

REVIEW ESSAY

Environmentalism, Economics, and the Public Interest

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THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT.
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Mark Sagoff is probably best known to environmental scholars for his role in the "plastic trees" debate.¹ In response to a suggestion that plastic trees would be cheaper and more durable than real ones, he undertook to explain what was wrong with such a utilitarian calculation. Since then, Sagoff has continued to explore the philosophical basis of environmental law. In *The Economy of the Earth*, he brings together fifteen years of scholarship on the subject of environmentalism. While he has by no means repudiated his early work, this book makes it clear that his thought on the subject has deepened and matured.

Much of the book, like Sagoff's first "plastic trees" article, is dedicated to attacking cost-benefit analysis and the associated standard of economic efficiency.² Some scholars, with important support from the Reagan Administration, have contended that economic efficiency is the only proper basis for assessing environmental regulation.³ Sagoff's ba-

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1. For the major contributions to the debate, see Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974); Laurence Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545 (1975); Laurence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). Sagoff and Tribe agreed in rejecting utilitarianism, but disagreed sharply in their rationales.

2. Briefly, a government action is economically efficient if its benefits exceed its costs in monetary terms, so that the beneficiaries could afford to compensate the losers and still remain ahead of the game.

3. The Reagan Administration's efforts to mandate cost-benefit analysis are discussed in Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 442-63 (1987). For references to the scholarly support for this approach, see pp. 225-26 nn.2-13, 228-30 nn.6-27. Because so much of the book is dedicated to attacking this use of economics, it is important to note that Sagoff is by no means hostile toward the discipline of economics. He believes that economists can provide policymakers with vital information, and in fact he supports some

sis argument is that cost-benefit analysis applies only to personal preferences, whereas environmentalism involves moral values.⁴ Such moral issues, he believes, more properly belong to the political process and cannot be resolved through economic analysis.⁵ Cost-benefit analysis can only compare the competing weight of arbitrary private wishes, not the moral principles involved in modern social regulation.

I will contend that Sagoff is right in arguing that environmental values are entitled to consideration independent of economic efficiency, but wrong in repudiating economic efficiency as another valid social goal. More generally, he errs in elevating "public values" like environmentalism over the private values of everyday life. He also focuses too exclusively on environmental protection of nature and fails to acknowledge the distinctive problems presented by health regulations. Finally, although Sagoff overly romanticizes politics while unduly deriding private life, he is correct that the political process is the appropriate forum for environmental decisionmaking. Thus, while I reject much of his argument, I agree with his fundamental thesis about the inherently political nature of environmental issues.⁶

Part I of this review essay will consider the relationship between environmental values and economic efficiency, concluding that both are legitimate social goals. Part II will then explore the special problems raised by environmental regulations designed to protect human health. Deciding how to balance safety and cost often involves knotty policy issues. Finally, Part III will return to the more general problem of how to define the public interest. As Sagoff correctly suggests, the public interest cannot be reduced to some objective standard like economic efficiency. What, then, does it mean to say that environmental protection is in the public interest?

economists' proposals for using "market-like" mechanisms to control pollution. See pp. 205-10, 217. His quarrel with economic theory concerns the goals of environmental law, not the role of economists in devising the means.

4. See pp. 8-9, 113-14.

5. See pp. 17-18, 26-29.

6. I also agree that environmental problems call for the exercise of practical reason rather than brilliant theorizing:

[T]o solve policy problems we need to develop the ordinary virtues of inquiry and deliberation . . . even at the expense of developing stimulating theoretical insights in journals of policy and economics. This does not mean that we need to replace the absolutes of welfare economics with other absolutes such as those associated with a "no risk" society. Rather, it means that we have to get along without certainty; we have to solve practical, not theoretical, problems; and we must adjust the ends we pursue to the means available to accomplish them. Otherwise, method becomes an obstacle to morality, dogma the foe of deliberation, and the ideal society we aspire to in theory will become a formidable enemy of the good society we can achieve in fact.

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I. ECONOMIC EFFICIENCY AND ENVIRONMENTAL VALUES

A. *Is Economic Efficiency the Only Value?*

Suppose we were doing a cost-benefit analysis to determine whether to save the whales. On the benefit side we would count the sale of whale products; on the cost side, we would include the expense of whaling. We would also want to evaluate the possibility of preserving a stock of whales so as to extend consumption into the future.⁷ Moreover, because whales are part of the ocean's ecological balance, whaling creates externalities that must be considered in a cost-benefit analysis. There are also recreational activities to be taken into account—for example, the amount of money people would be willing to pay for new National Geographic movies about whales. Beyond this, some economists would attempt to take into account the strong feelings many people have about saving the whales. Those people would be unhappy if the whales were exterminated and would be willing to pay something to prevent that outcome. In an attempt to make the cost-benefit analysis complete, the analyst might assign "shadow prices" to environmentalism based on their willingness to pay. Sagoff contends that environmental values cannot properly be considered by including them in the cost-benefit calculation.⁸

Unlike the environmentalist, who unabashedly seeks to advance particular values, the cost-benefit analyst may appear to stand above the fray, seeking only to maximize the satisfaction of consumer preferences.⁹ Counting moralisms as externalities may seem to provide a neutral decisionmaking process for combining individual preferences about public policy.¹⁰ But economists know better than to think such a process exists.

Arrow's Theorem shows that no possible methodology can reliably convert individual preferences into a rational social decision. Majority rule, for example, can produce bizarre results with three or more items on the agenda because shifting coalitions can lead to paradoxical "cycles." Although the theorem is often invoked in connection with voting mechanisms, it actually applies to any attempt to transform individual preference orderings into a rational social choice. Every method of social choice inevitably has its flaws. Economic efficiency, in a sense, is even worse than majority voting because it can produce cycles when

7. Whether preservation makes sense on these terms would depend on how the reproduction rate of whales compares with market interest rates: If whales reproduce at a rate of 3% annually, while money reproduces at 5%, we are better off converting the whales to cash and investing the proceeds.

8. See pp. 35-39.

9. See Charles Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 451-52 (1975).

10. See p. 40. For a discussion of moralisms from a leading member of the law and economics movement, see GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* ch. 4 (1985).

there are only two items on the agenda. That is, it is perfectly possible to have situations in which "*A* is more efficient than *B*" and "*B* is more efficient than *A*" are both true.¹¹

Sagoff exploits this weakness in the efficiency standard by showing how it can sometimes produce indeterminate results in environmental disputes.¹² Consider the decision to destroy a stand of redwoods. If lumber companies begin with the legal right to harvest the trees—because they owned them, for example—environmentalists might not be willing (or able) to pay the companies enough to get them to stop. A cost-benefit analyst would say that company profits were greater than the external costs imposed on the environmentalists, so logging would be economically efficient.

The loggers' argument assumes, however, that they own the entitlement to control logging. If the environmentalists had the legal right to prevent logging, they might demand a much higher price to sell that right to the lumber companies. One reason for the disparity is that changes in wealth shift the demand curve. Before, the environmentalists may simply have been too poor to pay what it was really worth to them to stop the logging. Owning the trees, they are in a position to demand from the loggers what they themselves could not afford to pay. Thus, if the environmentalists own the entitlement, the cost-benefit analysis may well show that logging is inefficient. We can't decide whether the logging is economically efficient until we know who has the entitlement. Cost-benefit analysis is indeterminate in this situation. We must look elsewhere to decide whether we should allow the trees to be cut.

None of this is news to economists.¹³ Even the most fervent believers in economic efficiency concede that "there is more to justice than economics."¹⁴

B. *Environmentalism As a Preference?*

This argument shows that economic efficiency alone cannot decide environmental disputes. Sagoff, however, wants to show more than this. He wants to show that cost-benefit analysis cannot even consider environmental values. He argues that economists are guilty of what philosophers call a category mistake—that is, that they are attempting to apply an attribute to the wrong category of entities, like trying to

11. This point is developed at greater length in Daniel Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337, 352-54. For a related argument against "wealth maximization" as a principle for social choice, see Donald Keenan, *Value Maximization and Welfare Theory*, 10 J. LEGAL STUD. 409 (1981).

12. See pp. 83-84, 184-85, 254 n.24. His argument follows Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems*, 33 STAN. L. REV. 387 (1981).

13. For example, the reversibility problem is discussed in Robert Cooter, *Liberty, Efficiency, and Law*, 50 L. & CONTEMP. PROBS. 141, 152-58 (1987).

14. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 25-26 (3d ed. 1986).

attach colors to numbers.¹⁵ In this instance, the attribute is "willingness to pay," which Sagoff claims applies only to personal tastes. As he says, no one would think that the validity of a mathematical proposition depends on whether its backers were willing to pay more in support of their belief than were the skeptics. "No matter how much people are willing to pay, three will never be the square root of six."¹⁶ Just so, he says, for moralisms.¹⁷

Here, it seems to me, Sagoff is only partially correct. "We should save the whales" is indeed a different kind of statement from "I like Szechuan food."¹⁸ So far, Sagoff is on track. But "we should save the whales" is also quite unlike " $2 + 2 = 4$ " or "the earth is round." In comparing moralisms to mathematical or empirical statements, Sagoff himself may be guilty of mixing categories.

Notably, despite Sagoff's claim that environmentalism is not just a preference but a moral principle "to be judged on the basis of reasons rather than wants,"¹⁹ he makes no real attempt to justify environmentalism rationally. This is a problem, not because environmentalism and other values necessarily need some logical foundation, but because Sagoff wants to call values "principled" and preferences "arbitrary." When he seeks to support environmentalism, he invokes the role of nature in literature and public opinion polls supporting environmentalism.²⁰ These would not count as rational arguments for a scientific theory or a mathematical theorem, or even, I would think, as valid arguments for a moral philosophy. His treatment raises the question of how seriously he takes his own argument that moralisms differ fundamentally from personal preferences.

Indeed, the distinction between the arbitrary and the principled may itself be rather overdrawn. Some preferences do not fit either category. Friendship is a good example. I cannot reasonably claim that every truly rational creature must like my friends. It would also be odd for me to say that my friendships are based on neutral principles. Yet friendship is not "arbitrary." It is not even purely a matter of choice. Instead, it is to some extent an unmediated response: I can't help but like my friends. The particular things I like about them, the traits that I value, are not themselves arbitrary; rather, they are closely linked with other aspects of my personality and life history. Moreover, to speak of friendship as "arbitrary" would overlook the extent to which the friends make the person; their perceptions of me and my experiences with them are part of what makes me what I am. Much the same is true

15. This term was introduced in GILBERT RYLE, *THE CONCEPT OF MIND* 11 (1949).

16. Pp. 44-45.

17. See pp. 8-9, 55-57, 69, 95.

18. The fact that I like Szechuan food does make me think that other people ought to like it as well, but I would not argue that they are obligated to eat it, whereas the environmentalist would claim that others are obligated to help save the whales.

19. P. 44.

20. See ch. 6; see also pp. 51, 254 n.23.

of other things that are important to people, including consumer goods like books or music, and nature itself.²¹ Basic personal values differ from mere "tastes" not because they are necessarily more rational or principled, but because these "habits of the heart"²² are so deeply a part of our lives.

In any event, Sagoff's "category mistake" argument does not address the important issue.²³ The real question is not whether environmental values should be ignored in doing cost-benefit analysis. After all, there is no reason for environmentalists to chastise economists for paying too much attention to the environment.²⁴ Rather, environmentalists claim that environmental values are entitled to independent consideration regardless of whether they can be incorporated into a cost-benefit analysis as well.

Even if efficiency cannot be the exclusive value promoted by government,²⁵ it might be argued that environmentalism and other moralisms are impermissible values. The strongest argument to this effect has been made by Ronald Dworkin. He contends that liberalism requires the government to remain neutral on the question of "the good," taking no position on what forms of human life are better than others. Ideally, the government would give each individual an equal share of resources, leaving it to the market to determine the allocation of goods and services.²⁶ If resources are fairly distributed, Dworkin says, the government should not interfere to promote the views of those who value wilderness against those who value increased coal production.²⁷ As Sagoff and others have argued, however, Dworkin's view

21. For an insightful analysis of the reasons for valuing artistic creations (many of which also have some relevance to environmentalism), see John Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. — (1989) (forthcoming). Even food preferences, often considered the epitome of arbitrariness, are not wholly arbitrary. They can also reflect, for example, provincialism versus cosmopolitanism.

22. I draw the phrase from HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (R. Bellah, R. Madsen, W. Sullivan, A. Swidler, & S. Tipton eds. 1985).

23. Sagoff's argument also 'proves too much'. If the truth of the proposition, "The whales should be saved," is unrelated to its believers' willingness to pay, it is presumably also unrelated to whether they are a majority of the population. Hence, deciding whether to implement that viewpoint on the basis of a majority vote is just as much a "category mistake" as making the same decision based on willingness to pay.

24. It is by no means clear that the government's response to a widespread social belief should turn solely on its truth. If many individuals wrongly believe that some harmless chemical causes cancer, it may be cheaper to eliminate the chemical than to educate the population. If the government can cheaply reassure extremely worried individuals, this seems desirable even if the cause of their anxiety is irrational. So, including moralisms in a cost-benefit analysis is not necessarily illegitimate.

25. The orthodox economic position, of course, is that efficiency is not an exclusive value at all. Rather, according to conventional welfare economics, the distribution of income must also be considered. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS chs. 2-3 (1983). The question is not whether efficiency should be augmented with other values, but whether environmentalism is one of those supplementary values.

26. See RONALD DWORKIN, A MATTER OF PRINCIPLE ch. 8 (1985).

27. *Id.* at 202.

is a caricature of liberalism.²⁸ While liberals do value tolerance and individual freedom, they need not make a fetish of moral neutrality.

When it adopts moralisms, the government is obviously favoring the views of some citizens over the views of others. Anti-environmentalists cannot be happy that their tax dollars are "wasted" on preservation. But citizens often disagree with government decisions and believe that tax money could be better spent elsewhere. The anti-environmentalist taxpayer seems to have a grievance no different in principle from that of the taxpayer who thinks the defense or social welfare budget is too large. Inevitably in deciding political disputes, the government will favor some views over others; but this does not mean that some groups are receiving unjustified favoritism. In short, the liberal vision of equality need not mean that government is powerless to favor those who want to save the whales over those who would rather kill them.

One way to reveal the flaw in Dworkin's argument is to consider a variant of the reasoning employed by John Rawls, Dworkin's fellow liberal philosopher. Rawls would assess social institutions by asking whether they would be adopted behind "the veil of ignorance," that is, by individuals who are ignorant of their own attributes, moral views, or position in society.²⁹ As a variation, imagine a group of individuals making plans for society. The individuals are presently all environmentalists, but they are not confident that any of them will retain this belief in the future. This deprives them of any assurance of personal benefit from implementing their present beliefs, since later they may not appreciate living in a world with lots of wilderness. Yet, if they now value wilderness, it would be rational for them to provide safeguards against their possibly anti-environmentalist future selves.

This desire to safeguard against future changes in preferences does not depend on these preferences having any "objective" basis. If, for some reason, a person had reason to think she might later turn against a friend who needed her help, she might well want to take steps now to safeguard her friend's interests, without believing that her friendship had some "objective" basis. On the other hand, if I now like Szechuan food but suspect that I won't in the future, it would be foolish of me to stock up now. In this sense, mere tastes differ from personal values, even if neither one claims to be "objectively" valid.

In one sense, my variation on Rawls is simply a strained hypothetical, but in another sense it is not so different from the ordinary state of the world. We know our preferences today (more or less). But we know much less about what our own preferences will be in the future, and even less about what the preferences of our children and grandchild-

28. See ch. 7; see also Steven Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103, 1147-74 (1983); Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

29. See JOHN RAWLS, A THEORY OF JUSTICE 11-22 (1971).

dren will be. In thinking about the future of our society, goals like allocational efficiency and distributional equality are all very well. But we can properly hope for more than that, for even more than a society that "takes rights seriously."³⁰ We can also hope for a future society which has preserved natural beauty, has a vibrant culture, and in other ways fits our own views of the good life.³¹ Sagoff is right that these goals need not be subordinated to economic efficiency. He is wrong, however, in thinking that the reason is based on some inherent philosophical distinction between these goals and those that animate private life.

C. *Does Economic Efficiency Have Value?*

Sagoff goes beyond arguing that environmentalism is a legitimate social goal. He also argues that efficiency is itself not a permissible goal and has no intrinsic value at all.³² The least controversial form of the efficiency standard derives from Pareto. A change is a "Pareto improvement" if someone prefers it and no one else opposes it.³³ Sagoff makes the somewhat startling argument that even Pareto improvements are not inherently worthwhile.

In his view, the fact that something is a Pareto improvement is no reason for the government to support it.³⁴ According to Sagoff, "[e]fficiency has no merit or worth to begin with and therefore cannot be balanced against substantive values like equality or justice"; hence, a "trade-off" between efficiency and equality is conceptually not in the cards.³⁵ He makes it plain that this applies even to Pareto improvements:

Even if there are no losers—if at least one person prefers and no one opposes the policy—it is preferable just from that individual's point of view. The idea that it is preferable from *society's* point of view either means nothing or begs the entire question. Why should a policy that benefits *some* be considered, in addition, to benefit *society* or to com-

30. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

31. As Sagoff argues persuasively, this is not so much a matter of maximizing the preferences of future generations, as of our responsibility to make a world which will be fit for them to live in. As he points out, it is hard to see how our descendants can have a present right to have their preferences considered; not only do they not yet exist, but our own decisions today will determine who they will be and perhaps what preferences they will have. See pp. 63-64.

32. See ch. 5.

33. "Pareto optimality" is a more problematic standard. A state is Pareto optimal if no Pareto improvement is possible (that is, at least one individual would oppose a move to any other possible state). Use of this standard is controversial because many Pareto optimal states may exist, some of which may be highly undesirable in other respects. For example, allocating all wealth to one individual may be Pareto optimal, since that individual may object to any reallocation. Thus, the term Pareto optimality may carry a false implication that a state is desirable in some absolute sense. The term "Pareto improvement" does not carry any misleading implication of absolute desirability. It merely expresses a judgment about the relative desirability of two specific states. See JAMES HENDERSON & RICHARD QUANDT, *MICROECONOMIC THEORY: A MATHEMATICAL APPROACH* 255, 279-80 (2d ed. 1971).

34. See pp. 99-104, 223-24.

35. P. 107.

mand the consent of *society* as a whole?³⁶

Inasmuch as society is composed of individuals, this is a bit baffling. I imagine going out for a pizza with Sagoff and some friends, Muir and Audubon. Audubon really likes mushrooms and the rest of us are indifferent. We prepare to order a large pizza with mushrooms. Sagoff then objects that Audubon's preference for mushrooms gives the *group* no reason to order them. To use one of Sagoff's favorite adjectives, this seems a bit crazy.³⁷

If our mushroom-loving friend Audubon is actually extremely allergic to mushrooms, we might not want them on the pizza even though he himself can't resist the temptation to order them. Thus, Sagoff would be on solid ground if he were arguing merely that the existence of an individual preference does not necessarily justify government action. But Sagoff's claim is much stronger; it is that the existence of a preference provides no reason at all for the government to act, even if there are no evident countervailing factors.

The argument against this claim is powerful. Individuals clearly do not always know what is good for them, but then neither does the government. The question is whether individuals are more likely than strangers to know their own welfare. If so, implementing individual preferences will, as a rule, improve individual welfare. Sagoff provides no reason for rejecting the premise that improving individual welfare is a valid social goal. This premise strongly implies that individual preferences presumptively do give the government a reason to take action.³⁸

Sagoff's rejection of the Pareto test further reflects his dichotomy between mere preferences and principled moral values. He regards many, perhaps most, preferences as unworthy of satisfaction. He argues that there is a "negative correlation between material improvement and perceived happiness,"³⁹ once "basic needs" are met. Material progress actually produces dissatisfaction because "[h]appiness and well-being are more likely to spring from overcoming or outgrowing many of our desires than from satisfying them."⁴⁰ The pursuit of private satisfactions, he says, is attractive only to hedonists.⁴¹

36. P. 108 (emphasis in original).

37. Perhaps Sagoff would respond that this situation is different because it is nonpolitical, while he is concerned with government decisionmaking. But one can readily imagine government officials in a similar situation. For example, suppose that a government committee is trying to decide what color to paint their meeting room. The committee has already narrowed the choice down to two colors. Everyone on the committee is indifferent between the two, except for one person who has a strong preference for one of the colors. Should the committee now flip a coin, ignoring that person's preference?

38. In cases of conflicting preferences, the argument for economic efficiency is more problematic because of distributional effects, which must be considered. In many applications of economics to legal problems, however, distributional effects are not substantial. See WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURES OF TORT LAW* 17-19 (1987).

39. P. 104; see also pp. 131-32.

40. P. 104.

41. P. 116.

In contrast, he discusses environmental values in tones of veneration. He speaks of the "reverence" we owe to what is wonderful in nature,⁴² and says that values we consider "sacred" cannot be priced in the market.⁴³ As the following passage illustrates, Sagoff puts environmental values on a higher spiritual plane than mere consumer consumption:

The wilderness that had served [Americans] had also seduced them, and in destroying it, they destroyed something of their hopes, something of their history, and something of their future as well as of their past. They saw that their prosperity was also an apostasy, their nationalism was also a secularism, and their happiness was also an emptiness. And while they reasoned in terms of wealth, power, comfort, and amenity, they had nothing to serve but themselves.

If, after this time, Americans have remained materialistic, if they have emphasized personal acquisition and wealth, they have done so *faute de mieux*. It is a part of their national character to want a devotion to noble purposes, a respect for great symbols, a commitment to important ideals. Of course, they had only one place to look. If they found collective symbols of freedom, intelligence, virtue, courage, and strength, they did so because a puritan people ascribed these qualities to nature itself.⁴⁴

Despite his rejection of materialism, Sagoff recognizes that economic considerations must be considered in environmental protection. He concedes that expecting people to abandon material comfort completely would be unrealistic. Firms should not be forced to forego all profit in order to protect the environment. However, Sagoff believes that exceeding the reasonable level of environmental protection should be considered "supererogatory," like an act of exceptional heroism.⁴⁵ Although the government should not close factories to eliminate the last traces of pollution, Sagoff implies that it would be praiseworthy for a firm to close voluntarily for that reason. Sagoff appears to attach little moral weight to the material losses incurred by shareholders, consumers, and most dramatically, unemployed workers.

One of the standard criticisms of environmentalism is that it is an essentially upper-middle-class movement, dedicated to preserving exotic recreational activities like backpacking and mountain climbing.⁴⁶ Although this criticism is in my view unfair (and underrates the breadth of public support for environmentalism), unsettling hints of this attitude appear in Sagoff's writings. When he gives illustrations of con-

42. P. 64; *see also* pp. 141-42.

43. P. 69.

44. Pp. 131-32.

45. *See* pp. 219-20. For example, the EPA "may argue instead that a reduction below reasonably safe levels counts as supererogatory given the technical, economic, and scientific factors bearing on a particular case." P. 220; *see also* pp. 197-98, 209-10.

46. For a general discussion of elitism and environmental law, *see* Gerald Torres, Book Review, 42 U. PITT. L. REV. 823, 828-33 (1981) (reviewing JOSEPH SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980)).

sumerism, he seems to select examples of plebeian tastes, such as recreational vehicles, romance novels, and velvet paintings.⁴⁷

More troubling is Sagoff's basic premise that personal consumption involves only trivialities. After "basic needs"⁴⁸ are met, any further consumption serves no purpose, for "[o]rdinary consumer preferences . . . are usually regarded not as intrinsically good but as arbitrary from a moral point of view."⁴⁹ Although this kind of asceticism is probably not unique to Sagoff among environmentalists, it is ultimately untenable, and not just because the flesh is weak. Environmentalism surely does not promote a society that preserves redwoods but bans flowers because only vegetable gardens are needed to meet "basic needs."⁵⁰

Sagoff recognizes that society should "strive to make the conditions under which people live and work cleaner, safer, more natural, and more beautiful," but he endorses these goals while speaking of them as subjects for government regulation.⁵¹ Sagoff does not address the possibility that private life can also seek these goals. This blindness to the moral value of private life underlies his rejection of economic efficiency as a social policy.

II. ENVIRONMENTALISM, PATERNALISM, AND RISK MANAGEMENT

Preserving nature is an important goal of environmental law. In recent years, however, saving human lives has become an equally important goal. Much of the recent growth in environmental law has been in the area of toxics regulation. Sagoff seems to assume that the issues at stake in toxics regulation are philosophically fungible with those of wilderness preservation. I question this assumption.

A. *The Problem of Paternalism*

Sagoff's premise is that "important shared values, for example, health, well-being, safety, cleanliness, and respect and reverence for nature . . . justify governmental intervention in markets, whether or not these markets are efficient."⁵² Human health and safety concerns raise quite different problems, however, from programs like protecting endangered species. In deciding how much to spend on saving the

47. See pp. 63, 67.

48. See p. 100. It is quite unclear to me what Sagoff means by a basic need, beyond the minimum number of calories needed for survival.

49. P. 102.

50. Taken seriously, this kind of asceticism would promote a society in which people did not waste money on architecture but instead lived in pre-fab barracks in which tasteless soy mush was the only available food, and in which the only athletic activities were calisthenics. This picture is not entirely fanciful. It bears resemblance to some of the excesses of the Chinese Cultural Revolution. For example, pets were not necessary to meet "basic needs," and were exterminated as parasites by the Red Guard. See William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 742 n.327 (1988).

51. P. 101.

52. P. 7.

whales, we need not worry about what the whales think is the appropriate tradeoff. But the beneficiaries of safety regulations will often have their own views about the appropriate level of protection.

For example, suppose an industry employs 10,000 workers. Current levels of exposure to a toxin will eventually kill five of these individuals. Eliminating the toxin will cost \$500 million, or \$100 million per life saved.⁵³ If the employees do not value their own lives that highly, a cost-benefit analysis will be unfavorable. Suppose that the workers actually value their lives at \$50 million apiece (which is much higher than the amounts revealed by econometric studies).⁵⁴ The employer is then spending \$500 million to deliver a benefit that the employees assess as being worth \$250 million.⁵⁵ Both employer and employees would prefer that the government simply tax the company \$300 million and send a check for \$30,000 to each worker. From their perspective, the government action is no different from imposing a \$500 million tax on the company, burning half of the money, and giving the rest to the workers. Depending on how the safety regulations affect employment, the workers may even find themselves worse off than they were to begin with.⁵⁶

In any event, it is not at all clear how the change can make the employees any better off in their own estimation. Their relative bargaining position limits the total wage which they can extract from the employer. The fact that the employer has just paid out \$500 million for safety equipment is hardly likely to make the employer willing to pay higher compensation as well. The government cannot increase their total compensation by ordering that part of it be paid in the form of safety improvements, any more than it could do so by ordering that workers be paid in apples instead of dollars. If workers are unwilling to buy apples (or safety) at the market rate, it is hard to see how their lives can be improved by requiring employers to pay part of their salary in

53. These figures may seem exaggerated, but they are actually of the same order of magnitude as those in a recent Supreme Court case. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 628-30, 654 (1980) (plurality opinion).

A fuller but more complex presentation of the same hypothetical would treat both the benefits to the workers and the costs to the industry as future cash flows reduced to present value. Also, a similar "stock versus flow" clarification could be made about the risk level, since employees enter and leave the industry constantly. The risk level given in the text should really be understood as the risk per employee work-year, multiplied by the number of employees and the average number of work-years.

54. See text accompanying note 72 *infra*. See also Richard Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1311-14 (1980).

55. Taking into account risk aversion would complicate, but not fundamentally change, the analysis.

56. For example, suppose that safety costs are proportional to output and that product demand is not perfectly inelastic. The effect of the safety regulation is then to shift the industry supply curve to the left, where a higher price is required to induce the industry to produce the same quantity. The result is that output falls, bringing about unemployment. The product price also rises, however; hence, part of the safety cost is passed on to consumers.

this form.⁵⁷ Thus, the regulation is apparently only worthwhile if we take the paternalistic attitude that the workers misunderstand the facts or undervalue their safety.⁵⁸

Sagoff attempts to sidestep the paternalism issue by arguing that risk preferences are actually irrelevant to the regulatory problem. Even if a risk is sufficiently small that people might be quite willing to assume it voluntarily, he maintains that they have a right to be free from involuntary imposition of the risk.⁵⁹ As an example, Sagoff recounts the story of a meeting about a nuclear waste site.⁶⁰ Residents were quite unimpressed—rightfully so, he thinks—by the assertion of a state official that “risks they casually accept, for example, by drinking alcohol or by crossing the street, were greater than the risks associated with the buried radioactive residues.”⁶¹ The residents were also unimpressed by the official’s argument that the waste facility brought enough income and employment into the town to compensate for the hazards. As Sagoff sees it, the real issue was the distribution of power in society, not the relationship between costs and benefits.⁶²

Apparently, if they had been consulted in advance, the residents would have agreed to the facility, or at least they would have been irrational if they did not, since the risk was insubstantial and the benefits were significant. But Sagoff argues that hypothetical consent is not enough; the fact that someone would have consented to a transaction means nothing unless they actually did consent.⁶³

Sagoff is right, I think, in his analysis of the psychology of the situation. Natural radon emissions are probably a far more serious health hazard than many heavily regulated activities.⁶⁴ But only nature is to blame, so this threat arouses relatively little public fervor.⁶⁵ Much of

57. It's hard to see, but maybe not impossible. There is an economic model in which destroying a bushel of wheat causes a society-wide Pareto improvement by expediting the creation of futures markets. See David Kreps, *In Honor of Sandy Grossman, Winner of the John Bates Clark Medal*, J. ECON. PERSP., Spring 1988, at 111, 121-23. Conceivably, requiring payment in safety improvements may improve social welfare.

58. One way of strengthening the cost-benefit analysis is to appeal to the preferences of members of the public. If 100 million Americans would each be willing to pay five dollars to save the lives of five factory workers, then the cost-benefit analysis would support regulation. But Sagoff correctly rejects this approach as failing to prove anything. There may be another 100 million Americans willing to pay five dollars apiece to save the company and its workers from unwarranted paternalistic intervention. In any case, saying that onlookers would be willing to pay more than the workers themselves to guard the workers' safety does little to advance the analysis. We would still want to know why the onlookers think they are better able to assess the value of worker safety than the workers themselves.

59. See pp. 185, 197-98.

60. See pp. 24, 46-47.

61. P. 24.

62. P. 24; see also pp. 46-48.

63. See pp. 108-10, 242 n.31. Although there is a somewhat stronger argument for actual consent in the case of our chemical workers, it is somewhat fanciful to assume that every worker made a conscious tradeoff between this particular risk and increased compensation.

64. See Research Note, *Indoor Radon: The Deadliest Pollutant*, 240 SCIENCE 606 (1988).

65. In a national poll, people ranked radon 27th out of 28 hazards, just above microwave

the outrage over toxic chemicals is probably due to the feeling that someone secretly imposed a risk on others; it is this feeling of powerlessness that gives rise to anger. Moreover, Sagoff also seems to be correct in arguing that hypothetical consent is not necessarily sufficient. If a panhandler picks my pocket, it is no defense that I would have given him the money anyway. We have an interest in the fairness of the process that determines what risks we are exposed to, even when we might, in the end, find the risk acceptable.⁶⁶

The independent significance of the decision-making process has some interesting implications for toxics regulation. It suggests that we should pay a great deal of attention to process, to full disclosure, and to public participation in setting levels of acceptable risk.⁶⁷ We might, for example, want to encourage collective bargaining on safety issues. But this approach does not resolve the ultimate question of how much safety is enough. Suppose that after full disclosure, workers continue to accept unsafe working conditions. Is society justified in intervening?

Sagoff has little hesitation in embracing paternalistic regulation:

The transactions that led to child labor, the sixteen-hour workday, and hideous workplace conditions were largely voluntary and informed; no centralized bureaucracy in Washington told workers how old they had to be or what minimum they had to be paid; labor markets were efficient. The resulting levels of death, misery, and disease, even if "optimal" or "efficient" from an economic point of view, cannot be tolerated in any civilized nation.⁶⁸

The reason Sagoff does not find paternalism troubling is that he is convinced that safety regulations change workers' preferences:

Suppose we were to determine for cost-benefit purposes a value-per-life-saved from *unregulated* but otherwise efficient markets—markets as they were, for example, at the turn of the century. Suppose, in other words, that we were to set an economic value on safety on the basis of the amount traded for it in markets not severely constrained by humanitarian regulation. It might be a very low value indeed. A hundred years of compassionate legislation has produced conditions in which economists can now argue that voluntary markets set an appropriate value on worker safety. This is a result not of more efficient markets but of persistent ethical regulation.⁶⁹

This argument attempts to avoid the paternalism problem by rely-

ovens. See Michael Hinds, *Radon: Making the Public Pay Attention*, N.Y. Times, Sept. 24, 1988, at 56, cols. 3, 5.

66. On the other hand, we have much less interest in a process in which the result is a foregone conclusion. This may have been true in the example Sagoff cites, in which the residents would only have rejected the waste facility if they had irrationally overestimated the risks.

67. Of course, we might decide that some risks are too trivial to warrant the costs of such "environmental due process." At some point, presumably, a risk becomes so insubstantial in relation to the benefits that the claim of involuntariness becomes moot.

68. P. 15.

69. Pp. 115-16 (emphasis in original).

ing on preference shifts. Because of the regulations, workers will be accustomed to greater safety and their willingness to tolerate risk will decrease. Hence, after the regulations are in effect long enough, they will fit the workers' own preferences. This argument is unsatisfactory for two reasons. First, it may not be factually accurate. How do we know that workers will be more willing to sacrifice wages for safety after the regulation is in effect? Sagoff's factual premise is not implausible, but plausibility is not proof. Second, as a general matter, reliance on future preference shifts is a dangerous way of avoiding the paternalism problem because it has the capacity to justify almost anything.⁷⁰

Although Sagoff's argument is inadequate, a better response to the paternalism argument is available. We have good reason to question whether the risk preferences revealed by industry wage patterns accurately reflect employees' considered appraisals of their interests. Studies by cognitive psychologists and others show that individuals are quite bad at estimating risk levels. Even where a risk is known, people do not process the information very well. They systematically deviate from rationality in considering combinations of risks; they ignore background information in assessing new data; and they are easily swayed by trivial changes in the presentation of information.⁷¹ Finally, when using labor information as a basis for assessing risk preferences, as is commonly done, we need to be especially cautious. The operation of labor markets is quite poorly understood by economists, which makes interpretation of the data difficult.

The upshot is that the methods used to determine risk preferences are quite unreliable. Not surprisingly, the results are extremely variable, with estimates of the value of life ranging from \$15,000 to \$10 million.⁷² So, we need not be terribly concerned with the claim that a regulation requiring that several million dollars be spent per life saved is oppressively paternalistic. This still leaves, however, the question of how we should set the appropriate level of risk.

70. See David Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 549-50 (1988) (rejecting Sagoff's argument for paternalism); Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1148-50 (1986) (endorsing Sagoff's form of paternalism but cautioning against the risk of abuse). Moreover, Sagoff's argument also fails to explain why we should reject the workers' present preferences in favor of greater safety. If we reduced safety levels, workers might put a lower premium on safety, shifting their preferences in precisely the opposite direction. Thus, the fact that workers' preferences might respond to government intervention does nothing to justify intervening in one direction rather than the other. It leaves unanswered the question why we should overturn the workers' current preferences.

71. This research is summarized in Ames Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67 (R. Hogarth & M. Reder eds. 1987).

72. See E.J. Mishan, *Consistency in the Valuation of Life: A Wild Goose Chase?*, in ETHICS & ECONOMICS 152, 160-61 (E. Paul, F. Miller, & J. Paul eds. 1985); Pierce, *supra* note 54, at 1312.

B. *How Much Safety is Enough?*

Eliminating the paternalism problem still leaves us with the ultimate question of how much safety society should seek. Unfortunately, Sagoff does not really address this problem, apparently because he considers safety to be a moral imperative. Evaluating both the benefits of safety and the appropriate social burden turns out to be quite difficult.

In the previous section, we assumed the only relevant risk information was the level of risk, that is, in the simplest terms, the mortality rate. This risk information is often difficult to obtain, given the limits of scientific knowledge about toxic chemicals. But the problem is even more complex because most people consider other factors in evaluating the seriousness of risks.⁷³ The cause of death is important. People quite reasonably think that slowly dying of cancer is worse than a sudden heart attack or accidental death. Age is another factor. Accelerating the death of an elderly person is not considered to be as horrible as causing the death of a child. This, too, seems reasonable, not because the elderly have less intrinsic moral worth than the young, but because death does not deprive them of so many of the major experiences of human life. Moreover, because death in old age is an expected part of the life cycle, it does not have the same traumatic effect on survivors as early death. Clusters of deaths are also taken more seriously. While it is bad to kill three people in the general population, it is worse to kill three in the same community, and worse still to kill three in the same family. This aspect of risk preferences also seems reasonable, both because concentrated deaths have more traumatic effects on survivors and because it seems fairer to distribute risks broadly.

I have more qualms about two other factors that people seem to find important to assessing risk. One is the unfamiliarity of the risk. Familiar risks are given less weight than those involving mysterious technology or esoteric scientific principles. This is a factor that should not be wholly discounted. It is important that people be able to make sense of the major events in their lives, particularly something as important as their own impending death or the death of someone they love. It is easier to make sense of and accept the familiar than the exotic. Still, people's fear of novel technological risks at times seems almost hysterical, leading to burdensome regulations on extraordinarily small risks.

The other major factor in risk assessment is voluntariness. Like unfamiliarity, this too has some reasonable basis. Regulation of voluntary risks raises greater problems of paternalism. Voluntary risks are also less socially traumatic because the resulting deaths fit more easily into a

73. Much of the discussion in the text is purely impressionistic, but it does find some support in empirical studies of risk perception. See Paul Slovic, *Perception of Risk*, 236 SCIENCE 280 (1987). See also Mark Machina, *Decision-Making in the Presence of Risk*, 236 SCIENCE 537 (1987).

coherent narrative of the person's life. Nevertheless, perceptions of voluntariness seem to play an exaggerated role in risk assessment.

The most dramatic example is cigarette smoking.⁷⁴ Cigarettes pose the most serious public health threat of any known toxic substance. They kill approximately 350,000 people per year. They are known to be addictive and most smokers start before the age of 16, so the voluntariness argument itself is somewhat dubious.⁷⁵ Nevertheless, because smoking at least appears voluntary, most people think government intervention is much less warranted than for hazardous waste sites or drinking water contamination.⁷⁶ The result is that we spend vast sums of money dealing with relatively minute health hazards,⁷⁷ but very little on controlling cigarettes, even though cutting smoking in half would undoubtedly save more lives than every environmental statute ever passed.⁷⁸ Voluntariness is important, but it becomes something of a fetish when it leads to such perverse results.

Obviously, deciding how seriously to take various risks is neither straightforward nor uncontroversial. Evaluating the costs of regulation is more than a matter of mechanical computation. The weight society should place on costs depends greatly on their incidence. It may well be reasonable to require a million people to pay a dollar each to save one life, but unreasonable to require ten people to sacrifice \$100,000 each, or to impose the entire cost on a small town whose economic foundation is destroyed by a plant closing. It may also matter whether the beneficiaries of the regulation are poorer or wealthier than those incurring the costs. Moreover, the type of product may be relevant. Decreased output may not be a serious concern for luxury goods, but may be much more important for necessities or for innovative products that promise important social benefits.

Given the difficulty of assigning values to the costs and benefits of health regulations, regulatory decisions clearly cannot be made by any mechanical formula or test. Sagoff argues, correctly I think, that we must rely heavily on such political virtues as dialogue, open-mindedness, clarity, participation, and intelligence. Some of the best passages

74. Smoking also involves two of the other factors: It mostly kills the old, and it is a familiar risk.

75. For a summary of the doleful facts about smoking, see Daniel Hays Lowenstein, "Too Much Puff": *Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1208-13 (1988).

76. When I teach environmental law, this is always the answer I get when I ask why it is worth spending hundreds of millions of dollars to clean up toxic waste sites based on speculative health risks, while the government does virtually nothing about cigarettes.

77. The scientific trend has been toward downplaying many toxics risks. See, e.g., Philip Shabecoff, *Estimate of Risk of Dioxin Is Cut in Cancer Study*, N.Y. Times, Dec. 9, 1987, at A1, col. 1.

78. Outlawing cigarettes would be impractical, but an increased tax would be useful, as would greater investment in public education. See Peter Passell, *Who Should Pay Smoking's Cost?*, N.Y. Times, June 22, 1988, at D2, col. 1. As Lowenstein points out, a ban on cigarette advertising might well be warranted. See Lowenstein, *supra* note 75. A ban on vending machines would also reduce cigarette availability, particularly to children.

in the book are devoted to this theme, and to the dangers of attempting to replace these virtues with technocratic formulas like cost-benefit analysis.⁷⁹

Although mechanical formulas cannot solve tough regulatory problems, we can still search for guidelines to aid in risk assessment. For example, it seems reasonable to say that the workplace would be sufficiently safe if going to work was as safe as staying home. This is almost true for the average worker,⁸⁰ but not for those in unusually hazardous occupations. This gives us some notion of the boundary of acceptable risk. There are also risks that we would clearly regard as insubstantial, such as the increased cancer risk from eating peanut butter or drinking a beer (both of which contain natural carcinogens).⁸¹ On the cost side, we can look for existing public health projects that seem clearly justified to provide a benchmark for appropriate expenditures.

Politics being what it is, we can never expect an entirely coherent public policy on risk management. But we could move considerably farther in that direction. If we were to apply in this way the political virtues that Sagoff rightly praises, I suspect we would find that we are currently spending far too much money on reducing some kinds of risks, and far too little on others.

III. ENVIRONMENTALISM AND THE PUBLIC INTEREST

As the previous section indicates, I think Sagoff's fundamental thesis is correct: Environmental regulation is an essentially political rather than economic affair. This makes it crucial to have some clear understanding of the nature of government. Sagoff is a firm supporter of the recent revival of republicanism, a philosophy that stresses the communitarian nature of government.⁸² Like that of others in this camp, Sagoff's view of politics is in some ways realistic, but in other respects gives politics too exalted a position.

79. See pp. 11-14, 17, 68, 77, 221-22. While Sagoff is not only right but importantly so in his praise of "practical reason," he may be wrong in his suggestion that these intellectual virtues can only be applied at the "micro-level," that is, on an ad hoc basis when administrators deal with particular problems. See pp. 212-15. Such micro-rationality may lead to grossly disparate regulatory solutions to risks that most people would regard as quite similar. Moreover, confining policymaking to the micro-level might reduce the political visibility of the regulatory process, thereby limiting public participation and giving undue power to bureaucrats and special interest groups. Consequently, we need to have at least some general rules of thumb about what risks to take seriously and how much we are willing to pay to eliminate them.

80. See W. KIP VISCUSI, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* 47-49 (1983).

81. See Bruce Ames, Rene Magaw & Lois Swirsky Gold, *Ranking Possible Carcinogenic Hazards*, 236 *SCIENCE* 271, 273 (1987).

82. See pp. 10-11, 16-17. For an excellent survey of the republicanism literature, see Frank Michelman, *Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4, 17-36, 58-65 (1986).

A. *Private Preferences and the Public Forum*

Sagoff draws a sharp distinction between the interests people have as private consumers and those they possess as citizens.⁸³ His thesis "is that social regulation expresses what we believe, what we are, what we stand for as a nation, not simply what we wish to buy as individuals."⁸⁴ Frank Michelman, similarly, has argued that in the republican vision we must be able to imagine that someone would vote for the Endangered Species Act even though she had no private interest in environmental matters.⁸⁵ As Sagoff explains it, "[s]ocial regulation reflects public values we choose collectively, and these may conflict with wants and interests we pursue individually."⁸⁶

This conflict doesn't trouble Sagoff, because he takes such a dim view of private life. "The pursuit of private satisfactions, except for the committed hedonist, soon becomes disappointing or boring, and we look for some public cause, like saving the whales, that does not benefit us personally but appeals to our conscience."⁸⁷ Sagoff's identification of hedonism and private satisfactions is telling. Only a frivolous pleasure-seeker, one gathers, would derive satisfaction from writing novels, practicing medicine, or raising children. As we saw in Part I, this casual dismissal of private life is at best thoughtless, at worst a denial of important moral values.

Indeed, Sagoff makes it clear that even minimal morality is not to be expected in private life. He tells us, with no evident embarrassment, that he bribed a judge to fix some traffic tickets, but then at election time helped to vote the corrupt judge out of office.⁸⁸ He speeds but wants the police to enforce laws against speeding.⁸⁹ From an economist's point of view, these are not irrational decisions, but typical behavior regarding public goods like honest government and highway safety. It is economically rational to vote for strong pollution laws while continuing to pollute in the meantime. But a moral philosopher might be expected to endorse a somewhat loftier precept for personal conduct than "Look Out for Number One."

Besides viewing private preferences as being morally valueless, Sagoff also seems to share the common belief that the government can readily modify private preferences.⁹⁰ There is certainly reason to

83. See pp. 27, 50-51, 69, 94, 171.

84. Pp. 16-17.

85. See Frank Michelman, *Politics and Values or What's Really Wrong With Rationality Review?*, 13 CREIGHTON L. REV. 487, 495-96 (1979).

86. P. 17.

87. P. 116. His earlier writings were harsher: "Beauty . . . is valued because it is a source of pleasure. But pleasure is merely contemptible." Sagoff, *supra* note 1, at 209.

88. P. 52.

89. P. 52. He also recounts that he has an "Ecology Now" sticker on a car that drips oil everywhere. P. 53.

90. See pp. 115-16, 63-64, 93; see also Sunstein, *supra* note 70, at 1154 ("the role of government is to shape preferences"). For a more guarded statement of this position, see MARK

doubt this belief. Despite decades of effort, the Soviet government seems to have been unable to motivate workers on collective farms to become productive. Equally stringent efforts to suppress religion have also been unsuccessful. If dictatorships cannot readily remold preferences, despite having complete control over the media and the educational system, it seems unlikely that democracies will have greater success. The government sometimes succeeds in changing private attitudes, but cultural traditions do seem to have tremendous inertia.⁹¹

Like private preferences, private customs often have considerable force of their own.⁹² We are creatures of the legal system to a lesser extent than some scholars would like to admit. Fortunately, contrary to Sagoff's beliefs, public life is not the only arena for the exercise of virtue.⁹³

B. *Defining the Public Interest*

Perhaps the most intriguing aspect of Sagoff's book is his attempt to

KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 131-37 (1987). For a powerful argument against ascribing such a central role to government, see Robert Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 84-90 (1987).

91. When values do change, the causes are quite obscure. Environmentalism is a good example. Sagoff seems to think that environmental values are inculcated either by government action or by exposure to the environment itself. Thus, he says, if we leave our descendants dumps to live in, they will find dumps aesthetically attractive. See p. 63. Based on this theory, we would expect to find that environmentalism was strongest when the continent was mostly wilderness and progressively weakened as most people came to live in cities. We would also expect to find that the government's environmental programs preceded popular environmentalist attitudes. But the exact reverse of both of these expectations is true.

92. In general, like some other contemporary believers in republicanism, Sagoff underestimates the resiliency and autonomy of nongovernmental institutions. He argues, for example, that property is entirely a creation of the legal system. See pp. 188, 191-92. Obviously, the legal system conditioned much of the institution of property, but it is clear that property is not simply a creature of legal rules. People develop their own expectations about property with or without legal sanctions. As Professor Ellickson has pointed out, whalers developed elaborate rules about property rights during the hunt, even though ships from many different nations were involved in these events on the high seas. See Robert Ellickson, *A Hypothesis of Wealth Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. — (1989) (forthcoming).

Closer to home, I recall that after a major Chicago blizzard, people who dug out parking spaces regarded them as their own property, often using signs to announce their property claims and sometimes resorting to force against "trespassers." Often, when the government does get around to giving legal recognition to new forms of property, it simply adopts the private understandings that already exist. See Ellickson, *supra*; Leo Raskind, *Reverse Engineering, Unfair Competition, and Fair Use*, 70 MINN. L. REV. 385, 397, 407-11 (1985) (Congress adopting semi-conductor industry custom as standard).

93. If Sagoff is too cynical about private life, he may be too romantic about politics. An opposing school of thought, often identified with public choice theory, takes the opposite perspective. It portrays politics as an arena of venality where self-serving special interests "belly up to the trough." So far as empirical evidence can settle such issues, the truth seems to be somewhere in between. No observer of contemporary politics can ignore the role of special interest groups. Statistical evidence confirms that campaign contributions and constituent pressure often explain legislative votes. But they are not the whole story. Sophisticated empirical studies also indicate that legislative votes are often determined by the legislator's own view of public policy. For a survey of the empirical literature, see Daniel Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883-901 (1987).

explain what is meant by the "public interest." We know from Arrow's Theorem that the public interest cannot be defined as simply an agglomeration of private interests because an arbitrary collection of private interests cannot be combined into a coherent scheme of public preferences. On the other hand, Rousseau's talk of the "general will" seems to suggest a dangerous invitation to totalitarianism.⁹⁴ Anyway, it is hard to understand in what sense a group can have a separate existence with beliefs or desires completely distinct from those of its members. Imagine someone announcing: "No one in our group likes anchovies on pizza, but the group's general will is that anchovies are great!"

Sagoff is none too clear on the location of the "intersubjective entity" he calls the public. The bulk of his discussion seems to suggest that this entity represents the cultural identity of a group.⁹⁵ As members of the group, individuals learn group norms: Americans, as he says, learn to venerate rivers the same way that Catholics learn to venerate the pope.⁹⁶ Early American literature, a subject to which he devotes considerable space, is part of the tradition that constitutes American culture. By becoming members of the group, individuals accept the ongoing culture of the group as part of their identities, so that they say: "We Americans feel strongly about the environment." Sagoff's idea seems to be that values which are part of this heritage have a special status, which entitle them to greater governmental support than mere personal preferences. Thus, for Sagoff, environmental protection becomes a part of preserving the national identity.⁹⁷

Clearly, appeals to "the American tradition" do carry special rhetorical weight. Yet, this understanding of what constitutes "the public interest" seems insufficient. The American tradition—like any living culture—contains too many conflicts to be reified as the contents of a unified group mind. Conflicting groups can all too easily proselytize their version of the American dream while denouncing their opponents as un-American.⁹⁸ Such difficulties seem to inhere in any attempt to view the "public interest" or "public values" as being descriptive terms for existing entities. If all members of the public agreed, there would be no need to distinguish private from public interests. If the members of the public disagree, there seems to be no way for an outsider to de-

94. See Suzanna Sherry, *Republican Citizenship in a Democratic Society* (Book Review), 66 TEX. L. REV. 1229, 1243-44 (1988) (reviewing AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987)). For an insightful critique of the new "communitarians," see C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985).

95. See ch. 6.

96. P. 127.

97. See pp. 124-45.

98. Sagoff's theory also seems to make environmentalism too localized, almost as if it were just another quaint national trait: Americans love the environment, Germans drink beer, the British go nuts at soccer matches, etc. If Sagoff were correct, Japanese environmentalism could not possibly have anything in common with the American variety, since the two countries have radically different cultural traditions.

termine which preferences should be attributed to the group as a whole.

If determining the public interest were a matter of attaching the right philosophical label to existing preferences, we would do better to turn the government over to professional philosophers. As Sagoff points out, this is the antithesis of liberalism.⁹⁹ And yet pure pluralism, which rejects the notion of the public interest, seems to convert government into an unsavory exercise in self-aggrandizement. How can we speak of the "public interest," when all that we can observe at any one moment are individual preferences, and no *a priori* method exists for determining which of them can properly claim to be public values?

Perhaps the best answer, as Sagoff sometimes hints,¹⁰⁰ is that the public interest (or "general will") is not something that exists independently of the political process itself. Rather, in a democracy, the political process creates the public interest in the process of searching for it. The public interest can best emerge from a political process possessing the liberal virtues of broad participation, tolerance, and intelligent deliberation.¹⁰¹ After such a political decision has been reached, everyone present can say: "*We* have decided such and such." The "*we*" is at once a reference to every member of the group, and a new dramatic persona in its own right. Thus, the democratic process earns the government the right to speak for "the Public."¹⁰²

If I can be excused for perhaps trivializing an important idea, the "general will" can even be found in the pizza parlor. It is not simply a summary of the pizza tastes that people brought in the door. But it also does not exist separately from their individual views. Rather, the "general will" springs into being when, after the issue has been fully dis-

99. See pp. 155-62.

100. See pp. 119-21. The following passage comes closest to this idea:

Suppose, for example, we are married to each other and have a child who we both intend shall have the best education possible. . . .

Now suppose that in some matters we determine our intentions not individually but together. We ask ourselves what *we* shall do about Jared's education. We discuss what *our* policy should be and then set out tasks for each of us to accomplish. We might decide that you should earn the money while I help with the homework, or some such thing.

We might then express our shared intention by each saying, "*We* intend Jared to have the best education possible." Wilfrid Sellars points out that statements of this kind "in the first person *plural* have the interesting properties that (a) they express the speaker's intention, yet (b) the intentions expressed are in the strongest sense the same." The *acts* of intending are subjective and therefore two in number, but the *content*, what is *intended*, is the same. In these circumstances, intention may be as intersubjective as perception and belief.

P. 120 (emphasis in original).

101. It is not essential that these virtues be found within the law-making body itself. For example, the electoral process could be deliberative, while legislative votes would be governed by strict party discipline.

102. I am putting aside the question of the role of courts as advocates for public values, since they have not typically served that function in environmental law. Tentatively, I would suggest that courts can propose public values but that these values do not become fully legitimate until the political process accedes to them.

cussed within the group, someone turns to the server and says, "*We'd* like to order a large pizza with mushrooms, but hold the anchovies."

In this review, I have criticized many aspects of Sagoff's argument. He is wrong, I think, in dismissing private preferences and the virtues of ordinary life. He makes claims of philosophical validity for moralism like environmental protection, but then makes no attempt to support those claims. He is too inattentive to problems of paternalism, and too simplistic in his analysis of risk management.

Nevertheless, his main argument, that cost-benefit analysis is misused to provide technocratic solutions to fundamentally political questions, is profoundly correct. There is no magic formula for determining how much whales are worth or how safe our drinking water should be. These issues can only be resolved through a political process which is always imperfect, but which at least aspires to identify the public interest.

