Everyone who is drawn to it accepts the notion that no one should be able to kill or maim another individual. In this context the liberty principle is so strong that it is hard to think of any good reason to overcome that presumption. But it is a very different thing when the notion of liberty is used as a barrier against taking or using someone else's property to avert imminent peril of life or limb. The suspension of absolute property rights to exclude in cases of private and public necessity has long been part of the common law. If possible, the party who avails himself of another's property should pay damages after the fact, but no one would allow a dock owner to demand an exorbitant docking fee from the captain of a sinking ship during a storm.

There are similarly tricky questions regarding the boundaries of liberty in the public sphere. Vexing problems include the imposition of taxes on income from labor or property, and the taking of private property for public use even when just compensation is provided. Working out the details of these rules is an arduous task, which I attempted to broach in my book *Takings* (Epstein 1985), which examines how complex the world turns out to be once these forced exchanges, whether for cash or kind, are allowed. There is no way to cabin this doctrine to simple cases in which the state takes land from one person to build a fort. Most critically, there are also frequent instances of government takings of lesser interests in land, including leases, mortgages, easements, covenants, air and mineral rights, from

large numbers of people, all of which have to be evaluated within the same intellectual framework. It is then necessary to sort all of these multiple types of takings into three groups. First, are those manifold takings that are blocked entirely, because they are not for a public use. Second there are those takings for permissible uses that are allowed only with just compensation. Third, there are those takings or regulations that may be done without compensation under the ‘police power’ to advance public health and safety, and to control monopoly behavior. These are multifaceted inquiries that the simple liberty framework cannot even address, let alone answer.

To be sure, this inquiry often requires empirical estimations, which in some cases are easy and in some cases difficult. It is tough to say whether third parties should be able to claim enforceable rights under contracts to which they are not parties, but stunningly easy to say that no two people by contract can impose affirmative duties on strangers. This framework can be used not only in a constitutional setting, but also to evaluate the various common-law rules for the creation of private property rights in different resources—land, water, minerals, air, spectrum, patents, copyrights and more. There is no way to go through the highways and byways here, but my methodological conversion to consequentialism was complete at the very latest with my article “The Utilitarian Foundations of Natural Law” (Epstein 1989).

Back in 1973 I did not see how such investigations would play out. Then, my chief interest was the theory of causation in the law of tort, usually a rather circumscribed inquiry. Perhaps, I am missing something today. But even if I were to adopt some new position on some issues, I don’t think that I could ever persuaded to go back to the simple liberty framework to which I appealed in dealing with the duty-to-rescue problem. That framework’s powerful claims of personhood against murder, rape, and theft remain rock-solid, because no one is ever permitted to invoke the notion that they labor under some private necessity in order to commit these heinous acts. That principle is applied only in those cases where one person needs to use (subject to an obligation of compensation after the fact) the property of another to escape imminent danger to life or property. Nothing in the consequentialist view displaces that presumption in favor of the protection of individual liberty in the core cases that give that principle its greatest attraction. And the consequentialist view is more systematic, and thus better able to explain a fuller range of simple and complex interactions, in ways that illuminate limitations as well as the usefulness of the liberty principle. I find that reckoning how the various threads fit together to my own satisfaction—much less anyone else’s—involves the work of a lifetime.

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# An Economist's Most Regrettable Statement

Sam Peltzman<sup>10</sup>

Sometime in the middle of 1988 I ventured to predict the outcome of the upcoming Presidential election. I cannot remember now whether this regrettable move was made in a working paper or some professional forum. Fortunately, as far as I recall, it never went further. I asserted confidently that Michael Dukakis would win handily over George H. W. Bush. Since Bush won with a popular vote margin of about eight percentage points and by over 300 electoral votes I could hardly have been more wrong. I exited the election prediction industry forthwith, and I have never returned, at least in professional guise.

At that time the election-prediction industry had more economists hanging around its edges than it does today. There was a flurry of interest among economists in quantifying the connection between economic conditions and electoral outcomes. I have some entries on this topic in this period (e.g., Peltzman 1987; 1990). Economists working in the area were busy presenting, discussing, and

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regressing on questions such as: Which set of conditions mattered—those prevailing just before the election, or conditions over the whole political term? And which conditions—income, unemployment, inflation, etc.—mattered? Whose income or employment mattered—mine (the voter’s) or thine (the country’s)? I am not sure that a consensus ever emerged on these weighty questions, or on why we should ask them in the first place, but it was fun while it lasted.

Part of the fun was that you could plug a few numbers into the right-hand side of your favorite empirical model and generate predictions. That is the trap I fell into in mid-1988. I had some results that could generate predicted values for each state, and so generate them I did. They predicted an Electoral College romp for Dukakis. Well, as they say, you live and you learn.

I hope I learned something more than never to do it again. With hindsight the methodological stupidity seems obvious: Predicted values in our usage are conditional, not forecasts; they come with standard errors; and so forth. In this case the stuff that concerned us—the macro background—could only be decisive in close elections, and the standard errors were substantial enough to make any forecasting unwise. The work was sloppy. It involved much ad hoc fishing with little serious thought as to why we were fishing hither rather than yon. Certainly the issues that obsess us today—identification, omitted variables, and the like—were of little concern back then.

The larger lesson I would draw from the fiasco was one of humility. I like doing empirical work, and I have always tried to do it carefully. I think I enjoyed mashing the electoral data that went into my ill-fated prediction, and I don’t think there was some obvious error either in data or procedure. But I no longer regard a single result, mine or anyone else’s, with the kind of confidence that led me then to sally forth into embarrassment.

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# The Statements I Most Regret

Cass R. Sunstein<sup>11</sup>

I have said a lot of things that I regret. Here are the worst of the worst, beginning with the one that most makes me squirm:

1. “Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America.”

That’s the title of my 2005 book on constitutional interpretation, and it’s a statement, all right. The great literary critic Wayne Booth explores the idea of an “implied author,” that is, the apparent character behind a written work, who may or may not resemble the real person. The implied author of *Radicals in Robes* is disrespectful and accusatory; he engages in plenty of name-calling. He is uncharitable to smart and good people. He wraps himself in the flag (“wrong for America”). He goes for the platitude. He’s not interesting. At times, he’s like a radio talk show host.

I don’t like that guy.

True, the book was written at a particular historical moment, when I feared that federal judges would read the Constitution as if it reflected the views of the conservative end of the Republican Party. That fear was hardly baseless, and under President Trump, it might turn out to be even more justified. I do not regret the substantive arguments in the book. But it makes too many debaters’ points, and the tone is all wrong, and so is much of the terminology—for example, using the word “fundamentalists” to describe those who believe in following the original meaning of the Constitution. Ugh.

2. “We ought to ban hunting, I suggest, if there isn’t a purpose other than sport and fun. That should be against the law. It’s time now.”

I said that orally, in a symposium at Harvard in 2007. The statement caused some serious trouble when the Senate considered my nomination to serve as Administrator of the Office of Information and Regulatory Affairs in 2009. It’s fair to say that the statement almost derailed my nomination.

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But that's not why I regret it! Academics should not refrain from saying what they think because of the prospect of a difficult confirmation hearing. I regret the statement because I do not believe it. As I recall, my written remarks did not contain anything like that statement, and (I confess) the infectious enthusiasm and moral commitment of the very large crowd led me to endorse a position that, on reflection, I do not hold.

To be sure, there are strong moral objections to killing animals for sport and fun; I share those objections. But a legal ban on hunting would intrude on social practices that have long played a large role in American culture. True, traditions are hardly self-justifying, and it would be better if people preferred baseball, skeet shooting, and nature walks to hunting and killing live animals. But a legal ban, imposed by some kind of elite, would be a horrific fit with our nation's culture, and it would be disrespectful to the practices and commitments of millions of people (about 13.7 million, at last count).

3. "Marriage, as such, should be completely privatized."

That gem appears in chapter 15 of *Nudge* (2008), coauthored with Richard Thaler. The argument of the chapter is that the word "marriage" should not appear in any laws, and marriage licenses should "no longer be offered or recognized by any level of government." Sure, religious organizations could perform marriage ceremonies. But government would get out of the marriage business.

What a terrible idea. For countless people (including the present author, married in 2008, after chapter 15 was done), official marriage is important, even precious. It recognizes a status, and it does so in the distinctive way that comes from the state itself. Abolishing that status would impose a serious loss—and it might well have unintended bad consequences for spouses and children alike.

To be sure, Thaler and I were trying to solve a particular problem: the intense and seemingly intractable debate over same-sex marriage. We thought that privatization would be a way to make that debate disappear. We failed to foresee the immense power of the movement for same-sex marriage, which was able to achieve its goals in an extraordinarily short time. But even if that movement had turned out to fail, our proposal would throw away an indispensable institution.

4. "Cognitive infiltration."

In 2008, Adrian Vermeule and I published an essay in the *Journal of Political Philosophy*, "Conspiracy Theories: Causes and Cures." The essay deals mostly with why people believe (false) conspiracy theories; it explores the relevance of the availability heuristic, informational cascades, and group polarization. More briefly,

it discusses what government might do to correct (false) conspiracy theories. It emphasizes that the “first-line response to conspiracy theories is to maintain an open society.” But among other things, it suggests “a distinctive tactic for breaking up the hard core of extremists who supply conspiracy theories: cognitive infiltration of extremist groups, whereby government agents or their allies (acting either virtually or in real space, and either openly or anonymously) will undermine the crippled epistemology of believers by planting doubts about the theories and stylized facts that circulate within such groups, thereby introducing beneficial cognitive diversity.”

Vermeule and I note that we “assume a well-motivated government that aims to eliminate conspiracy theories, or draw their poison, if and only if social welfare is improved by doing so.” We also note, in passing (and without endorsing any particular proposal), that government has an array of possible responses to conspiracy theories, including bans and taxes. But we focus on (and do endorse) the idea of “cognitive infiltration,” and we spend several pages elaborating what that might entail.

I regret the term, because it is so readily susceptible to misinterpretation, and because it can be understood to conjure up the image of a new kind of Big Brother, using secret surveillance, and lies and tricks of various sorts, to undermine freedom of speech and association. Puzzlingly, and perhaps revealingly, not one of our many early readers objected to the term, or even flagged the possibility of misinterpretation, during the lengthy period in which the paper was circulating in draft and subject to comments (including peer review at the *Journal of Political Philosophy*). But when I was nominated to serve in the Executive Office of the President, a lot of alarm bells rang. Rereading the paper, I understand why.

I hasten to add that my own understanding of the proposal was quite narrow: We were speaking of how the U.S. government might disrupt recruitment efforts by terrorists who mean to kill Americans. (Vermeule, a wonderful friend and exceptional scholar, can of course speak for himself.) Nor was the proposal wild-eyed. From the public record, it appears that with respect to terrorists, the U.S. government is indeed working to use its own “agents or their allies (acting either virtually or in real space, and either openly or anonymously)” to “undermine the crippled epistemology of believers by planting doubts about the theories and stylized facts that circulate within such groups, thereby introducing beneficial cognitive diversity.”

In my view, there is nothing even a little bit wrong with that. But the narrowness of the proposal was not self-evident from the paper, and the term “cognitive infiltration” was a poor choice. It created a lot of misunderstanding and apparently widespread concern. (The fact that my job title was Administrator of the Office of Information and Regulatory Affairs was not helpful, because some

people thought that the word “information” suggested a propaganda function. In fact it refers mostly to the Paperwork Reduction Act.)

There is an interesting question about audience here. Red Auerbach, the great coach of the Boston Celtics, liked to say, “It’s not what you say; it’s what they hear.” If this particular paper had stayed in the academic domain—with readers of the *Journal of Political Philosophy*—there would be little or no cause for regret, because (I think) no one, or almost no one, would have taken it to be alarming. But academic articles always have some chance of receiving broader attention, and academics usually do best to avoid misunderstanding by general readers.

One last point: If an academic has said little or nothing that he regrets, there’s a real problem. A main job of academics is to float ideas and take risks, and if they do not make mistakes, or learn enough to change their minds, well, that’s really something to regret.

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