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# **MONEY, IS THAT WHAT I WANT?: COMPETITION POLICY AND THE ROLE OF BEHAVIORAL ECONOMICS**

**Maurice E. Stucke\***

## **INTRODUCTION**

Until the recent financial crisis, U.S. competition policymakers assumed competition as generally a self-correcting, self-initiating process. When left mostly alone by government regulators, market forces allocate resources efficiently to users who value them the most.<sup>1</sup> Antitrust law “does not authorize the government (or any private party) to seek to ‘improve’ competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints.”<sup>2</sup> The policymakers’ neoclassical economic theories define “rational behavior” as that conducted by people who “accumulate an optimum amount of information” and “maximize their utility from a stable set of preferences.”<sup>3</sup> In short, their theories assume rational actors with willpower pursuing their self-

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1. UNILATERAL CONDUCT WORKING GROUP, INT’L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 29 (2007), <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

2. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 3 (2007), [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

3. GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976).

interest.

The neoclassical economic theories of Milton Friedman and others associated with the University of Chicago are now under attack. As Commissioner J. Thomas Rosch of the Federal Trade Commission (FTC) recently said, “[o]ne thing is clear to me: the orthodox and unvarnished Chicago School of economic theory is on life support, if it is not dead.”<sup>4</sup> He added, “in the real world—as opposed to the worlds of political and economic theory—markets are not perfect; . . . imperfect markets do not always correct themselves; and . . . business people do not always behave rationally.”<sup>5</sup> Likewise in shelving the Bush administration’s highly-criticized Section 2 Report,<sup>6</sup> the new head of the U.S. Department of Justice’s Antitrust Division rejected the report’s underlying assumption that monopoly markets are generally self-correcting: “The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected’ . . .”<sup>7</sup> The new Assistant Attorney General also noted how these ideologies have failed:

Americans have seen firms given room to run with the idea that markets “self-police,” and that enforcement authorities should wait for the markets to “self-correct.” It is clear to anyone who picks up a newspaper or watches the evening news that the country has been waiting for this “self-correction,” spurred innovation, and enhanced consumer welfare. But these developments have not occurred. Instead, we now see numerous markets distorted. We are also seeing some firms fail and take American consumers with them. It appears that a combination of factors, including ineffective government

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4. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Remarks at the New York Bar Association Annual Dinner: Implications of the Financial Meltdown for the FTC 2 (Jan. 29, 2009), <http://ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf>.

5. *Id.* at 5.

6. U.S. DEPT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

7. Press Release, U.S. Dep’t of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard With Focus on the Impact of Exclusionary Conduct on Consumers (May 11, 2009), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2009/245710.htm](http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm).

regulation, ill-considered deregulatory measures, and inadequate antitrust oversight contributed to the current conditions.<sup>8</sup>

So what are the financial crisis's implications for competition policy? It has prompted U.S. policymakers to reexamine the assumptions underlying and goals of the prevailing neoclassical economic theories.<sup>9</sup> This article addresses how behavioral economics can assist competition authorities in recalibrating their economic and legal theories. Although behavioral economics is a hot area in legal and economic scholarship, the U.S. competition authorities and community, until recently, have not embraced it.<sup>10</sup> I discuss elsewhere how behavioral economics can inform merger analysis<sup>11</sup> as well as cartel<sup>12</sup> and monopolization cases.<sup>13</sup> This

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8. Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks for the U.S. Chamber of Commerce: Vigorous Antitrust Enforcement in This Challenging Era (May 12, 2009), <http://www.usdoj.gov/atr/public/speeches/245777.htm>.

9. John Authers, *Wanted: New Model for Markets*, FIN. TIMES, Sept. 29, 2009, at 9.

10. But among the promising signs, FTC Commissioner Rosch has been interested in behavioral economics' implications on competition policy. See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks before the Bates White Antitrust Conference in Washington, D.C.: Antitrust Law Enforcement: What To Do About The Current Economics Cacophony? 10–11 (June 1, 2009), <http://www.ftc.gov/speeches/rosch/090601bateswhite.pdf>; Rosch, *supra* note 4, at 8. At its 2008 annual meeting, the American Antitrust Institute's (AAI) keynote speaker and panelists discussed the applicability of behavioral economics to competition policy. American Antitrust Institute, Audio Recordings from AAI's Annual National Conference, <http://www.antitrustinstitute.org/Archives/2008conferenceaudio.ashx> (last visited Jan. 10, 2010). The AAI's transition report also recommends the empirical analysis to further this new antitrust realism. AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 26, 172, 185, 200–01, 272–75 (2008) (discussing cartels, mergers, and media industries). The FTC in April 2007 sponsored a conference on behavioral economics and consumer protection issues. See Federal Trade Commission, A Conference on Behavioral Economics and Consumer Policy, <http://www.ftc.gov/be/consumerbehavior/index.shtml> (last visited Dec. 20, 2009). Scholars and competition authorities in the European Union are also looking at the applicability of behavioral economics to competition policy. See, e.g., British Institute of International and Comparative Law, <http://www.biicl.org/clf/clfmeetings2009> (discussing its hosting of a Competition Law Forum on Behavioral Economics in July 2009).

11. See Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007) [hereinafter Stucke, *Behavioral Economists*]; Maurice E. Stucke, *New Antitrust Realism*, GLOBAL COMPETITION POL'Y MAG., Jan. 2009.

12. Maurice E. Stucke, *Am I a Price-Fixer? A Behavioral Economics*

article addresses one assumption of these neoclassical economic theories—namely, that people pursue their self-interest, which for this article’s purpose, means people seek to maximize their wealth and other material goals, and generally do not care about other social goals to the extent they conflict with personal wealth maximization.<sup>14</sup> This assumption of self-interest has broad implications for U.S. economic and legal policies, as it implicates, among other things, environmental sustainability concerns, consumerism, the problems Americans face in a debt economy, and privacy issues.

Part I outlines how the assumption of self-interest by neoclassical economic theories shaped U.S. competition policy over the past thirty years. Part II surveys the behavioral economics experiments, which show that contrary to the Chicago School’s assumption, many people do not solely pursue their self-interest. Because the assumption of self-interest is not descriptive, Part III asks whether it is normative. Should citizens pursue their self-interest? Part IV discusses the risks that may arise if governmental policies prime persons to pursue their self-interest.

## I. COMPETITION POLICY BEFORE 2007

Antitrust ideologies in the United States generally have a thirty- to forty-year lifespan.<sup>15</sup> Since the late 1970s, the Chicago School’s neoclassical economic theories have shaped U.S. antitrust policy.<sup>16</sup> The “Chicago School” generally refers to the approach affiliated with the Department of Economics at the University of Chicago:

In a looser sense, the term “Chicago School” is associated

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*Analysis of Cartels*, in CRIMINALISING CARTELS: A CRITICAL INTERDISCIPLINARY STUDY OF AN INTERNATIONAL REGULATORY MOVEMENT (forthcoming 2010); Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443.

13. Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 496.

14. It is beyond this article’s scope to examine whether firms (which are a collection of individuals) pursue (or should pursue) their self-interest. Just as individual behavior may differ depending upon the norms and expectations in that social setting, so too firm behavior may vary. Moreover, profit-maximization, as a normative corporate theory, has many packed issues.

15. See Stucke, *Behavioral Economists*, *supra* note 11, at 537–42 (summarizing ebb and flow of antitrust policies since 1890).

16. *Id.* at 539–44.

with a particular brand of economics which adheres strictly to Neoclassical price theory in its economic analysis, "free market" libertarianism in much of its policy work and a methodology which is relatively averse to too much mathematical formalism and willing to forego careful general equilibrium reasoning in favor of more results-oriented partial equilibrium analysis.<sup>17</sup>

Two qualifications are worth noting when describing the Chicago School economic theories.

First, in defining the Chicago School theories as fixed ideologies, one risks caricaturing a caricature. The beliefs of some Chicago School theorists evolved over time.<sup>18</sup> At times, its theorists have clashed over competition policy<sup>19</sup> or in their beliefs in market forces.<sup>20</sup> For example, Nobel laureate Ronald H. Coase, who is commonly associated with the Chicago School, observed that the neoclassical economist's consumers are not human beings, but instead "consumers without humanity."<sup>21</sup> He observed that the "rational utility maximizer of economic theory bears no resemblance to the man on the Clapham bus or, indeed, to any man (or woman) on any bus."<sup>22</sup> Coase advocated for more empirical analysis of the legal institutions that will make the competitive system work more efficiently.<sup>23</sup> During this financial crisis, Richard A. Posner, another Chicago School theorist, reconsidered some of his earlier beliefs.<sup>24</sup> While assuming self-interest as

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17. The Chicago School, <http://homepage.newschool.edu/het/schools/chicago.htm> (last visited Dec. 20, 2009).

18. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979) (noting that some ideas first advanced by one of the School's founders, Aaron Director, "have been questioned, modified, and refined, resulting in the emergence of a new animal: the 'diehard Chicagoan' (such as Bork and Bowman) who has not accepted any of the suggested refinements or modifications in Director's original ideas").

19. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 10–11.

20. For a recent disagreement between Judges Easterbrook and Posner, see *Jones v. Harris Assocs., L.P.*, 527 F.3d 627 (7th Cir. 2008), and *Jones v. Harris Assocs.*, 537 F.3d 728 (7th Cir. 2008).

21. R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 3 (1988).

22. *Id.* at 3–4.

23. R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992).

24. RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009); Marcus Baram, *Judge Richard Posner Questions His Free-Market Faith in "A Failure Of Capitalism,"*

a private virtue,<sup>25</sup> Judge Posner recognized how self-interested behavior can be, at times, a public vice, and set the stage “for an economic catastrophe.”<sup>26</sup> Because each self-interested person will not consider the small probability that his or her decision (in conjunction with that of her competitors) may bring down the entire economy, Posner argued that the government must serve as a countervailing force to such self-interested private behavior by better regulating financial institutions.<sup>27</sup>

Second, to say that the Chicago School dominated U.S. competition policy, observed FTC Commissioner (and its former Chair) William Kovacic, ignores the Harvard School contributions of Phillip Areeda, Donald Turner, and Stephen Breyer.<sup>28</sup> They “had as much to do as Chicago with creating many of the widely-observed presumptions and precautions that disfavor intervention by U.S. courts and enforcement agencies.”<sup>29</sup> In a similar vein, the post-Chicago economists, while offering different predictions under neoclassical economic theory, for the most part, continue to employ the theory’s rationality assumption.<sup>30</sup>

With these two caveats in mind, the Chicago School is

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HUFFINGTONPOST.COM, Apr. 20, 2009, [http://www.huffingtonpost.com/2009/04/20/judge-richard-posner-disc\\_n\\_188950.html](http://www.huffingtonpost.com/2009/04/20/judge-richard-posner-disc_n_188950.html) (stating that Judge Posner now sees “the importance of government regulations; the need to strengthen the regulatory structure by directly funding authorities rather than the current fee-based model; the dangers of excessive executive compensation, and even express support for the idea of changing bankruptcy law to make it easier for homeowners who face foreclosure”).

25. POSNER, *supra* note 24, at 107.

26. *Id.* at 107, 112.

27. *Id.* at 112–13.

28. Kovacic, *supra* note 19, at 80.

29. *Id.*

30. For example, the DOJ’s top antitrust economist recently said:

Nor does the current crisis call into question the basic utility of neoclassical microeconomics for understanding how firms behave and how markets perform. In particular, notwithstanding great advances in the field of behavioral economics, I have seen nothing in the past year that would cause me to depart from the tried and true working assumption in antitrust economics that for-profit firms generally seek to maximize profits and that this quest usually benefits the public in a myriad of ways. Adam Smith’s teaching in this respect remains as valid as ever.

Carl Shapiro, Deputy Assistant Att’y Gen. for Economics, Antitrust Div., U.S. Dep’t of Justice, Competition Policy In Distressed Industries: Remarks as Prepared For Delivery to ABA Antitrust Symposium: Competition as Public Policy (May 13, 2009), <http://www.usdoj.gov/atr/public/speeches/245857.htm>.



commonly associated with certain beliefs. The “basic tenet of the Chicago school,” Posner said, is that “problems of competition and monopoly should be analyzed using the tools of general economic theory.”<sup>31</sup> But if this universal “general economic theory” existed, then economists would not band together under the labels of Chicago School, post-Chicago School, evolutionary theorists, New Institutional Economics, and behavioral economics, among others.<sup>32</sup> So unlike behavioral economics, the Chicago School’s neoclassical economic theories are derived from the assumption that businessmen are “rational profit-maximizers.”<sup>33</sup>

#### A. *Chicago School’s Assumption of Self-Interest*

The assumption that people pursue their self-interest is often associated with Adam Smith’s famous statement:

It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity, but to their self-love, and never talk to them of our own necessities but of their advantage.<sup>34</sup>

If, from the myriad manifestations of human behavior, one could infer a general and dominant characteristic of behavior, then “neoclassical economics can also be used to explain a wide array of nonmarket and social phenomena.”<sup>35</sup> The first assumption, “[o]ne of the hallmarks of rational decision making, is . . . that preferences, whatever they may be, are stable.”<sup>36</sup> If human preferences gyrate unpredictably

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31. Posner, *supra* note 18, at 933–34.

32. As Posner recently commented on the different schools of macroeconomic thought, “[t]he very existence of warring schools within a field is a clue that the field is weak, however brilliant its practitioners.” POSNER, *supra* note 24, at 265.

33. Posner, *supra* note 18, at 928; *see also* RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001) (noting how everyone involved in antitrust agrees that firms “should be assumed to be rational profit maximizers”). But as Posner admitted, “[i]t is a curiosity, and a source of regret, that to this day [1979] very few of [one of the Chicago School’s founders Aaron] Director’s ideas have been subjected to systematic empirical examination.” Posner, *supra* note 18, at 931 n.13.

34. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS I.2.2 (Methuen & Co. 1904) (1776).

35. Francesco Parisi, *Introduction: The Legacy of Richard A. Posner and the Methodology of Law and Economics*, in THE ECONOMIC STRUCTURE OF THE LAW xii, (Francesco Parisi ed., 2000).

36. Terrence Chorvat & Kevin McCabe, *Neuroeconomics and Rationality*, 80

(such as desiring money one day, abhorring it the next), then human behavior is unpredictable.

Next, economists must identify (preferably empirically) these stable preferences. Economists have not uniformly accepted what this stable preference is; it can range from people maximizing their expected utility, to self-interest, to wealth maximization.<sup>37</sup> An economic theory with a vague stable preference (such as utility maximization) can more easily explain behavior *ex post* (e.g., people acted that way because it maximized their utility). But the theory's predictive value diminishes.<sup>38</sup> If self-interest, for example, encompasses everything between miserliness and benevolence, then the theory cannot accurately predict which specific behavior (miserliness or benevolence) will likely dominate.<sup>39</sup>

To bolster their theories' predictive abilities and simplify their models, certain economists assume that individuals have a stable universal preference of maximizing their financial well-being.<sup>40</sup> "The simple logic is that if humans are rational maximizers of their wealth or self-interest in all their activities, they will respond to changes in exogenous constraints, such as laws and sanctions, in a way that can be measured and predicted."<sup>41</sup> So, if motivated by money, self-interested people should uniformly respond to changes in exogenous financial incentives and disincentives in a way that can be measured and predicted.

Until recently, almost all economic models assumed that people exclusively pursued their material self-interest and did "not care about 'social' goals *per se*."<sup>42</sup> Thus, "the average

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CHI.-KENT L. REV. 1235, 1238 (2005).

37. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law & Economics*, 88 CAL. L. REV. 1051, 1060–67 (2000) (outlining spectrum of rational choice theory).

38. *Id.* at 1061–66.

39. *See id.* at 1065.

40. ISRAEL M. KIRZNER, *THE ECONOMIC POINT OF VIEW: AN ESSAY IN THE HISTORY OF ECONOMIC THOUGHT* 51–70, 68–69 (2d ed. 1976), available at <http://www.econlib.org/library/NPDBooks/Kirzner/krzPV3.html#3.38> (describing desire of Jevons and Edgeworth, both early users of mathematical methods in economics, to use self-interest to turn economics into a science).

41. Parisi, *supra* note 35, at xii.

42. Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, in *ADVANCES IN BEHAVIORAL ECONOMICS* 271, 271 (Colin F. Camerer et al. eds., 2004); see also Richard A. Posner, *The Value of Wealth: A*

human being is about [ninety-five] percent selfish in the narrow sense of the term.”<sup>43</sup> As Chicago School economist George Stigler wrote, when “self-interest and ethical values with wide verbal allegiance are in conflict, much of the time, most of the time in fact, self-interest theory . . . will win.”<sup>44</sup> Karl Marx and Friedrich Engels agreed.<sup>45</sup>

### *B. Chicago School's View of Self-Correcting Markets*

Few, if any, markets are characterized by perfect competition.<sup>46</sup> Under the Chicago School's assumptions,

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*Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 247 (1980) (“Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically.”). For criticisms of this theory that wealth maximization does not suffer the same infirmities of measurement as utilitarianism, see Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 521 (1980) and Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 754–60.

43. Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159, 159 (1993) (quoting GORDON TULLOCK, *THE VOTE MOTIVE* (1976)).

44. George J. Stigler, *Economics or Ethics?*, in *THE TANNER LECTURES ON HUMAN VALUES* 143, 176 (Sterling M. McMurrin ed., 1981); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 119 (1978) (reasoning profit-maximization assumption is “crucial” to the Chicago School's theories); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (3d ed. 1986) (“The task of economics . . . is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”); Posner, *supra* note 18, at 931 (stating that Chicago School's theory offered “powerful simplifications,” such as “rationality, profit maximization, [and] the downward sloping demand curve”); Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1665 n.4 (2003).

45. Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in *BASIC WRITINGS ON POLITICS & PHILOSOPHY* 9 (Lewis S. Feuer ed., 1959) (arguing that the bourgeoisie has pitilessly torn asunder the motley feudal ties that bound man to his “natural superiors,” and has left no other bond between man and man than naked self-interest, than callous “cash payment”).

46. Perfect competition, under neoclassical economic theory, is where “buyers and sellers are so numerous and well informed that each can act as a price-taker, able to buy or sell any desired quantity without affecting the market price.” JOHN BLACK, *A DICTIONARY OF ECONOMICS* 349 (2d ed. 2002). A perfectly competitive market assumes transparent prices, highly elastic demand curves, easy entry and exit, and informed producers and consumers. William J. Kolasky, *What Is Competition? A Comparison of U.S. and European Perspectives*, 49 ANTITRUST BULL. 29, 31 (2004). Price equals marginal cost, and market forces will produce the efficient level of outputs with the most efficient techniques, using the minimum quantity of inputs. *Id.*

markets are composed of rational self-interested participants with willpower; most markets are competitive or are working themselves to the competitive solution; mergers and vertical arrangements among manufacturers, distributors and retailers often generate efficiencies; and market forces likely will redress any firm's attempt to exercise market power.<sup>47</sup>

The government is generally thought to operate outside the free market, and must justify intervening and displacing competition.<sup>48</sup> Government intervention is limited to clear and sustained instances of market failure, namely competitors' concerted efforts to curtail output: "[O]nly explicit price fixing and very large horizontal mergers (mergers to monopoly) [are] worthy of serious concern."<sup>49</sup> Even then, the government must proceed cautiously. "Spontaneous free market forces eventually defeat, through expansion or de novo entry, this temporary exercise of market power" (whereby firms increase price above, and reduce output below, competitive levels).<sup>50</sup>

President Reagan told the nation, "government is not the solution to our problem; government is the problem."<sup>51</sup> So, too, the Chicago School underscores how government interference in the market, in inhibiting the market's efficient allocation of scarce resources, likely causes greater harm than good. The concern is that market forces may not readily overcome governmental restraints on competition, unlike the way in which these forces can overcome market-created impediments.<sup>52</sup> Consequently, the Chicago School's greater concern is that governmental intervention will increase the

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47. See BORK, *supra* note 44, at 405–06; Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 266 (describing Chicago School policies).

48. Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 957–59 (2008).

49. Posner, *supra* note 18, at 933; see also UNILATERAL CONDUCT WORKING GROUP, *supra* note 1, at 29; Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701–02 (1986).

50. Stucke, *supra* note 48, at 958; see also Stucke, *Behavioral Economists*, *supra* note 11, at 563–64 (discussing impact of entry assumption on antitrust merger analysis).

51. Ronald Reagan, First Inaugural Address (Jan. 20, 1981), <http://www.bartleby.com/124/pres61.html>.

52. Stucke, *supra* note 48, at 958–59 (outlining concerns of Bush administration officials).

risk of false positives,<sup>53</sup> and thereby chill pro-competitive market behavior, which market forces cannot readily redress. It has less concern about false negatives as self-interested firms through entry or expansion presumably will correct most market failures.

The Chicago School beliefs burned brightest during the George W. Bush administration. In speeches<sup>54</sup> and amicus briefs in support of defendants,<sup>55</sup> antitrust officials at the DOJ often raised concerns about false positives, rarely about false negatives. Indeed even the “diehard Chicagoan” Robert Bork criticized the Bush administration’s proposed legal standard for evaluating monopolistic abuses as too non-interventionist.<sup>56</sup> The DOJ officials did not prosecute any

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53. False positives here involve finding antitrust liability for restraints that are competitively neutral or procompetitive. *See, e.g.,* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 879 (2007) (noting the risk of false positives from its per se rules in “prohibiting procompetitive conduct the antitrust laws should encourage”); Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986))).

54. *See* Stucke, *supra* note 13, at 531 n.186; Jay L. Himes, *Monopoly Is What Happens While You’re Busy Making Speeches: Change We Can Believe In Comes to the Antitrust Division*, ANTITRUST & TRADE REG. REP., June 12, 2009, at 2, available at [http://www.labaton.com/\\_cs\\_upload/en/about/published/17796\\_1.pdf](http://www.labaton.com/_cs_upload/en/about/published/17796_1.pdf).

55. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Petitioners at 26, Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc., 129 S. Ct. 1109 (2009) (No. 07-512), available at <http://www.usdoj.gov/atr/cases/f237100/237148.htm>; Brief for the United States as Amicus Curiae Supporting Petitioner, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (No. 05-381), available at <http://www.usdoj.gov/atr/cases/f217900/217988.htm>; Brief for the United States as Amicus Curiae Supporting Petitioners at 25, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), available at <http://www.usdoj.gov/atr/cases/f218000/218048.htm>; Brief for the United States as Amicus Curiae, Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (Nos. 04-805 & 04-814), available at <http://www.usdoj.gov/atr/cases/f209200/209209.htm>.

56. In their amicus briefs in *Trinko*, several, including Judge Bork, criticized the Bush administration’s proposed legal standard as inconsistent with the D.C. Circuit’s earlier, en banc *Microsoft* decision. Brief for the Project to Promote Competition and Innovation in the Digital Age as Amici Curiae Supporting Respondent to the Limited Extent of Clarifying Sherman Act Section 2 Analysis at 2, *Trinko*, 540 U.S. 398 (No. 02-682). The Bush administration urged the Court to adopt a no-economic-sense legal standard. Brief for the United States & Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Trinko*, 540 U.S. 398 (No. 02-682), available at <http://www.usdoj.gov/atr/cases/f201000/201048.pdf> (“Where . . . plaintiff asserts

monopolistic abuses,<sup>57</sup> and criticized foreign competition authorities for prosecuting Microsoft for certain monopolistic practices.<sup>58</sup> The DOJ repeated here and abroad the stock phrase, “The successful competitor, having been urged to compete, must not be turned upon when he wins.”<sup>59</sup> They advocated an antitrust hierarchy that emphasized cartel prosecutions and deemphasized challenges of mergers and monopolistic practices.<sup>60</sup>

## II. THE FINANCIAL CRISIS’S SILVER LINING

The financial crisis has prompted policymakers to re-examine fundamental issues such as the efficiency of markets and the role of legal, social, and ethical norms in a market economy. Antitrust officials, such as FTC Commissioner Rosch and Assistant Attorney General Varney, have criticized the Chicago School ideology that private market forces left alone generally will allocate goods and services efficiently.<sup>61</sup>

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that defendant was under a duty to assist a rival . . . conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.”) (emphasis omitted); see also Reply Brief for the United States at 2, *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (No. 03-4097), available at <http://www.usdoj.gov/atr/cases/f203200/203296.pdf> (“Conduct is ‘predatory’ or ‘exclusionary,’ within the meaning of Section 2’s prohibition against maintaining a monopoly, if it would make no economic sense but for its tendency to harm competition.”). Under this legal standard, plaintiff must prove that the monopolist cannot proffer any economic justification for its action (even one whose benefit is small compared to its harm to consumers). This standard is more deferential than the efficiencies defense in merger analysis (where *defendants* must show the productive efficiency gains outweigh the alleged allocative inefficiencies) or the structured “rule of reason” standard where courts balance the restraints’ pro- and anti-competitive effects. Bork argued for the “rule of reason” rather than the administration’s deferential standard: “Business efficiency is an affirmative defense and, in the right circumstances, can appropriately lead to a balancing of pro- and anticompetitive effects.” Brief for the Project to Promote Competition and Innovation, *supra* note 56, at 4.

57. See Rosch, *supra* note 4, at 3–4; Stucke, *supra* note 13, at 500 n.21.

58. See Stucke, *supra* note 13, at 501 n.22.

59. Judge Learned Hand authored this oft-quoted line in *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). Ironically the DOJ, which under the Bush administration never legally challenged any monopolistic conduct, quoted this decision, in which an active DOJ successfully challenged monopolistic conduct under section 2. For the administration’s other stock phrases, see Himes, *supra* note 54, at 2.

60. See Stucke, *supra* note 13, at 500 n.21.

61. See Rosch, *supra* note 4, at 4–5; Varney, *supra* note 8.

This is not to say, as F.A. Hayek discussed after the Great Depression, that a centrally-planned economy is the remedy.<sup>62</sup> Rather, the concern is that former policymakers veered too close to one extreme, namely laissez-faire dogma.<sup>63</sup> Policymakers now must chart a new course between the shoals of laissez-faire and socialist fundamentalism.

If the financial crisis has prompted a general reexamination of the economic tenets of a market economy, it makes sense for competition authorities to reevaluate the goals of, and assumptions underlying, competition policy. Antitrust cannot operate in a vacuum, relying on outdated, empirically questionable assumptions (rational, self-interested participants) and questionable goals (maximizing output under a static price equilibrium model).

This re-examination requires more than conceding that market participants' cognitive abilities and willpower are limited. This introspection may cast our attention to greater concerns about those left behind. Many Americans today are upset over the growing disparity between the wealthy and everyone else.<sup>64</sup> In the 1970s, for example, the United States was the richest country with the most educated population, but income inequality was no higher than in most other rich countries.<sup>65</sup> That changed dramatically over the next thirty years.<sup>66</sup> Although the disparity between the rich and poor has widened globally, observed the Organisation for Economic Co-operation and Development (OECD), "nowhere has this trend been so stark as in the United States."<sup>67</sup> Despite its

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62. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 93–94 (Univ. of Chi. Press 2007) (1944).

63. POSNER, *supra* note 24, at 113, 134–35, 235 (criticizing Bush administration's laissez-faire attitudes).

64. David Frum, *The Vanishing Republican Voter*, N.Y. TIMES, Sept. 7, 2008, § MM (Magazine), at 50; John Thornhill, *Poll Shows Wide Dislike of Wealth Gap*, FIN. TIMES ONLINE, May 18, 2008. This displeasure over the wealth disparity exists in the EU as well. John Thornhill et al., *Accent on Egalité: Europe Loses Patience With Its Wealthy Elite*, FIN. TIMES ONLINE, June 8, 2008.

65. Thomas Lemieux, *For Equality, Education Matters*, SCIENCE, Sept. 26, 2008, at 1779.

66. *Id.*

67. Growing Unequal?: Income Distribution and Poverty in OECD Countries, <http://www.oecd.org/dataoecd/47/2/41528678.pdf> (last visited Jan. 9, 2010). Interestingly, the income divide between 1948 and 2007 trended upward during Republican administrations and downward during Democratic administrations. LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL*

high employment rate, the United States in 2005 had the third-highest poverty rate and third-highest income gap between the rich and poor among OECD nations (trailing Mexico and Turkey on both measures).<sup>68</sup> Washington, D.C., in fact, had the highest income disparity in the United States in 2007<sup>69</sup> and was among the ten states and territories with the highest poverty rate.<sup>70</sup> The United States ranks among the lower tier of OECD nations for earnings mobility between generations.<sup>71</sup> In other words, contrary to the Horatio Alger belief,<sup>72</sup> the poor in the United States are likely to produce the next generation of poor. Ironically, the wealth disparity by 2007 likely exceeded the levels reached during the robber-baron era when the Sherman Act was promulgated.<sup>73</sup>

Utilitarian welfare economics is agnostic about

ECONOMY OF THE NEW GILDED AGE 31 (2008).

68. ORG. FOR ECON. CO-OPERATION & DEV., ARE WE GROWING UNEQUAL?: NEW EVIDENCE ON CHANGES IN POVERTY AND INCOMES OVER THE PAST 20 YEARS 2–3 (2008), <http://www.oecd.org/dataoecd/48/56/41494435.pdf>.

69. The Gini coefficient for Washington, D.C. in 2007 was 0.542, compared to the national average of 0.467. ALEMAYEHU BISHAW & JESSICA SEMEGA, U.S. DEPT OF COMMERCE, INCOME EARNINGS, AND POVERTY: DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 9–10 (2008). The Gini index shows how much income distribution differs from a proportionate distribution (e.g., twenty percent of the population holding twenty percent of the income), and varies from zero (perfect equality) to one (perfect inequality—one person controls all the wealth). *Id.* at 9.

70. *Id.* at 21 (noting that 16.4 percent of D.C. residents were in poverty, compared to thirteen percent of Americans overall).

71. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 68, at 7; *see also* LAWRENCE MISHLE ET AL., THE STATE OF WORKING AMERICA 2008/2009 5 (2009).

72. Roland Bénabou & Jean Tirole, *Belief in a Just World & Redistributive Politics*, Q. J. ECON. 699, 701–03 (2006) (noting popular perceptions of upward mobility in U.S. and Europe).

73. Peter H. Lindert, *When Did Inequality Rise in Britain and America?*, 9 J. INCOME DISTRIBUTION 11, 13 (2000); *see also* MISHLE ET AL., *supra* note 71, at 3 (“Data on income concentration going back to 1913 show that the top [one percent] of wage earners now hold [twenty-three percent] of total income, the highest inequality level in any year on record, bar one: 1928.”); Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* (Update with 2007 estimates) (Aug. 5, 2009), <http://elsa.berkeley.edu/~saez/saez-USTopincomes-2007.pdf>. Senator Sherman identified this inequality of condition, wealth, and opportunity as the greatest threat to social order, stating that this inequality “has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.” 21 CONG. REC. 2455, 2460 (Mar. 21, 1890) (statement of Sen. Sherman), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTI-TRUST LAWS AND RELATED STATUTES 113, 123 (Earl W. Kintner ed., 1978).



distributional effects from the exercise of market power.<sup>74</sup> But under social contract theory, many would consent *ex ante* to a competition policy only if a fair equality of opportunity was maintained, and the competitive benefits (and harms) did not disproportionately favor (and harm) particular groups.<sup>75</sup> As the wealth gap widens in the United States, those left behind have less incentive to perpetuate the prevailing competition policies. Recently reflecting on the financial crisis, Peter Sutherland, chairman of British Petroleum and Goldman Sachs International, compared the social safety net support in Denmark with that of Anglo-Saxon economies: "I do think we need to reflect on a certain culture of excess."<sup>76</sup>

#### A. Behavioral Economics Conception of Strong Reciprocity

Neoclassical economic theory assumes individuals as rational, self-interested beings with perfect willpower.<sup>77</sup> Behavioral economics, in contrast, uses facts and methods from other social sciences such as psychology and sociology to understand the limits of this assumption.<sup>78</sup> Testing this

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74. Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 SW. J. L. & TRADE AM. 211, 219–20 (2007) (stating that "proponents of this perspective on aggregate efficiency or wealth do not grapple with the deontological questions of power and how opportunity is distributed").

75. JOHN RAWLS, A THEORY OF JUSTICE 242–46 (rev. ed. 2005).

76. Harry Eyres, *Lunch with the FT: Peter Sutherland*, FIN. TIMES ONLINE, Jan. 3, 2009; see also Leo Hindery, *Obama Must Act to Curb Executive Greed*, FIN. TIMES ONLINE, June 24, 2009 (stating that former AT&T executive decried income disparity as beyond an "ethical embarrassment" but a "[thirty]-year-old flesh-eating bacterium that is gnawing away at our economy").

77. See BECKER, *supra* note 3, at 14.

78. For interesting surveys of the behavioral economics research, see generally GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE (Herbert Gintis et al. eds., 2005); ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 42; Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. OF ECON. LIT. 315 (2009); Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237 (2008); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487 (1998); Prentice, *supra* note 44. For a broader survey of literature attacking the conventional economic theories, see generally ERIC D. BEINHOCKER, THE ORIGIN OF WEALTH: THE RADICAL REMAKING OF ECONOMICS AND WHAT IT MEANS FOR BUSINESS AND SOCIETY (2007).

rationality assumption in actual experiments,<sup>79</sup> behavioral economists find that people systematically and predictably do not behave under certain scenarios as neoclassical economic theory predicts.<sup>80</sup> Instead, actual human behavior is characterized as bounded rationality, willpower, and self-interest. Individuals may react differently depending on how the choice is phrased or elect suboptimal outcomes based on certain heuristics.<sup>81</sup> Neither the state nor private economic agents are endowed with perfect cognitive abilities, but adopt a “satisficing and adaptive behaviour.”<sup>82</sup> Individuals lack willpower and knowingly act contrary to their long-term interests (for example by overeating, imbibing too much alcohol, and smoking). And, as this article discusses, people can be far more charitable and fair than their theoretical self-interested counterparts.

Even apart from behavioral economics, the neoclassical economic theories’ assumption of rational self-interested behavior suffers several flaws.

First, the model of perfect competition itself has problems, including its incompleteness; it has “little to say about productive and dynamic efficiency.”<sup>83</sup>

Second, even before behavioral economics, individuals adhering to religious or ethical norms rejected the assumption that people solely pursue their self-interest. As C.S. Lewis said, homogeneity in motivation inheres in vices

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79. Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, in ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 42, at 7.

80. Tor, *supra* note 78, at 242–43.

81. DellaVigna, *supra* note 78, at 320–65 (surveying the empirical evidence from the field on various biases and heuristics); Stucke, *Behavioral Economists*, *supra* note 11, at 527–28 (identifying several identified biases and heuristics).

82. François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 851 (2004).

83. Stucke, *supra* note 48, at 967 (footnote omitted). If the model’s assumptions were true, then human behavior should be easier to predict. A state planner arguably could model any scenario using the hypothetical profit-maximizer and centrally plan the same outcome. Execution of economic goals might, if the rationality assumptions are correct, be equally or perhaps more efficient, through central planning. It is precisely the complexity and unpredictability of the competitive process, the diversity of human knowledge, and the variety of conditions intrinsic to or affecting markets, such as ethical and cultural norms, technology, production, and service norms that necessitate against a centrally-planned economy. An inverse relationship exists between the two concepts: the greater the infirmities of the assumptions underlying perfect competition, the less practicable a centrally-planned economy becomes.

rather than virtues.<sup>84</sup> The many ways to live a virtuous life enrich our world; the tyrants' pursuit of their narrow self-interest only deadens it.<sup>85</sup> Motivated by religious or social norms of fairness, many people are compassionate and cooperative even when it does not maximize their wealth.

Third, even before behavioral economics, Adam Smith and other economists rejected this assumption of self-interest.<sup>86</sup> Even Posner recognized that economic analysis "long ago abandoned the model of hyperrational, emotionless, unsocial, supremely egoistic, nonstrategic man (or woman)."<sup>87</sup> Some economists today acknowledge other-regarding behavior.<sup>88</sup> The issue for them is under what circumstances, and to what degree, do people pursue their self-interest. Yet as economist Matthew Rabin observed, many economists, including experimental economists, still cling to the assumption of self-interest.<sup>89</sup>

The behavioral economics experiments confirm that human motivation is more nuanced and complex than the simplistic assumption of self-interest; but they also measure when, and to what degree, people pursue or sacrifice their self-interest. The recent experiments in bargaining settings, as Samuel Bowles summarizes, systematically show "that

84. C.S. LEWIS, *MERE CHRISTIANITY* 175 (rev. ed. 1952) ("How monotonously alike all the great tyrants and conquerors have been: how gloriously different are the saints."). For a beautifully written account of the diversity of several saints' lives, and their lives' impact on one Jesuit priest, see JAMES MARTIN, SJ, *MY LIFE WITH THE SAINTS* (2006).

85. See ST. FRANCIS DE SALES, *INTRODUCTION TO THE DEVOUT LIFE* 34 (Vantage Spiritual Classics 2002) (1876) (noting "how all alike are hateful, restless, wild: see how they despise one another, and only pretend to an unreal self-seeking love"); CORNELIUS TACITUS, *THE ANNALS & THE HISTORIES* 139 (Moses Hadas ed., Alfred John Church & William Jackson Brodribb trans., 2003) (describing his gloomy task in presenting "in succession the merciless biddings of a tyrant, incessant prosecutions, faithless friendships, the ruin of innocence, the same causes issuing in the same results, and [being] everywhere confronted by a wearisome monotony in my subject matter").

86. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 3 (1759) ("How selfish soever man may be supposed, there are evidently some principles in his nature which interest him in the fortune of others and render their happiness necessary to him though he derives nothing from it except the pleasure of seeing it."); see also Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

87. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1552 (1998).

88. Korobkin & Ulen, *supra* note 37, at 1134; Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUR. ECON. REV. 657, 665 (2002).

89. Rabin, *supra* note 88, at 667.

substantial fractions of most populations adhere to moral rules, willingly give to others, and punish those who offend standards of appropriate behavior, even at a cost to themselves and with no expectation of material reward.<sup>90</sup> This “strong reciprocity” in human behavior entails “a predisposition to cooperate with others and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid either by others or at a later date.”<sup>91</sup>

Psychological and experimental economic evidence shows that people care about treating others, and being treated, fairly.<sup>92</sup> For example, employers may not reduce wages during times of deflation as workers perceive this wage reduction as unfair, and retaliate by working less hard.<sup>93</sup> So rather than self-interest, employers may appeal to fairness concerns.<sup>94</sup> Likewise, in the behavioral experiments, people care about resources being equitably distributed, not solely about resources going to those with the greater use.<sup>95</sup>

Neoclassical economic theory predicts free riding when people are confronted with a public good. Instead, many people in public goods experiments do not free ride at all, or to the extent predicted under the neoclassical economic theories: “[P]eople have a tendency to cooperate until experience shows that those with whom they’re interacting are taking advantage of them.”<sup>96</sup> Especially when given the

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90. Samuel Bowles, *Policies Designed for Self-interested Citizens May Undermine “The Moral Sentiments”: Evidence from Economic Experiments*, SCIENCE, June 20, 2008, at 1605, 1606.

91. Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 EVOLUTION & HUM. BEHAV. 153, 154 (2003). These authors argue that “the evolutionary success of our species and the moral sentiments that have led people to value freedom, equality, and representative government are predicated upon strong reciprocity and related motivations that go beyond inclusive fitness and reciprocal altruism.” *Id.*

92. Jolls et al., *supra* note 78, at 1479.

93. Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE, *supra* note 78, at 3, 32.

94. See Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986) (“A central concept in analyzing the fairness of actions in which a firm sets the terms of future exchanges is the *reference transaction*, a relevant precedent that is characterized by a reference price or wage, and by a positive reference profit to the firm.”).

95. Rabin, *supra* note 88, at 665.

96. RICHARD H. THALER, THE WINNER’S CURSE: PARADOXES AND

option of punishing free riders, even when it involves a personal cost, people cooperate at much higher levels than neoclassical economic theory predicts.<sup>97</sup>

Our “strong reciprocity” to cooperate with others and punish unfair behavior is also displayed in the Ultimatum Game.<sup>98</sup> In this behavioral economics experiment, a subject is given some money and must offer a second subject some portion thereof.<sup>99</sup> If the second subject accepts the offer, both can keep the money.<sup>100</sup> If the second subject rejects the offer, neither keeps the money.<sup>101</sup> Neoclassical economic theory predicts people will offer the smallest amount—one penny.<sup>102</sup> If everyone acts in their self-interest, the first subject would selfishly want as much money as possible; the second subject recognizes that a penny is better than nothing.<sup>103</sup> But actual experiments of this Ultimatum Game in over twenty countries show the contrary. Most offer significantly more than the nominal amount (ordinarily forty to fifty percent of the total amount available) and recipients about half the time reject nominal amounts (less than twenty percent of the total amount available).<sup>104</sup> Consequently, most receivers in this game forgo wealth to punish unfair offers, and offerors generally offer more than the nominal profit-maximizing amount.<sup>105</sup>

These results cannot be explained as the participants’ maximizing their reputation or goodwill; the same results occur in anonymous one-shot games.<sup>106</sup> Even when the game is repeated ten times to allow for learning, similar results follow.<sup>107</sup> In the Dictator Game, a variation of the Ultimatum

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ANOMALIES OF ECONOMIC LIFE 14 (1992); *see also* Prentice, *supra* note 44, at 1698.

97. Gintis et al., *supra* note 93, at 15.

98. *Id.* at 11–13.

99. *Id.* at 11–12.

100. *Id.* at 12.

101. *Id.*

102. Jolls et al., *supra* note 78, at 1490.

103. *Id.*

104. THALER, *supra* note 96, at 21–25; Jolls et al., *supra* note 78, at 1492–93; Werner Guth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 371–74, 375 tbls.4–5 (1982); Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S291 tbl.2 (1986).

105. Stucke, *Behavioral Economists*, *supra* note 11, at 530 n.79.

106. Jolls et al., *supra* note 78, at 1492.

107. *Id.* at 1490.

Game where the receivers must accept any offer, people still share, although the amount shared may vary depending on certain conditions, such as whether the recipients stand up and give a few facts about themselves or are identified as a charity.<sup>108</sup>

Evidence of strong reciprocity and conditional cooperation is also found in other behavioral experiments. In one Prisoner's Dilemma game, for example, test subjects A and B each possess £10, which they can either keep or transfer to the other person.<sup>109</sup> Upon transfer, the recipient gets triple the amount.<sup>110</sup> So if A and B decide to keep their money, each earns £10; if both decide to transfer, each earns £30.<sup>111</sup> If one transfers her money, but the other does not, then the sharer loses out. She gets nothing, while the recipient gets £40 (the £30 transferred, plus the £10 kept). Neoclassical economic theory predicts that self-interested players will keep their £10 and not cooperate.<sup>112</sup> Instead many test subjects cooperate in these situations.<sup>113</sup>

Not everyone, of course, is trusting. In many behavioral economics experiments, some behave selfishly, and other individuals (the conditional cooperators) may incur costs to punish this selfish behavior.<sup>114</sup> When selfish individuals and strongly-reciprocal individuals interact, the experiment's outcome can depend on each person's perception of the other person as sharing or selfish,<sup>115</sup> the rules of the game,<sup>116</sup> and

108. Nava Ashraf et al., *Adam Smith, Behavioral Economist*, 19 J. ECON. PERSP. 131, 135–36 (2005).

109. Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS & MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE, *supra* note 78, at 151, 164–65.

110. *Id.* at 165.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 155.

115. Cooperative individuals in the trust and public goods experiments will act selfishly if they feel they are being taken advantaged of and no penalty provision exists to punish selfish behavior. Fehr & Fischbacher, *supra* note 109, at 167. If both believe the other will share, both will share. *Id.* If both believe the other is selfish, neither will share. *Id.* Even persons prone to sharing will not share if they believe that the other will defect. *Id.* Thus, the suboptimal equilibrium (defect, defect) arises. *Id.*

116. If the game's rules are changed so that the selfish players must decide first, the equilibrium shifts. *Id.* If the first-mover knows that her partner is naturally cooperative, the selfish player will opt for cooperation as the payoff is greater. *Id.*

institutional mechanisms to punish behavior perceived as selfish or unfair. Neoclassical economic theory predicts that the punishment mechanism, if it involves costs to the punisher, should not affect the outcome.<sup>117</sup> But as individuals forgo profits to punish unfair offers in the Ultimatum Game, so too in the behavioral public goods and trust experiments, they incur costs to punish free riding.<sup>118</sup> In fact, the punishment mechanism has a positive effect in deterring free riding; in repeat games, contributions steadily increase until nearly all participants contribute one hundred percent of their endowment.<sup>119</sup>

Neoclassical economic theory predicts that financial incentives should motivate, and penalties should deter, behavior.<sup>120</sup> So if law firm associates are disgruntled in working longer hours (and other viable job prospects exist), reward them with higher bonuses. But suppose these associates are running a 5K road race for a local charity. Can one induce them to run faster by offering them a monetary prize?

People, as the behavioral economic experiments show, are not solely motivated by, and may act contrary to, self-interest. We are also motivated by praise as well as “shame, guilt, empathy, or sensitivity to social sanction.”<sup>121</sup> At times, financial incentives and ethical norms are complements. But in most behavioral experiments, financial rewards that displace social, moral, or ethical norms decrease (not increase) motivation or the likelihood of achieving the desired results.<sup>122</sup> Indeed, mixing financial norms into ethical or social settings may be counterproductive.

Professor Dan Ariely, for example, did several

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117. Because punishment is costly for the punisher (which the punisher does not recoup through cooperation), self-interested players would not punish. *Id.* at 169. Recognizing this, self-interested players will not contribute to public goods games. Thus, with or without costly punishment mechanisms, the predicted response under neoclassical economic theory is zero contributions. *Id.* at 170.

118. *Id.* at 169.

119. *Id.* at 169–70. In the last few periods of the multi-period games, the actual rate of punishment is low. *Id.* at 170.

120. Uri Gneezy & Aldo Rustichini, *Incentives, Punishment, and Behavior*, in *ADVANCES IN BEHAVIORAL ECONOMICS*, *supra* note 42, at 572.

121. See Samuel Bowles & Herbert Gintis, *Origins of Human Cooperation*, in *GENETIC AND CULTURAL EVOLUTION OF COOPERATION* 429, 432–33 (Peter Hammerstein ed., 2003).

122. Bowles, *supra* note 90, at 1605–06.

experiments when social and market norms clashed.<sup>123</sup> Participants were divided into three groups. Each group performed the same mundane task.<sup>124</sup> One group (the social-norm group) was not compensated, but asked to undertake the task as a favor.<sup>125</sup> In the first study, the social-norm group outperformed the group whose members received five dollars of compensation for the task, which outperformed the group whose members received fifty cents for the task.<sup>126</sup> In the second study, the two groups did not receive cash, but a gift of comparable value (a Snickers bar for the fifty-cent group and a box of Godiva chocolate for the five-dollar group).<sup>127</sup> The two groups performed as hard as the social-norm group.<sup>128</sup> When in the third study the gifts were monetized to the two groups—a “[fifty]-cent Snickers bar” or a “[five dollar]-box of Godiva chocolates”—these two groups again devoted less effort than the social-norm group.<sup>129</sup>

Other behavioral experiments show the flipside—the way in which appealing to ethical or religious norms can deter unwanted self-interested behavior.<sup>130</sup> At times, highlighting

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123. ARIELY, *supra* note 78, at 69–74.

124. *Id.* at 70.

125. *Id.*

126. *Id.* at 70–71.

127. *Id.* at 72.

128. *Id.* at 72–73.

129. ARIELY, *supra* note 78, at 73. Similarly more lawyers volunteered to donate their services for free to needy retirees than when they were offered a relatively small amount (thirty dollars per hour). *Id.* at 71. Voluntary blood donations in Britain declined sharply when a policy of paying donors was instituted alongside the voluntary sector. Gintis et al., *supra* note 93, at 20. Likewise Uri Gneezy and Aldo Rustichini did an experiment with high school students who collected donations for a public purpose in Israel’s annually publicized “donation days.” Gneezy & Rustichini, *supra* note 120, at 573. One group of high schoolers was given a pep talk of the importance of these donations. *Id.* at 579. A second group, in addition to the pep talk, was promised one percent of the amount collected to be paid from an independent source. *Id.* A third group was promised an even greater financial incentive (ten percent of the amount collected). *Id.* Under neoclassical economic theory, the third group, motivated by the greater financial incentive, should collect the most donations. Instead, the groups promised the one percent and ten percent shares collected a lower average amount (\$153.67 and \$219.33, respectively) than the group not financially compensated but given only the pep talk (\$238.60). *Id.* at 578–80.

130. In one experiment, MIT students, divided into three groups, were financially rewarded for correct answers on a math test. ARIELY, *supra* note 78, at 211. The control group, which could not cheat, solved on average three problems; the second group could cheat as they self-reported the number of right answers and reported solving on average 5.5 problems on the same test.



an ethical or religious norm more effectively deters unwanted behavior than other penalties.<sup>131</sup> One experiment involved citizens preparing their income tax statements.<sup>132</sup> It attempted to compare the effect of penalties with that of appeals to conscience. For the penalty group, the emphasis was on the severity of possible jail sentences and the likelihood that tax violators would be apprehended. The “conscience” group was exposed to questions “accentuating moral reasons for compliance with tax law.”<sup>133</sup> The conscience appeal, overall, had a stronger effect on income reported than did the threat of penalties.<sup>134</sup> The study’s results gave some evidence that, although the threat of punishment can increase tax compliance (particularly among the wealthiest respondents), appeals to conscience (particularly among the college-educated respondents) can be more effective than threatening penalties for securing tax compliance.<sup>135</sup>

At times, a voluntary, community-regulated system of restraints is more effective than a financial penalty; the monetary penalty “may be perceived as being unkind or hostile action (especially if the fine is imposed by agents who have an antagonistic relationship with group members).”<sup>136</sup>

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*Id.* at 212. The third group, like the second group, could cheat, but they signed at the beginning of the test the statement “I understand that this study falls under the MIT honor system.” *Id.* MIT does not, in fact, have an honor code. The third group self-reported on average three problems, the same number as the control group, which could not cheat. *Id.* at 212–13. In another experiment, a group before being administered a test was asked to write down as many of the Ten Commandments as they could recall. *Id.* at 207. That group could, but did not, cheat (compared to the group asked to recite beforehand ten books they read in high school, which did cheat). *Id.* at 207–08. Thus reminding participants of moral or ethical norms just before the temptation to cheat proved effective. These behavioral experiments support Federal Rule of Evidence 603’s policy that trial witnesses immediately before testifying take an oath or affirmation “calculated to awaken the witness’ conscience and impress the witness’ mind with the duty” to testify truthfully. FED. R. EVID. 603.

131. ARIELY, *supra* note 78, at 207–08.

132. Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 283–99 (1967).

133. *Id.* at 287–88.

134. *Id.* at 291.

135. *Id.* at 299; see also Kent Greenfield, *Using Behavioral Economics to Show the Power & Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 615–17 (2002) (noting that perceptions of fairness and justice may in certain situations play a greater role in motivating behavior than incentives or penalties).

136. Gintis et al., *supra* note 93, at 20.

Professors Gneezy and Rustichini considered what impact, if any, a monetary fine had on curbing undesired behavior—namely, parents who were picking up their children late from private day care centers.<sup>137</sup> These day care centers originally had no rule governing parents who picked up their children after 4:00 p.m.; generally, a teacher had to wait with the tardy parent's child.<sup>138</sup> A fine on tardiness was thereafter introduced in some of the day care centers, which, under neoclassical economic theory, should decrease the incidences of tardiness.<sup>139</sup> Instead, the average number of late-arriving parents increased for these day care centers.<sup>140</sup> Moreover, after the fine was canceled, the average number of late-arriving parents did not return to the pre-fine levels.<sup>141</sup> For the control group, on the other hand, for whom no fine was imposed, there was no significant shift of late-arriving parents during this period, and fewer parents reported late in these day care centers than in the day care centers with the fine.<sup>142</sup> So why did the monetary penalty increase the undesired behavior? Perhaps, as the authors conclude, parents before were intrinsically motivated to pick up their children on time.<sup>143</sup> The introduction of the fine monetized that lateness into an additional service, offered at a relatively low price.<sup>144</sup>

*B. Competition Policies, Like Other Governmental Policies, Can Affect Human Behavior*

Individuals are not always charitable or selfish. As Subpart A discussed, many factors, such as the way questions or experiments are framed, affect human behavior. An important factor in the Prisoner's Dilemma experiment, for example, is whether the game is framed in "cooperation" terms (individuals are more likely to cooperate) than in "competitive" terms.<sup>145</sup> Using market terminology, such as "exchange," to describe an experiment reduces fair-minded

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137. Gneezy & Rustichini, *supra* note 120, at 581–86.

138. *Id.* at 582.

139. *Id.* at 572, 582–83.

140. *Id.* at 584.

141. *Id.*

142. *Id.*

143. Gneezy & Rustichini, *supra* note 120, at 586.

144. *Id.*

145. Fehr & Fischbacher, *supra* note 109, at 165.

behavior.<sup>146</sup>

At times, reminding individuals about money can lead to selfish, less desirable behavior.<sup>147</sup> One series of experiments involved nonconscious reminders of the concept of money.<sup>148</sup> Compared to the control group, participants primed with money were more independent in their work, but less likely to seek help from others, less willing to spend time helping others, and stingier when asked to donate to a worthy cause.<sup>149</sup> Those primed with money in get-acquainted conversations put more physical distance between themselves than those in the control group.<sup>150</sup> Unlike the people primed with a control condition (poster showing a seascape or flower garden), participants primed with money (their desk faced a poster showing various currency denominations) chose more individually-focused leisure experiences and preferred to work alone rather than with a peer on a task.<sup>151</sup>

146. Bowles, *supra* note 90, at 1606.

147. Some empirical studies find students majoring in economics are motivated more by self-interest than others, although other studies show the contrary. See, e.g., Anthony M. Yezer et al., *Does Studying Economics Discourage Cooperation? Watch What We Do, Not What We Say or How We Play*, 10 J. ECON. PERSP. 177, 180–81 (1996) (showing that in an experiment of leaving “lost” letters with ten dollars in cash in classrooms, there was a higher rate of return (fifty-six percent) for thirty-two letters left in upper-economics classes than thirty-two letters left in upper-level classes in other disciplines (thirty-one percent)); T.D. Stanley & Ume Tran, *Economics Students Need Not Be Greedy: Fairness and the Ultimatum Game*, 27 J. SOCIO-ECON. 657, 660 (1998) (showing that in Ultimatum Game conducted at small liberal arts college, with about 1000 undergraduate students, the seven economic majors were less motivated by self-interest than the nine other students in their experiment).

148. The participants, for example, had to descramble four of the five words (e.g., “high a salary desk paying”) into a sensible phrase (e.g., “a high-paying salary”). Kathleen D. Vohs et al., *The Psychological Consequences of Money*, SCIENCE, Nov. 17, 2006, at 1154. Those primed with money had to descramble phrases involving money. *Id.*

149. *Id.*; see also Benedict Carey, *Just Thinking About Money Can Turn the Mind Stingy*, N.Y. TIMES, Nov. 21, 2006, at F6.

150. Vohs et al., *supra* note 148, at 1156.

151. *Id.* In another experiment, the participants played the board game Monopoly. *Id.* at 1155. After seven minutes, the game was cleared leaving the participants with one of three different amounts of Monopoly play money: \$4000 (high-money condition), \$200 (low-money condition), and no money (control condition). *Id.* For the high- and low-money condition participants, their play money remained in view for the rest of the experiment. *Id.* Each participant in the high-money group was asked to imagine a future with abundant finances. *Id.* Those in the low-money group were asked to imagine a future with strained finances. *Id.* Those in the control group (which received

*C. Criticisms of Behavioral Economics*

While amused by the behavioral economics literature, some question its applicability to individual (or firm) behavior in the marketplace. One criticism is that behavioral economics focuses on certain persons not representative of the total population (namely university students) in an artificial setting (namely lab experiments).<sup>152</sup> So naturally students' decisions in experimental games with small financial stakes could differ from real market behavior with often greater financial stakes.

This criticism perhaps was valid for earlier behavioral experiments involving university students (and at times professors), but today's behavioral economics literature includes field experiments and data from actual market transactions.<sup>153</sup> For example, researchers expanded the Ultimatum Game experiment to fifteen small-scale economies from twelve countries on four continents.<sup>154</sup> These group members, like the university students, reciprocated and did not offer the nominal amount. Nor do high financial stakes eliminate these heuristics and biases.<sup>155</sup>

A second criticism of behavioral economics is that the neoclassical economic theories, while imperfect, are a good approximation. Many firms benefit from the division of labor, and accordingly train or hire experts to capture the benefits from specialized knowledge. Market participants typically

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no money at the end) were asked about their plans for tomorrow. *Id.* An accident was staged: one confederate to the experiment (who did not know the participant's priming condition) spilled twenty-seven pencils before the participant. *Id.* Participants in the high-money condition on average gathered fewer pencils than the low-money participants, which gathered fewer pencils than the control group. *Id.*

152. See, e.g., Posner, *supra* note 87, at 1566.

153. For one recent survey of the literature, see DellaVigna, *supra* note 78, at 320–65. For an earlier informative examination of the criticisms of behavioral economics and responses thereto, see Prentice, *supra* note 44.

154. Gintis et al., *supra* note 91, at 154. The groups studied included (i) three foraging groups (the Hadza of East Africa, the Au and Gnaou of Papua New Guinea, and the Lamalera of Indonesia), (ii) six slash-and-burn horticulturists (the Aché, Machiguenga, Quichua, and Achuar of South America and the Tsimane and Orma of East Africa), (iii) four nomadic herding groups (the Turguud, Mongols, and Kazakhs of Central Asia, and the Sangu of East Africa), and (iv) two sedentary, small-scale agricultural societies (the Mapuche of South America and Zimbabwe farmers in Africa). *Id.* at 158.

155. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1468–69 (2003).

are repeat players who learn from and correct their mistakes. Firms and their employees have greater incentives to be rational, as they often are subject to competitive pressures.<sup>156</sup> Those behaving irrationally eventually exit the market. Thus, as Posner opines, “unusually ‘fair’” people will avoid or be forced out of “roughhouse activities—including highly competitive businesses, trial lawyering, and the academic rat race.”<sup>157</sup> Basically the fair-minded are relegated to monopoly industries, government-subsidized work or inactivity, and religious organizations that do not compete for converts.

No doubt people can learn from their mistakes and improve their reasoning and willpower. For example, frequent and more experienced sports cards traders display less of an endowment effect<sup>158</sup> for sports cards (such as baseball trading cards) than for other items such as chocolates and mugs.<sup>159</sup> But one must distinguish between bounded rationality/willpower and bounded self-interest. Perfect rationality and willpower, while not descriptive, are at least defensible norms. Who would not want better willpower and reasoning capabilities? But as the next part addresses, self-interest is not a well-accepted norm.

A third criticism is that behavioral economics, while identifying the predictive shortcomings of neoclassical economic theory, does not provide policymakers an alternative unifying theory.<sup>160</sup> But this criticism misconstrues the purpose of behavioral economics. Its purpose is to augment, not displace, neoclassical economic

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156. See, e.g., Edward L. Glaeser, *Paternalism & Psychology*, 73 U. CHI. L. REV. 133, 140–41, 144–46 (2006) (arguing how consumers outside the lab have stronger incentives to reduce error, which they can through experience).

157. Posner, *supra* note 87, at 1570.

158. The endowment effect occurs when we demand much more to give up and sell an object (such as baseball’s World Series tickets) than what we would be willing to pay to acquire that object. THALER, *supra* note 96, at 70–74.

159. John A. List, *Neoclassical Theory Versus Prospect Theory: Evidence from the Marketplace*, 72 ECONOMETRICA 615, 615 (2004); John A. List, *Does Market Experience Eliminate Market Anomalies?*, 118 Q. J. ECON. 41 (2003). But the fact that some individuals are less susceptible to a particular bias does not mean that they are immune from all biases and heuristics.

160. Posner, *supra* note 87, at 1559–60; cf. Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577, 1586 (1998) (noting how behavioral economics “can better be seen as a series of particular counterstories, formed largely in parasitic reaction to the unduly self-confident predictions of rational choice theorists, than as an alternative general theory of human behavior”).

theory by providing more realistic assumptions of human behavior, such as incurring personal costs to punish unfair behavior.<sup>161</sup>

A fourth criticism involves behavioral economics' policy implications. Rational self-interested persons with perfect willpower often can take care of themselves in the marketplace. But in relaxing that assumption of rationality, one runs the risk of inviting too much governmental regulation under the guise of paternalistically protecting "irrational" citizens. This paternalism thereby minimizes our incentives to improve our cognitive abilities and willpower. Also, if private market participants are predictably irrational, so too are governmental agents. While market forces provide greater incentives for private market participants to improve their willpower and rationality, government agents at times undertake anticompetitive actions because of weaker incentives to avoid mistakes, political myopia, the lack of direct accountability to voters, and regulatory capture. Thus, consumers may be worse off when the government intervenes to cure what it perceives as irrational behavioral.<sup>162</sup>

Government paternalism at times can cause suboptimal outcomes. But one cannot infer from these anecdotes that governmental paternalism *always* reduces consumer welfare. Before assessing the policy implications of irrational market behavior and the benefits and risks of various governmental policies and inaction, one must first examine the factual context in which bounded rationality arises. The policy implications differ, for example, when (i) a competition policy assumes that private market participants behave rationally when they systemically behave irrationally under certain settings, (ii) rational firms exploit consumers' irrationalities, or (iii) rational firms know of consumer irrationality but do not (or cannot) eliminate it.<sup>163</sup>

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161. Jolls et al., *supra* note 78, at 1479.

162. For more on behavioral economics' policy implications on the role of government, see generally THALER & SUNSTEIN, *supra* note 78; Glaeser, *supra* note 156, at 133; Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); and Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003).

163. For example, rational investors may know that other investors are acting irrationally (such as buying a company's stock on hope that past price

### III. SHOULD SELF-INTEREST BE THE NORM?

Part II showed that people do not predictably and uniformly pursue their self-interest. As the behavioral economics literature shows, many people generally care about treating others, and being treated, fairly. Moreover, legal, social, and ethical norms as well as other factors, such as market mechanisms to punish perceived selfish behavior, can affect human behavior. Because human behavior can vary, this part asks whether self-interest should be the norm. Is self-interested behavior the desired end, or the necessary means to some higher end, such as maximizing social welfare? Advocates of self-interest must now debate theologians, philosophers, political scientists, and others in espousing how people *ought* to act. They must answer why self-interest is an ideal that captures most or all the relevant ideals important to society, or the principal and necessary means to some higher end, such as happiness.

#### A. *In Defense of Self-Interest*

As John Kenneth Galbraith commented: "The modern conservative is engaged in one of man's oldest exercises in moral philosophy; that is, the search for a superior moral justification for selfishness . . ."<sup>164</sup> Greed and selfishness are repackaged as virtues. One presupposition of neoclassical economic theory is that the "natural laws of the market are in essence good . . . and necessarily work for the good, whatever may be true of the morality of individuals."<sup>165</sup> Society should encourage self-interest, which drives markets toward more efficient outcomes. The government need not intervene because rational market participants primed to pursue their self-interest will prevent or quickly cure most market failures

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increases will continue with future price increases). The rational trader may want to short the company's stock (and thereby make money when the price of the stock declines). The rational investor, however, does not know when the bubble will end and it, due to investor pressure, may be subject to short-term horizons. Instead, rational traders may actually prolong the speculation by seeking short-term gains and waiting to short the stock when it appears more likely that the market appears ripe for a downturn.

164. MICHAEL JACKMAN, CROWN'S BOOK OF POLITICAL QUOTATIONS: OVER 2500 LIVELY QUOTES FROM PLATO TO REAGAN 31 (1982).

165. Joseph Cardinal Ratzinger, *Market Economy and Ethics*, ACTON INSTITUTE, 1985, [http://www.acton.org/publications/occasionalpapers/publicat\\_occasionalpapers\\_ratzinger.php?view=print](http://www.acton.org/publications/occasionalpapers/publicat_occasionalpapers_ratzinger.php?view=print).

in the form of arbitrage.<sup>166</sup>

But few economists defend self-interest on normative grounds.<sup>167</sup> The Chicago School economists, likewise, do not endorse self-interest as a normative theory. Bork defended his School's definition of rationality on its superior descriptive qualities, not on normative grounds.<sup>168</sup> Posner characterized earlier economists' attempts to defend wealth maximization as a societal goal and to make economics a source of moral guidance as "doomed efforts."<sup>169</sup> Instead, the economist's role is prescriptive.<sup>170</sup>

Others may argue for a weaker form of self-interest, namely to maximize individual liberty to choose between charity and selfishness. This weaker form of self-interest could easily be characterized as individualism, whereby the goal is to widen the field for the exercise of personal choice. Compared with a totalitarian regime dictating what is desirable, the weaker form of self-interest is, of course, preferable. To press the issue further, why not make self-interest as the norm? Indeed unless one adopts a strict rationalist model, one cannot avoid this issue.

A rationalist model is consistent with the weaker form of self-interest. People, through reason, alter their behavior to

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166. JUSTIN FOX, *THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET* 192 (2009); ANDREI SCHLEIFER, *INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE* 2–5 (2000).

167. Robert Skidelsky, *How to Rebuild a Shamed Subject*, *FIN. TIMES*, Aug. 6, 2009, at 11 ("Ever since modern economics started in the 18th century it has presented itself as a predictive discipline, akin to a natural science."); LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 242 (Fox & Wilkes 1996) (1949) ("Economics is not intent upon pronouncing value judgments."); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1688 (2003) (criticizing law and economics scholars as typically and conveniently assuming that although ideal preferences are superior to actual preferences as a criterion of well-being, there usually will be no significant empirical differences in applying the two measures); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 251 (1998) (noting that economic analysis ordinarily assumes rationality as descriptive, rather than normative or logical).

168. BORK, *supra* note 44, at 120–21.

169. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1670 (1998).

170. *Id.* ("What the economist can say, which is a lot but not everything, is that if a society values prosperity (or freedom or equality), these are the various policies that will conduce to that goal, and these are the costs associated with each. The economist cannot take the final step and say that a society's ultimate goal should be growth, equality, happiness, survival, conquest, stasis, social justice, or what have you.").



progress toward the desired end. Rational individuals determine which goals (such as fame, fortune, or power) are the proper end, and the means of attaining that end.<sup>171</sup> Rationality, for Aristotle, reflected deliberations on the end (happiness), and the means to attain that end (living a virtuous life).<sup>172</sup> Behavior motivated by wealth maximization is neither rational, in accord with a virtuous life, nor likely to lead to happiness, but rather an appetite devoid of rationality.<sup>173</sup> So as their cognitive abilities and willpower improve, people will choose the virtuous life.<sup>174</sup> Thus, dictating self-interest as the norm is unnecessary. Under this model, the objective is to enable individuals to make the wisest choices by affording them the liberty and ability to improve their cognitive abilities and willpower.<sup>175</sup>

Responding to the rationalist model, Dostoyevsky remarked, “[t]he trouble with man is that he’s stupid. Phenomenally stupid.”<sup>176</sup> Some people persist in desiring rather than reasoning. Contrary to the rationalist model, but milder than Dostoyevsky’s conception, the social intuitionist model recognizes human capacity for deliberative, slow reasoning, but posits that many judgments generally appear in consciousness automatically and effortlessly.<sup>177</sup> More active moral reasoning typically arises *ex post* to justify our moral judgment, and our moral judgments are highly attuned to group norms and the moral judgments of our family, friends, and peers.<sup>178</sup> Even for Aristotle, knowledge about the proper means was insufficient.<sup>179</sup> Virtue arises from

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171. ARISTOTLE, *NICOMACHEAN ETHICS* 37–60 (Roger Crisp ed., 2d ed. 2002)

172. *Id.* at 3–23.

173. *Id.* at 60–65.

174. *Id.* at 23.

175. See, e.g., JOHN STUART MILL, *ON LIBERTY* 13, 61–62, 86–99 (Barnes & Noble Books 2004) (1859) (demanding liberty of conscience, tastes, and pursuits); George J. Stigler, *The Intellectual and the Market Place*, 2 *NEW INDIVIDUALIST REV.* (1962), <http://oll.libertyfund.org/title/2136/195332> (“man should be free within the widest possible limits of other men’s limitations on his beliefs and actions”).

176. FYODOR DOSTOYEVSKY, *NOTES FROM THE UNDERGROUND* 109 (Andrew R. MacAndrew trans., Signet Classic 1980) (1961).

177. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 818–19 (2001); see also Matthew Rabin, *Psychology and Economics*, 93 *AM. ECON. REV.* 1449, 1450–52 (2003); Kahneman, *supra* note 155, at 1450.

178. Haidt, *supra* note 177, at 818–19.

179. ARISTOTLE, *supra* note 171, at 23.

routinely exercising the desired behavior. By cultivating and habituating the desired behavior through repetition, one more likely responds similarly in future decisions: “So too we become just by doing just actions, temperate by temperate actions, and courageous by courageous actions.”<sup>180</sup>

Consequently, under a rationalist or social intuitionist model, one does not simply ponder whether self-interest or compassion is the proper choice. Rather, as Aristotle observed, and the social intuitionist model supports, “it is not unimportant how we are habituated from our early days; indeed it makes a huge difference—or rather all the difference.”<sup>181</sup> Even if the goal is maximizing personal choice, the fundamental issue remains: should parents, communities, and the larger society seek to habituate in their children either through legal, social, or ethical norms self-interest or something else?

*B. Issues if Self-Interest Is the Desired Norm*

*1. Self-Interest, at Times, Can Undermine, Rather Than Support, a Market Economy*

Self-interested market participants—free of legal, social, and ethical institutions—are not a prerequisite for a market economy or for promoting overall happiness. Unbridled capitalism, as Professors Akerlof and Shiller write, “does not automatically produce what people really need; it produces what they *think* they need, and are willing to pay for.”<sup>182</sup> It can maximize output of snake oil or products that eventually wipe out the economy.<sup>183</sup> Fielding congressional questioning during the financial crisis, the former Federal Reserve Chairman Alan Greenspan expressed his “distress” in discovering a “flaw” in his free-market beliefs: “Those of us who have looked to the self-interest of lending institutions to protect shareholder’s equity (myself especially) are in a state of shocked disbelief.”<sup>184</sup>

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180. *Id.*

181. *Id.* at 24.

182. AKERLOF & SHILLER, *supra* note 78, at 26.

183. *Id.*; see also Anthony Faiola et al., *What Went Wrong?*, WASH. POST, Oct. 15, 2008, at A01 (noting several Clinton and Bush administrations officials’ opposition to regulation of derivatives).

184. Kara Scannell & Sudeep Reddy, *Greenspan Admits Errors to Hostile House Panel*, WALL ST. J., Oct. 24, 2008, at A1, available at

Granted people engage in commerce to promote their satisfaction. It is not out of benevolence that I spend money on auto repairs. But an economy, Amartya Sen recently wrote, “needs other values and commitments such as mutual trust and confidence to work efficiently.”<sup>185</sup> In athletic contests, some cooperation and trust are required, and the athletes generally abide by unwritten rules to ensure a fair contest.<sup>186</sup> Likewise, markets rely on trust. Suppose a prospective employer offers you a contract that meticulously details its specific requirements, and identifies the penalty for every conceivable transgression or deficient work performance.<sup>187</sup> Would you want to work there? The behavioral experiments show how communicating these penalties can backfire; by signaling distrust, the penalty terms engender less productivity from the experiments’ employees.<sup>188</sup>

Posner assumes that self-interested individuals will seek out, while unusually fair people will avoid or be forced out of, highly competitive businesses and academia.<sup>189</sup> His empirically unsupported assumption is that those with this

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<http://online.wsj.com/article/SB122476545437862295.html>.

185. Amartya Sen, *Adam Smith’s Market Never Stood Alone*, FIN. TIMES, March 11, 2009, at 11; see also Ashraf et al., *supra* note 108, at 136 (collecting some of the literature on importance of trust in market economies).

186. For example, professional cyclists (generally from different teams) often breakaway from the main body of riders (the peloton). See Bicycle Racing Terminology: A Primer, <http://www.amgentourofcalifornia.com/Peloton/glossary.html> (last visited Jan. 10, 2010). To prevent the peloton from catching them, the breakaway cyclists must cooperate by taking turns riding up front. *Id.* To take advantage of the slipstream, the cyclists often ride behind one another. *Id.* Thus, the cyclist up front is working harder than others in the paceline. *Id.* Moreover, the peloton riders enforce unwritten norms such as discouraging tactical attacks during feed zones or bathroom breaks. Rob Hodgetts, *Cycling’s Gentleman’s Club*, BBC SPORT, July 22, 2003, [http://news.bbc.co.uk/go/pr/fr/-/sport2/hi/other\\_sports/cycling/tour\\_de\\_france\\_2003/3086279.stm](http://news.bbc.co.uk/go/pr/fr/-/sport2/hi/other_sports/cycling/tour_de_france_2003/3086279.stm).

187. Steven Goldberg, my thoughtful administrative law professor, often began or ended classes with quotations. His quotation of Grant Gilmore comes to mind:

Law reflects, but in no sense determines the moral worth of a society. . . . The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. . . . In Hell, there will be nothing but law, and due process will be meticulously observed.

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110–11 (1977).

188. Bowles, *supra* note 90, at 1608.

189. Posner, *supra* note 87, at 1570.

maladaptive trait of fairness are somehow at a competitive disadvantage.<sup>190</sup> But is this true?

Chicago School economist Albert Rees taught for several decades the neoclassical economic theory of wage determination, which had nothing to say of fairness.<sup>191</sup> But Rees confessed that this economic theory was of no help in his administrative positions with the government, corporations, and universities: "The factors involved in setting wages and salaries in the real world seemed to be very different from those specified in the neoclassical theory. The one factor that seemed to be of overwhelming importance in all these situations was fairness."<sup>192</sup> Likewise the directors of Harvard Negotiation Project in their national bestseller pressed negotiators to identify and discuss the relevant fairness standard(s).<sup>193</sup> Consumers, the behavioral experiments show, are willing to sacrifice their economic interests to punish unfair acts (e.g., through organized boycotts) and support businesses they perceive as behaving fairly, and consumer motivation increases as their personal costs decrease.<sup>194</sup>

Contrary to Posner's assumption, firms must be sensitive to fairness concerns,<sup>195</sup> which are not necessarily the outcomes predicted under neoclassical economic theory. For example, a fair split in the Ultimatum Game is closer to 50:50 than 99:1. Consequently, even if maximizing profits is the aim, market participants, like players in the Ultimatum Game, must be attuned to the fair outcome; players highly sensitive to the fair outcome in the Ultimatum Game are at a competitive advantage to the Chicago School theorist who assumes individuals solely pursue their self-interest. After a natural disaster, many businesses could price gouge, but decline to behave opportunistically for various reasons, including the implications of short-run profit gains on long-term profitability and non-economic reasons such as fairness

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190. *Id.* at 1570-71.

191. AKERLOF & SHILLER, *supra* note 78, at 19.

192. *Id.* at 20.

193. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 151-57 (2d ed. 1991).

194. See Matthew Rabin, *Incorporating Fairness into Game Theory & Economics*, 83 AM. ECON. REV. 1281, 1282 (1993).

195. Fairness may be determined by a reference transaction set by legal, social, or ethical norms. Jolls et al., *supra* note 78, at 1496.

and customer loyalty.<sup>196</sup>

## 2. *Reconciling Self-Interest's Conflict with Religious, Ethical, and Social Norms*

None of the major religions promote self-interest as a virtue.<sup>197</sup> Instead they advocate other-regarding behavior and treating others as one would like to be treated. The chief rabbi of Britain, for example, argued that capitalism without an ethical core cannot sustain itself:

When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our worth is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.<sup>198</sup>

Aside from religious norms, children through schooling, volunteer activities, and other forms of socialization are taught altruism, compassion<sup>199</sup> and empathy. If the goal is to promote self-interest, it makes no sense for children to internalize norms of altruism, compassion and empathy, only to reject these norms in adulthood. Before advocating self-interest, one must inquire why societies promote these other norms. Empathy, even for adults, can debias moral judgments. Social intuitionism finds that people at times lack the capacity to reach moral judgments through pure reason. Thus a principal pathway to moral judgments is empathy.<sup>200</sup> Studies find that psychopaths understand the

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196. *Id.* at 1512–15 (noting literature on why fairness considerations explain firms that do not raise prices opportunistically and why state residents support criminal and civil penalties of price gouging, which some economists view as ethically neutral); Kahneman et al., *supra* note 94, at 735 (discussing surveyed individuals' adverse reaction to grocery store raising prices when its competitor is temporarily forced to close); Stucke, *Behavioral Economists*, *supra* note 11, at 561–62 (discussing how actual firm behavior may deviate from that of self-interested firms).

197. Stigler, *supra* note 175 (“[A] dislike for profit-seeking is one of the few specific attitudes shared by the major religions.”).

198. HOWARD GARDNER, *FIVE MINDS FOR THE FUTURE* 137 (2007) (quoting JONATHAN SACKS, *TO HEAL A FRACTURED WORLD* (2005)).

199. Envy commonly opposes compassion, which is “love, insofar as it so affects a man that he is glad at another’s good fortune, and saddened by his ill fortune.” BENEDICT DE SPINOZA, *ETHICS* 107–08 (Penguin Books 1996) (1677).

200. Haidt, *supra* note 177, at 819.

rules of social behavior and their action's harmful consequences, but they simply do not care.<sup>201</sup> By putting oneself in the other person's position, one may experience multiple competing intuitions,<sup>202</sup> which helps mitigate self-serving bias,<sup>203</sup> and has been identified as the "single most effective skill in negotiation."<sup>204</sup>

### 3. *How Does Self-Interest Improve Individual Welfare?*

Although happiness is complex, economists increasingly since the 1990s have analyzed the determinants of happiness in different countries.<sup>205</sup> The economic literature shows happiness as weakly related to income.<sup>206</sup> In the United States, higher-income individuals (those in the highest decile) reported on average the highest level of happiness.<sup>207</sup> But the happiness economic literature does not identify a correlation between self-interest and greater happiness. After one's basic needs are met, there is no strong correlation between *increases* in wealth and subjective happiness. For example, the mean income (adjusted for inflation) of the top decile in the United States increased thirty-three percent between 1972 and 1996, but the mean happiness rating for that wealthy group remained the same.<sup>208</sup> This is not especially controversial. Economists generally recognize the diminishing marginal utility of money.<sup>209</sup>

Studies also show that once a country's gross domestic product (GDP) per capita exceeds a moderate income level

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201. *Id.* at 824.

202. *Id.* at 819.

203. Jolls et al., *supra* note 78, at 1503–04.

204. WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 19 (1993).

205. Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LIT. 402, 404 (2002).

206. In multivariate regressions, income as it correlates to subjective happiness evaluations has a low coefficient. *Id.* at 410; see also Elizabeth Dunn et al., *Spending Money on Others Promotes Happiness*, SCIENCE, Mar. 21, 2008, at 1687.

207. Frey & Stutzer, *supra* note 205, at 410 (showing that on a three-point scale ranging from not to happy (1), pretty happy (2), and very happy (3), the tenth decile between 1994–1996 had a mean happiness rating of 2.36, which was slightly higher than the ninth decile's mean of 2.3).

208. *Id.*

209. Matthew Rabin, *Diminishing Marginal Utility of Wealth Cannot Explain Risk Aversion*, in CHOICES, VALUES, AND FRAMES 202, 202 (Daniel Kahneman & Amos Tversky eds., 2000).

(\$12,000), societies do not become happier as they get richer: "large increases in income for a given country over time are not associated with increases in average subjective well-being."<sup>210</sup> For example, per capita income (adjusted for inflation) in the United States more than doubled between 1945 and 1991, but Americans are not necessarily happier.<sup>211</sup> The percentage of "very happy" Americans has not increased; nor has the percentage of "not very happy" Americans substantially decreased.<sup>212</sup>

Although poverty is increasing in the United States, most Americans, noted the OECD, enjoy a living standard whereby they can spend a significant share of their income on goods and services other than food, shelter, clothing, or other basics.<sup>213</sup> Since the Sherman Act was enacted, average family income (adjusted for inflation) increased threefold.<sup>214</sup> The percentage of total expenditures on discretionary items more than doubled since 1901 (with most of the increases occurring between 1901 and 1984).<sup>215</sup> In 1901, the average U.S. family devoted 79.8 percent of its spending to food, clothing, and housing.<sup>216</sup> By 2002–2003, U.S. families reduced spending on

210. Daniel Kahneman et al., *Would You Be Happier If You Were Richer? A Focusing Illusion*, SCIENCE, June 30, 2006, at 1908; see also DANIEL NETTLE, HAPPINESS: THE SCIENCE BEHIND YOUR SMILE 15, 72–73 (2005); Rafael Di Tella & Robert MacCulloch, *Some Uses of Happiness Data in Economics*, 20 J. ECON. PERSP. 25, 26 (2006); Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 J. ECON. PERSP. 3, 15–16 (2006) (stating that despite China's real income per capita increasing by a factor of 2.5 between 1994–2005, there has been no increase in reported life satisfaction, and an increase in percentage who are dissatisfied); Frey & Stutzer, *supra* note 205, at 413 (stating that Japan's income per capita increased six-fold between 1958 and 1991, while average life satisfaction remained unchanged).

211. RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 29–30 (2005); Di Tella & MacCulloch, *supra* note 210, at 26; Frey & Stutzer, *supra* note 205, at 403.

212. LAYARD, *supra* note 211, at 29–30.

213. TRACEY STRANGE & ANNE BAYLEY, SUSTAINABLE DEVELOPMENT: LINKING ECONOMY, SOCIETY, ENVIRONMENT 79 (2008).

214. In 1901 the average U.S. family's income was \$750. In 2002–2003, this family's real income, expressed in 1901 dollars, would have increased threefold, to \$2282. U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, 100 YEARS OF U.S. CONSUMER SPENDING DATA FOR THE NATION, NEW YORK CITY, AND BOSTON 65 (2006), available at <http://www.bls.gov/opub/usc/reflections.pdf>.

215. In 2002–2003, the average U.S. family could allocate 49.9 percent (\$20,333) of total expenditures for various discretionary consumer goods and services, while the average family in 1901 could allocate only 20.2 percent, or \$155, for discretionary spending. *Id.*

216. *Id.* at 66.

necessities to 50.1 percent.<sup>217</sup>

With increases in discretionary income, Americans can now consume more goods and services. Unlike the Kramdens in the 1950s television show, *The Honeymooners*, Americans today no longer consider automobiles,<sup>218</sup> television sets,<sup>219</sup> washer and dryers,<sup>220</sup> and telephones as luxuries.<sup>221</sup> A recent government report concluded from these findings:

Perhaps as revealing as the shift in consumer expenditure shares over the past 100 years is the wide variety of consumer items that had not been invented during the early decades of the 20th century but are commonplace today. In the 21st century, households throughout the country have purchased computers, televisions, iPods, DVD players, vacation homes, boats, planes, and

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217. *Id.* In 1901, U.S. households allotted 42.5 percent of their expenditures for food; by 2002–03, food's share of spending dropped to 13.2 percent. *Id.* By the twenty-first century, however, the average U.S. family allocated just 58.1 percent of food spending for food eaten at home and 41.9 percent for food eaten away from home. *Id.*

218. Between 1934 and 1936, 44.4 percent of U.S. households owned an automobile. *Id.* at 69. In New York City and Boston, where well-developed public transportation was available, the percentages were 14.8 and 14.1, respectively. *Id.* By the twenty-first century, eighty-eight percent of U.S. households had at least one vehicle, with the average U.S. family owning two. *Id.* In New York City, the average household owned 1.4 vehicles; in Boston, 1.6. *Id.*

219. The percentage of U.S. homes with a television set went from nine percent in 1950 to 87.1 percent in 1960, to ninety-eight percent in 1978. Number of TV Households in America, [http://www.tvhistory.tv/Annual\\_TV\\_Households\\_50-78.JPG](http://www.tvhistory.tv/Annual_TV_Households_50-78.JPG) (last visited Jan. 10, 2010).

220. The percentage of housing units with clothes washers ranged from fifty-seven percent for the lowest income level (less than \$15,000); seventy-two percent (\$15,000–\$29,999); eighty-two percent (\$30,000–\$49,999); eighty-nine percent (\$50,000–\$74,999); and ninety-four percent for the highest income level (\$75,000 or more). U.S. Energy Info. Admin., U.S. Dep't Energy, *The Effect of Income on Appliances in U.S. Households*, <http://www.eia.doe.gov/emeu/recs/appliances/appliances.html>. The percentage of households owning clothing dryers is forty-five percent for the lowest income level and ninety-two percent for the highest income level. *Id.* Ownership of both a washer and dryer is related to the type of housing unit the respondent lives in. *Id.* Ninety-one percent of residents in single-family, detached homes have a washer and a dryer; only nineteen percent of residents in large apartment buildings (five or more rental units) have both. *Id.*

221. Some appliances are common in the home regardless of income level, such as refrigerators (99.9 percent of households), cooking appliances (which includes the standard oven with stove-top burners, separate stove and ovens, and toaster ovens) (99.7 percent), and color televisions (98.9 percent). Residential Energy Consumption Survey 2001: Housing Characteristics Data Tables, [http://www.eia.doe.gov/emeu/recs/recs2001/detail\\_tables.html](http://www.eia.doe.gov/emeu/recs/recs2001/detail_tables.html).



recreational vehicles. They have sent their children to summer camps; contributed to retirement and pension funds; attended theatrical and musical performances and sporting events; joined health, country, and yacht clubs; and taken domestic and foreign vacation excursions. These items, which were unknown and undreamt of a century ago, are tangible proof that U.S. households today enjoy a higher standard of living.<sup>222</sup>

Whether or not iPods and other material goods are “tangible proof” of a higher, better living standard, the basic needs for many Americans are met. Thus, the happiness literature predicts that further increases in wealth and consumption will not correlate with greater happiness.

*C. Why Do Many People Whose Basic Needs Are Met Yearn to Consume More Goods and Services?*

One could reply that people inherently know what makes them happy. For centuries, people across cultures revealed through their choices (such as purchasing lottery tickets) their desire for wealth. So economists can assess people’s preferences, not by their subjective beliefs or intentions, but by their actual choices. Because looking at people’s actual choices is a more objective method to infer individuals’ utility, and because people’s choices reveal their preference for wealth, self-interest is a proper norm.

As Part II showed, people in the Ultimatum Game and other behavioral experiments do not always choose to maximize wealth. But behavioral economics also casts doubt on this assumption of revealed preferences.<sup>223</sup> Although this article focuses on bounded self-interest, the behavioral experiments identify many heuristics and biases that systematically appear in human decision-making.<sup>224</sup> We at

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222. U.S. BUREAU OF LABOR STATISTICS, *supra* note 214, at 70.

223. Frey & Stutzer, *supra* note 205, at 404–05; Kahneman & Krueger, *supra* note 210, at 3–4; George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. PUB. ECON. 1795 (2008).

224. In contrast to Bernoulli’s theory of expected utility, prospect theory predicts that individuals favor risk aversion for gains, favor risk seeking for losses, and most importantly suffer loss aversion, whereby the dissatisfaction in actually losing money from a reference point (say \$100) is greater than the satisfaction in winning that sum of money. Kahneman, *supra* note 155, at 1456–57. For example, rational individuals with stable preferences, unlike actual consumers, would not distinguish between merchants: (a) requiring

times predict poorly as to what will make us happy; so we choose poorly. As Professors Kahneman and Krueger observe, "If people display bounded rationality when it comes to maximizing utility, then their choices do not necessarily reflect their 'true' preferences, and an exclusive reliance on choices to infer what people desire loses some of its appeal."<sup>225</sup> Rather than inferring utility from observed choices, some economists now seek to capture happiness directly by measuring individuals' subjective well-being.<sup>226</sup> But this measure of utility is also susceptible to human biases. Many people are aware that accumulations of wealth (or the goods and services purchased) in the long run do not yield greater happiness. One lore is that money does not buy happiness. So why do many people find jumping off the hedonic treadmill difficult?<sup>227</sup>

The happiness studies show how people inaccurately predict: (1) the impact of future life events on their happiness (such as junior professors' prediction if denied tenure);<sup>228</sup> (2) their adaptation to their new condition (whether a physical disability or winning the lottery);<sup>229</sup> and (3) the strong effects of relative rather than absolute wealth on satisfaction.<sup>230</sup>

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customers to pay a five percent surcharge for using a credit card or (b) giving customers a five percent discount for paying cash. ITM RESEARCH, THE ABOLITION OF THE NO-DISCRIMINATION RULE 7-8 (2000), <http://www.creditslips.org/files/netherlands-no-discrimination-rule-study.pdf>.

225. Kahneman & Krueger, *supra* note 210, at 3.

226. *Id.* at 18-21 (proposing U-index measure of the proportion time an individual spends in an unpleasant state).

227. LAYARD, *supra* note 211, at 48.

228. Kahneman et al., *supra* note 210, at 1908; Daniel Kahneman and Robert Sugden, *Experienced Utility as a Standard of Policy Evaluation*, 32 ENVTL. & RESOURCE ECON. 161, 170 (2005).

229. Di Tella & MacCulloch, *supra* note 210, at 36 n.7.

230. LAYARD, *supra* note 211, at 41-43; NETTLE, *supra* note 210, at 73. Similarly, people rarely choose things in absolute terms, but instead based on their relative advantage to other things. ARIELY, *supra* note 78, at 2. As Professor Ariely discusses, by adding a third more expensive choice, for example, the marketer can steer consumers to a more expensive second choice. *Id.* In one behavioral economics study, 100 MIT students were offered three choices for the *Economist* magazine: (i) Internet-only subscription for fifty-nine dollars (sixteen students); (ii) print-only subscriptions for \$125 (no students); and (iii) print-and-Internet subscriptions for \$125 (eighty-four students). *Id.* at 5. When the "decoy" second choice (print-only subscriptions) was removed and only the first and third options were presented, the students did not react similarly. *Id.* at 5-6. Instead sixty-eight students opted for Internet-only subscription for fifty-nine dollars (up from sixteen students) and only thirty-two students chose print-and-Internet subscriptions for \$125 (down from eighty-four

People often predict greater happiness they would achieve if they were only wealthier. But “increases in income have mostly a transitory effect on individuals’ reported life satisfaction.”<sup>231</sup> Winners of large amounts of money in lotteries, for example, have a temporary boost in happiness.<sup>232</sup> Individuals may desire more goods and services, but after obtaining them, they become preoccupied with obtaining other goods and services.<sup>233</sup>

Many people do not care solely about absolute levels of wealth or personal consumption, but also about changes in their wealth and consumption relative to others.<sup>234</sup> One’s total income is less important than relative income, namely earning slightly more than one’s peers, neighbors, friends, or, as H.L. Mencken observed, one’s wife’s sister’s husband.<sup>235</sup> We compete by comparing ourselves to the wealth and consumption of our peers and the socio-economic class immediately above us; after adapting to the higher rung, we strive for more.<sup>236</sup>

Behavioral economists describe this “focusing illusion” in pursuing happiness as the fact that “[n]othing that you focus on will make as much difference as you think.”<sup>237</sup> One example of this bias came from a recent experiment, which reaffirmed “[t]here is more happiness in giving than in receiving.”<sup>238</sup> First the study’s authors found from a nationally representative survey that personal spending was

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students). *Id.* at 5–6.

231. Kahneman et al., *supra* note 210, at 1909.

232. NETTLE, *supra* note 210, at 75. Even people with acquired disabilities or health problems show considerable, but not always complete, adaptation to happiness. *Id.* at 83.

233. *Id.* at 76–77; Kahneman et al., *supra* note 210, at 1909–10.

234. Rabin, *supra* note 88, at 661.

235. Kahneman et al., *supra* note 210, at 1909; *see also* David Neumark & Andrew Postlewaite, *Relative Income Concerns and the Rise in Married Women’s Employment*, 70 J. PUB. ECON. 157 (1998) (finding that women’s employment decisions are positively related to sisters’ employment decisions; all else being equal, women whose sisters live nearby and worked the past year are about ten to fifteen percent more likely to work than women whose sisters did not work).

236. ARIELY, *supra* note 78, at 17–18.

237. David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy?*, PSYCHOL. SCI., Sept. 1998, at 345; *see also* Daniel Kahneman & Richard H. Thaler, *Utility Maximization & Experienced Utility*, 20 J. ECON. PERSP. 221 (2006).

238. 20 Acts of the Apostles 35 (New Jerusalem Bible).

unrelated to happiness, but spending more of one's income on others predicted greater happiness.<sup>239</sup> Higher prosocial spending (e.g., gifts for others and donations to charity) was associated with significantly greater happiness.<sup>240</sup> The study's authors next performed a before-and-after field study of employees who received a profit-sharing bonus. They found that "employees who devoted more of their bonus to prosocial spending experienced greater happiness after receiving the bonus, and the manner in which they spent that bonus was a more important predictor of their happiness than the size of the bonus itself."<sup>241</sup> In a third experiment, participants, after rating their happiness in the morning, were given an envelope containing money (either five dollars or twenty dollars) and were told to spend the money by five p.m. that day.<sup>242</sup> In one group participants were told to spend the money on themselves; the second group was told to spend the money on someone else or give it to a charity. After five p.m. the participants were asked about their happiness. Although the amount of money the participants received (five dollars or twenty dollars) did not have a significant effect on their happiness, participants who gave the money away reported greater post-windfall happiness than did participants who spent it on themselves.<sup>243</sup>

So if giving leads to greater happiness, the study's authors ask, why don't we spend a little less on ourselves and donate a little more?<sup>244</sup> People predict poorly. The authors found that sixty-three percent of the university students predicted personal spending would make them happier than prosocial spending, and that twenty dollars would make them happier than five dollars.<sup>245</sup>

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239. Dunn et al., *supra* note 206, at 1687.

240. *Id.*

241. *Id.* at 1688.

242. *Id.*

243. *Id.*

244. *Id.*

245. Dunn et al., *supra* note 206, at 1688. In another recent experiment, neuroscientists and economists combined brain imaging techniques and behavioral economics research to better understand individuals' tendency to overbid. Specifically, they examined whether the fear of losing the social competition inherent in an auction game, in part, causes people to pay too much. Mauricio R. Delgado et al., *Understanding Overbidding Using the Neural Circuitry of Reward to Design Economic Auctions*, SCIENCE, Sept. 26, 2008, at 1849. At the beginning of each auction round, the loss-frame group

Although the happiness economic literature empirically tested this focusing illusion, the ancient Greeks and Romans, early Christian theologians,<sup>246</sup> and economists such as Adam Smith<sup>247</sup> and Thorstein Veblen<sup>248</sup> warned readers about it. Lucius Annaeus Seneca noted that some gadgets are purchased not because of their inherent utility, but “because others have bought them or they’re in most people’s houses.”<sup>249</sup> These desires can never be satiated, he said, as we shall adapt to our current lifestyle, and envy those on the higher rung: “However much you possess there’s someone else who has more, and you’ll be fancying yourself to be short of things you need to the exact extent to which you lag behind him.”<sup>250</sup> Plutarch similarly observed, prisoners “envy those who have been freed, who envy those with citizen status, who in turn envy rich people, who envy province commanders, who envy kings, who—because they almost aspire to making thunder and lightning—envy the gods.”<sup>251</sup> If the poor aspire to be wealthy, and the wealthy aspire to be king, it logically follows that the tyrant who possesses unparalleled power and fortune is the happiest. But as the tyrant Dionysius

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members were given fifteen dollars; they were told that if they won the auction for that round, they would get the payoff from the auction and could keep the fifteen dollars. If they lost, they would have to return the fifteen dollars. *Id.* The bonus-frame group members were told that if they won that auction round they would get a fifteen-dollar bonus at the end of the round. *Id.* This framing should not affect a rational self-interested player: the winner of each round gets an extra fifteen dollars, the loser gets nothing. *Id.* Nonetheless the loss-treatment group members outbid the bonus-treatment group members, which outbid the baseline group. *Id.* This might prove an interesting experiment for anyone running their school fundraising charity. Project on the wall each family’s name in a picture of a donated “brick.” Every time the family loses an auction, its name becomes fainter. Those that win any auction item get to have their donated brick used in the school.

246. SAINT AUGUSTINE, *CONFESSIONS* 33 (1961) (acknowledging “man’s insatiable desire for the poverty he calls wealth”); SAINT THOMAS AQUINAS, *COMPENDIUM THEOLOGIAE*, reprinted in *ACQUINAS’S SHORTER SUMMA* 353–56 (2002).

247. See *infra* notes 230–33.

248. See *infra* notes 234–37.

249. SENECA, *Letter CXXIII*, in *LETTERS FROM A STOIC* 227 (Robin Campbell trans., 1969).

250. SENECA, *Letter CIV*, in *LETTERS FROM A STOIC*, *supra* note 249, at 186.

251. PLUTARCH, *On Contentment*, in *ESSAYS* 222 (Ian Kidd ed., Robin H. Waterfield trans., 1992). Bruce Springsteen’s song *Badlands* repeats this theme: “Poor man wanna be rich, rich man wanna be king, and a king ain’t satisfied till he rules everything.” BRUCE SPRINGSTEEN, *Badlands*, on *DARKNESS ON THE EDGE OF TOWN* (Columbia 1978).

demonstrated in his experiment on one flatterer Damocles, tyrants cannot be happy.<sup>252</sup> "There is a sickness that infects all tyrants, they cannot trust their friends."<sup>253</sup> Similarly, a key factor in predicting happiness in a country is the proportion of its citizens who say that others can be trusted.<sup>254</sup>

Adam Smith in 1759 likewise warned about this focusing illusion and status competition.<sup>255</sup> People labor night and day to acquire talents superior to their competitors, and solicit every employment opportunity, only to serve those whom they hate, and be obsequious to those whom they despise.<sup>256</sup> On the deathbed, they may realize the emptiness of the quest:

It is then, in the last dregs of life, his body wasted with toil and diseases, his mind galled and ruffled by the memory of a thousand injuries and disappointments which he imagines he has met with from the injustice of his enemies, or from the perfidy and ingratitude of his friends, that he begins at last to find that wealth and greatness are mere trinkets of frivolous utility, no more adapted for procuring ease of body or tranquillity of mind than the tweezer-cases of the lover of toys; and like them too, more troublesome to the person who carries them about with him than all the advantages they can afford him are commodious.<sup>257</sup>

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252. CICERO, ON THE GOOD LIFE 84–85 (Michael Grant trans., 1971).

253. Aeschylus, *The Prometheus Bound*, in THREE GREEK PLAYS 105 (Edith Hamilton trans., 1965). How can they when they believe their friends are capable of the same vices? For if the minds of tyrants could be laid bare, "there would be seen gashes and wounds; for, as the body is lacerated by scourging, so is the spirit by brutality, by lust, and by evil thoughts." CORNELIUS TACITUS, *The Annals* VI.6–9, in THE ANNALS & THE HISTORIES, *supra* note 85, at 170.

254. LAYARD, *supra* note 211, at 64, 68–69.

255. ADAM SMITH, *supra* note 86, at IV.I 183–87, states:

How many people ruin themselves by laying out money on trinkets of frivolous utility? What pleases these lovers of toys is not so much the utility, as the aptness of the machines which are fitted to promote it. All their pockets are stuffed with little conveniencies. They contrive new pockets, unknown in the clothes of other people, in order to carry a greater number. . . .

Nor is it only with regard to such frivolous objects that our conduct is influenced by this principle; it is often the secret motive of the most serious and important pursuits of both private and public life.

*Id.* at 183.

256. *Id.* at 184.

257. *Id.* Thus the trinkets' real purpose is to "more effectually gratify that love of distinction so natural to man." *Id.*

Self-deception, for Adam Smith, drives market productivity.<sup>258</sup>

Thorstein Veblen in 1899 (nine years after the Sherman Antitrust Act was enacted) observed that the predominant motive for conspicuous consumption is the “invidious distinction attaching to wealth.”<sup>259</sup> The accumulation of goods and services forms the conventional basis of esteem. He too noted how the hedonic treadmill never stops: “[T]he present pecuniary standard [marks] the point of departure for a fresh increase in wealth; and this in turn gives rise to a new standard of sufficiency and a new pecuniary classification of one’s self as compared with one’s neighbors.”<sup>260</sup> Chronically dissatisfied with his present lot, man will strain to place “a wider and ever-widening pecuniary interval between himself and the average standard.”<sup>261</sup> For Veblen, like the social scientists before him, our ideal of consumption lies just beyond our immediate reach.<sup>262</sup>

Status competition and the hedonic treadmill have confounded consumers for centuries. John Maynard Keynes, for example, assumed that as a result of increased productivity and living standards, people in developed economies could work only fifteen hours per week.<sup>263</sup> He identified two classes of needs—“those needs which are absolute in the sense that we feel them whatever the situation of our fellow human beings may be, and those which are relative in the sense that we feel them only if their satisfaction lifts us above, makes us feel superior to, our fellows.”<sup>264</sup> So as its economy developed, society should deemphasize the importance of relative needs:

When the accumulation of wealth is no longer of high social importance, there will be great changes in the code of morals. We shall be able to rid ourselves of many of the pseudo-moral principles which have hag-ridden us for two

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258. *Id.* at IV.I.10 182.

259. THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 26 (Penguin Books 1994) (1899).

260. *Id.* at 31.

261. *Id.*

262. *Id.* at 103–04.

263. JOHN MAYNARD KEYNES, *Economic Possibilities for Our Grandchildren*, in *ESSAYS IN PERSUASION* 358, 369 (1932) (“For three hours a day is quite enough to satisfy the old Adam in most of us!”).

264. *Id.* at 365.

hundred years, by which we have exalted some of the most distasteful of human qualities into the position of the highest virtues. We shall be able to afford to dare to assess the money-motive at its true value. The love of money as a possession—as distinguished from the love of money as a means to the enjoyments and realities of life—will be recognised for what it is, a somewhat disgusting morbidity, one of those semi-criminal, semi-pathological propensities which one hands over with a shudder to the specialists in mental disease. All kinds of social customs and economic practices, affecting the distribution of wealth and of economic rewards and penalties, which we now maintain at all costs, however distasteful and unjust they may be in themselves, because they are tremendously useful in promoting the accumulation of capital, we shall then be free, at last, to discard.<sup>265</sup>

So why aren't many Americans, Europeans, and Asians today working fifteen or even twenty hours per week? While predicting the rise in productivity and real living standards, Keynes "underestimated the appeal of materialism."<sup>266</sup>

*D. If Self-Interest Does Not Yield Greater Happiness, What Does?*

One defense of self-interest is that happiness is elusive. Some people intentionally confound happiness. Even if social scientists modeled the formula for happiness, "what joy will [an individual] get out of functioning according to a timetable?"<sup>267</sup> Others accept Aristotle's belief that the path toward happiness is practicing virtue, yet disagree that perfect happiness is attainable on earth.<sup>268</sup> Thus, if theologians and philosophers disagree over whether and how happiness can be attained, then happiness is an unrealistic measure for evaluating self-interest as a proper norm.

Measuring happiness can indeed be fickle.<sup>269</sup> But

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265. *Id.* at 369–70.

266. Jonathan Guthrie, *Anything to Distract Us from the Arts of Life*, FIN. TIMES, Apr. 30, 2009, at 11 (quoting Professor Alan Manning).

267. DOSTOYEVSKY, *supra* note 176, at 104.

268. *See, e.g.*, AQUINAS, *supra* note 246, at 197–98.

269. Individual responses can depend on the order or wording of questions, the scales applied, a fortunate event (like the individual discovering a dime before the questioning), or the current weather. Frey & Stutzer, *supra* note 205, at 406; Kahneman & Krueger, *supra* note 210, at 6–7. One study, for example, examined the correlation between the responses of two questions:



drawing from large diverse samples, the happiness economic literature yields consistent conclusions. In examining happiness in fifty countries in up to four years, one study identified six factors that can explain eighty percent of the variation in happiness: divorce rate, unemployment rate, level of trust, membership in non-religious organizations, quality of government, and fraction believing in God.<sup>270</sup> On an individual level, the primary sources of happiness are family relationships, employment, community and friends, health, self-control or autonomy, personal ethical and moral values, and the quality of the environment.<sup>271</sup> One's financial situation is also a factor, but has a weak correlation with happiness.<sup>272</sup> Personal control—the ability to control one's life or achieve a spiritual indifference<sup>273</sup>—according to a British life satisfaction study, is a better predictor of happiness than income.<sup>274</sup>

Individuals, who look beyond their self-interest and practice religion, “belong to community organizations, do voluntary work, and have rich social connections [generally] are healthier and happier than those who do not.”<sup>275</sup> Sophocles observed that the noblest work occurs when a

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“How happy are you?” and “How many dates did you have last month?” Norbert Schwartz & Fritz Strack, *Reports of Subjective Well-Being: Judgmental Processes and Their Methodological Implications*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 63 (Daniel Kahneman et al. eds., 1999). When the happiness question was asked first, no correlation was found between the responses. *Id.* But when the dating question was asked first, there was a significant correlation between the two questions' responses. *Id.* Likewise, in another study, individuals were first asked to report either three positive or negative recent life events. Respondents who were first asked to recall the recent positive events reported higher current life satisfaction than those who were first ask to report three recent negative events. *Id.* at 65.

270. LAYARD, *supra* note 211, at 71.

271. *Id.* at 62–73; NETTLE, *supra* note 210, at 85, 87.

272. LAYARD, *supra* note 211, at 64.

273. St. Ignatius of Loyola described this spiritual indifference:

[W]e must above all endeavour to establish in ourselves a complete indifference towards all created things, though the use of them may not be otherwise forbidden; not giving, as far as depends on us, any preference to health over sickness, riches over poverty, honour over humiliation, a long life over a short. But we must desire and choose definitively in every thing what will lead us to the end of our creation.

SAINT IGNATIUS, *THE SPIRITUAL EXERCISES OF ST. IGNATIUS* 22 (Kessinger Publishing 2005).

274. NETTLE, *supra* note 210, at 74.

275. *Id.* at 156–57.

person helps others with all her gifts and native strength.<sup>276</sup> Likewise, the most satisfying jobs were, as one recent survey found, “especially those involving caring for, teaching, and protecting others and creative pursuits,”<sup>277</sup> not those jobs with the highest salaries or that reward self-interest. Heading the list were members of the clergy (87.3 percent very satisfied), followed by physical therapists (with the second highest mean score and 78.1 percent very satisfied), and firefighters (80.1 percent very satisfied).<sup>278</sup> Occupations with the happiest reported people were the clergy (67.2 percent very happy) and firefighters (57.2 percent very happy).<sup>279</sup>

Closer to home, many lawyers have left financially lucrative positions. There is a high attrition rate at law firms and non-private firm attorneys tend to be much happier.<sup>280</sup> A 2008 survey asked, “If you could change one aspect of your job as a lawyer, which one of the following would it be?”<sup>281</sup> The surveyed lawyers’ top two choices were (i) decreased job stress (thirty-one percent) and (ii) fewer hours at work or more personal time (thirty percent). Only two percent identified higher salaries/compensation.

#### IV. RISKS IF SOCIAL POLICIES PROMOTE SELF-INTEREST

As Parts II and III addressed, the neoclassical economic theories’ assumption of self-interest is neither descriptive nor normative. Self-interested behavior does not necessarily improve, and may undermine, a market economy, is inconsistent with moral and social norms of empathy and compassion, and does not correlate with greater overall or individual happiness. The evidence instead shows that rationality includes the use of reason to help others and improve our community (and thereby ourselves).

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276. SOPHOCLES, *Oedipus the King*, in THE THREE THEBAN PLAYS 176 (Robert Fagles trans., 1984).

277. TOM W. SMITH, NORC/UNIV. OF CHI., JOB SATISFACTION IN THE UNITED STATES (Apr. 17, 2007), <http://www-news.uchicago.edu/releases/07/pdf/070417.jobs.pdf>.

278. *Id.*

279. *Id.*

280. Peter H. Huang & Rick Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 SYRACUSE L. REV. 335 (2008).

281. Press Release, Robert Half Legal, Lawyers Seek Less Stress on the Job (Oct. 7, 2008), <http://legal.rhi.mediaroom.com/lessstressonthejob>.

A Chicago School theorist might agree that people do not (nor should they) invariably pursue their self-interest. Instead, this assumption is useful in the context of commercial transactions. Consumers often choose retailers or manufacturers with better or similar goods and services at lower prices. No one quibbles when consumers seek to save some money by going to the cheaper gas station. Likewise the assumption of self-interest must be viewed in connection with the Chicago School's economic goal for antitrust, namely maximizing total welfare (or for others consumer welfare).<sup>282</sup> Antitrust's central task, for the Chicago School, "is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental."<sup>283</sup> Private coordinated restraints on the output of goods and services are suspect.<sup>284</sup> Antitrust seeks to prevent competitors from agreeing to increase prices above and reduce output below competitive levels.<sup>285</sup> Absent collusion, prices are lower, output is greater, and price-sensitive consumers can save or consume more.

Within these happy confines, promoting self-interest and deterring collusive reductions in output are uncontroverted. No one contends that consumers should opt for higher-priced inferior goods and services or that a market economy benefits from cartels that reduce output.

But policymakers can become restless within these confines and press further. If society benefits whenever consumers pursue their self-interest in opting for lower-priced, better quality goods, shouldn't society likewise benefit

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282. See Stucke, *supra* note 48, at 991–1008 (discussing the dispute over the terms' meaning and how the concepts are actually measured).

283. BORK, *supra* note 44, at 122; see also *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.") (Easterbrook, J.).

284. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107–08 (1984) [hereinafter *NCAA*] ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979) [hereinafter *BMI*] (stating that Court's per se illegal rule applies when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output"); see also *U.S. Gypsum Co. v. Ind. Gas Co., Inc.*, 350 F.3d 623, 627 (7th Cir. 2003) (discussing antitrust laws designed to encourage productive efficiencies, higher output, and lower prices) (Easterbrook, J.).

285. *NCAA*, 468 U.S. at 107.

whenever people seek to maximize their wealth? "Greed is the foundation of much economic activity."<sup>286</sup> Likewise, if society is harmed whenever competitors agree to reduce output, does it not follow that society necessarily benefits whenever competitors increase output?<sup>287</sup>

In markets with a downward sloping demand curve, and absent price discrimination, increases in output generally are associated with lower prices. To put it differently, as price decreases, consumer demand for the product increases. As the firm's output increases, productive efficiencies accrue. As its cost in making the product decreases, the firm can further lower price and increase output. Once-considered luxury goods (such as DVD players, cell phones) are affordable to more consumers, who generally benefit from a greater choice of lower-priced goods and services. Labor may be needed to further increase output, thereby reducing unemployment.<sup>288</sup> All benefit thereby. "Production and consumption together form the backbone of the economy," observed the OECD.<sup>289</sup>

Even without governmental prodding, profit-maximizing firms will continue to promote consumption of their products. But to what extent should the government, either through soft paternalism or hard policies, promote self-interest and increased consumption and output for their own sake? A helpful exercise is to consider the risks from these governmental policies.

This exercise is not an academic adventure. While policymakers are reevaluating their economic theories during this financial crisis, U.S. consumers are reevaluating their economic behavior. When on the treadmill, many U.S. consumers were predisposed to consuming. But in this financial crisis, they are curtailing spending and increasing personal savings.<sup>290</sup> In one 2008 survey, eighty-four percent

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286. *Kumpf v. Steinhaus*, 779 F.2d 1323, 1326 (7th Cir. 1985) (Easterbrook, J.).

287. *NCAA*, 468 U.S. at 103 ("*Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." (citing *BMI*, 441 U.S. at 18-23)).

288. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 102 (1998).

289. *STRANGE & BAYLEY*, *supra* note 213, at 81 (discussing in context of sustainable development).

290. Jonathan Birchall & Jenny Wiggins, *Retail Suppliers Chase the Value in a Shift to Thrift*, *FIN. TIMES*, May 7, 2009, at 15; Jack Healy, *As the Recession Worsens, Consumers Save More and Spend Less*, *N.Y. TIMES*, Feb. 3, 2009, at B3.

were inclined “to buy less stuff” and ninety percent were considering opting for a simpler life.<sup>291</sup> Fewer Americans in 2009 (compared to those surveyed in 2006) viewed various household items as necessities.<sup>292</sup> Perhaps the financial crisis has suspended the era of super-sized stores, homes, cars, meals, parents, and children.<sup>293</sup>

But during a recession teetering on a depression, government authorities are tempted to exhort consumers to get back on the hedonic treadmill and make up for lost output.<sup>294</sup> This temptation is especially significant after U.S. industrial output in September 2008 experienced its biggest decline in thirty-four years.<sup>295</sup> Although some incremental spending by the public and private sectors is needed to get the U.S. economy through this recession, this part identifies several risks if the government either through soft

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291. *BrainReserve Survey Details America's "Culture of Recession,"* MARKETWIRE, Sept. 10, 2008, <http://www.marketwire.com/press-release/Faith-Popcorn%27S-Brainreserve-898522.html>.

292. Rich Morin & Paul Taylor, *Luxury or Necessity? The Public Makes a U-Turn*, PEW RES. CTR., Apr. 23, 2009, <http://pewsocialtrends.org/pubs/733/luxury-necessity-recession-era-reevaluations> (discussing how people view some household electronic items—microwave (only forty-seven percent viewed it a necessity, down from sixty-eight percent in 2006), television set (fifty-two percent, down twelve percentage points from 2006 and the smallest share since the question was first asked over thirty-five years ago), car (minus three percent to eighty-eight percent), clothes dryer (minus seventeen percent to sixty-six percent); home computer (minus one percent to fifty percent), cable or satellite television (minus ten percent to twenty-three percent), and dishwasher (minus fourteen percent to twenty-one percent)).

293. Elizabeth Kolbert, *Why Are We So Fat?*, NEW YORKER, July 20, 2009, at 73–76, available at [http://www.newyorker.com/arts/critics/books/2009/07/20/090720crbo\\_books\\_kolbert](http://www.newyorker.com/arts/critics/books/2009/07/20/090720crbo_books_kolbert); Centers for Disease Control and Prevention, Overweight and Obesity, <http://www.cdc.gov/obesity/childhood/prevalence.html> (last visited Jan. 11, 2010) (revealing survey data from 1976–1980 and 2003–2006 that shows the prevalence of obesity has increased for children aged two-to-five years from five percent to 12.4 percent; for those aged six-to-eleven years, from 6.5 percent to seventeen percent; and for those aged twelve-to-nineteen years, prevalence increased from five percent to 17.6 percent).

294. *Stimulus Spending Before the Comm. on House Oversight and Gov't Reform*, 111th Cong. (July 8, 2009) (statement of Robert L. Nabors II, Deputy Director Office of Management and Budget) (noting the roughly seven-percent “significant” gap between what the U.S. economy is capable of producing and what it is actually producing so “[i]mmmediately after taking office, the President and the Congress focused on restoring the demand for goods and services that our economy could produce with its existing capacity as the key to returning the nation to a path of economic growth”).

295. Daniel Pimlott & James Politi, *Output Falls at Fastest Rate in 34 Years*, FIN. TIMES, Oct. 17, 2008, at 5.

paternalism or hard policies promotes self-interest and continual increases in output.

*A. Promoting Self-Interest Quickens the Hedonic Treadmill*

As the OECD observed, “[w]e live in a ‘productivist’ society, where growth and economic activity have long been the central focus of the activities we undertake as individuals and communities.”<sup>296</sup> It becomes apparent how social policies that encourage increased output, conspicuous consumption, and self-interest are reinforcing.

Let us begin with the least sinister social policy, namely maximizing output of consumer goods and services, to see how it can reinforce conspicuous consumption and self-interest. Farmers will not plant extra carrots absent sufficient demand and a minimum price for them. Unless the incremental output is exported elsewhere, domestic consumers must purchase the extra carrots. If consumers are to be induced to continually acquire more, their desire for goods and services must remain ungratified: “The higher level of production has, merely, a higher level of want creation necessitating a higher level of want satisfaction.”<sup>297</sup> The benchmark for personal consumption must continually exceed society’s current possessions.<sup>298</sup> It follows then that human behavior must conform to this social goal of increased output: “the secret of all successful ‘socialization’ is making the individuals *wish to do* what the system *needs them to do* for it to reproduce itself.”<sup>299</sup> Thus to increase output of consumer goods and services, an ethic of conspicuous consumption must be ingrained, namely “the fallaciousness of resting satisfied.”<sup>300</sup> At times, personal consumption becomes a patriotic duty.<sup>301</sup>

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296. STRANGE & BAYLEY, *supra* note 213, at 79.

297. GALBRAITH, *supra* note 288, at 129.

298. ZYGMUNT BAUMAN, DOES ETHICS HAVE A CHANCE IN A WORLD OF CONSUMERS? 169 (2008). As Coco Chanel said: “Luxury is a necessity that begins where necessity ends.” Famous Women and Beauty, Quotes by Coco Chanel, <http://www.famous-women-and-beauty.com/quotes-by-coco-chanel.html> (last visited Jan. 11, 2010).

299. *Id.* at 149.

300. *Id.* at 148.

301. President Bush, for example, in his first lengthy national address after the 9-11 attacks, encouraged citizens to continue consuming: “I ask your continued participation and confidence in the American economy.” Pres. George H.W. Bush, Address to the Nation (Sept. 20, 2001), *available at*

To ingrain this consumerism ethic, the government need not advocate increased consumption per se. It can instead appeal to self-interest. In appealing to status competition, one correlates an improved living standard and greater happiness with an increase in consumption of material goods and services. For output to continually increase, wealth must be desired in relative terms (namely, how much one possesses relative to one's peers), not absolute terms (say possessing a million dollars). One must also distinguish evidence of wealth from actual wealth. For output to continually increase, status must be afforded not to wealth per se, but to evidence of wealth, which is displayed primarily through increased conspicuous leisure and consumption. Consumers on the hedonic treadmill should not seek to outdo their peers' net worth; otherwise, personal savings, investments, and frugality would be higher and consumption lower than they are currently. Instead, to make invidious pecuniary comparisons, Thorstein Veblen observed, "wealth or power must be put in evidence, for esteem is awarded only on evidence."<sup>302</sup> Under this zero-sum status competition, every time others acquire more, I have less, so I need to acquire more. Envy keeps the hedonic treadmill humming as the desire to maximize one's reputation through invidious comparison, like the desire for power or fame, can never be satiated. Status competition has no ultimate winner, and besides death, no finish line or satisfactory resting place.<sup>303</sup>

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<http://newsaic.com/res92001.html>. One goal of his 2003 economic agenda was to "encourage consumer spending that will continue to boost the economic recovery." The White House, Office of Communications, Fact Sheet: Taking Action to Strengthen America's Economy (Jan. 7, 2003), *available at* 2003 WL 42248. In 2005, the White House reported consumer spending growing at a "healthy rate," up by a "strong 0.8 percent, the biggest increase since July 2004," and "sales of both new and existing homes reached all-time highs, as the strong housing market continues to be powered by strong job growth and low interest rates." The White House, Office of Communications, President Bush Discusses Agenda for Continued Economic Growth (Aug. 9, 2005), *available at* 2005 WL 1874659.

302. VEBLEN, *supra* note 259, at 36. Indeed, Veblen predicted that as communities become larger and have greater turnover as mobility increases, then the utility of conspicuous consumption will increase relative to conspicuous leisure. *Id.* at 86–87.

303. *Id.* at 32 ("[S]ince the struggle is substantially a race for reputability on the basis of an invidious comparison, no approach to a definitive attainment is possible."); cf. T.S. Eliot, *Ash-Wednesday*, in COLLECTED POEMS 1909–1962, 1986 (1991) ("End of the endless / Journey to no end.").

A governmental policy focused on increasing consumption and output does not always advance its citizens' welfare. Instead this policy, at times, promotes (rather than mitigates) envy, status competition, and individuals' focusing illusion (i.e., predicting greater happiness from increased wealth and consumption and not accounting one's adaptation to one's new living standard). In priming its citizens of the virtues of self-interest, the governmental policy will torment its citizens, as there will always be someone richer to envy. In this arms race scenario, the overall level of happiness stagnates or decreases.<sup>304</sup> Indeed, although real income per head (adjusted for inflation) has nearly doubled since 1972, the percentage of Americans who say they are pretty well satisfied with their financial situation has fallen.<sup>305</sup>

As consumers are implored to increase consumption, along the way, they too become "commodities on the consumer and labor markets."<sup>306</sup> The more citizens are primed of the importance of self-interest, the more they will be asked to sacrifice activities that are actually correlated with greater happiness. As lawyers at large law firms experience, the significant personal sacrifices generally occur not in the first 2,000 billable hours, but the incremental hours thereafter. Americans whose family income is equal to, or above, \$100,000, for example, spend more time at work and commuting<sup>307</sup> than those with lower family incomes.<sup>308</sup> And in another study, commuting ranked as the worst activity of

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304. Joseph M. Sirgy, *Materialism & Quality of Life*, 43 SOC. INDICATORS RES. 227 (1998).

305. LAYARD, *supra* note 211, at 42.

306. BAUMAN, *supra* note 298, at 58.

307. Kahneman et al., *supra* note 210, at 1910.

308. Among wealthy industrialized countries, U.S. workers in 1997 worked the longest hours—1966 hours per capita, which is four percent longer than the 1883 hours U.S. workers worked in 1980. Press Release, Int'l Labour Org., Europeans Work Less Time, but Register Faster Productivity Gains—New ILO Statistical Volume Highlights Labour Trends Worldwide (Sept. 5, 1999), [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang-en/WCMS\\_071326/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_071326/index.htm). The United States' trend was contrary to a world-wide trend in industrialized countries in which the number of work hours remained steady or declined. *Id.* In Norway and Sweden, hours worked in 1997 were, respectively, 1399 and 1552 per year. *Id.* According to the International Labour Organization, Americans work the longest hours among industrialized countries, with the Japanese second longest. *Id.*; see also MISHEL ET AL., *supra* note 71, at tbl.3.2 (describing trend of increased productivity and annual working hours between 1967 and 2006).



the day.<sup>309</sup>

As citizens are told of the importance of self-interest, it should be unsurprising if they behave selfishly. A consumerism utopia does not concern itself about caring for others, wrote sociologist Zygmunt Bauman; the “privatized utopias of the cowboys and cowgirls of the consumerist era show instead vastly expanded ‘free space’ (free for *my* self, of course)—a kind of empty space of which the liquid-modern consumer, bent on solo performances and solo performances only, never has enough.”<sup>310</sup> The governmental policy runs the risk of, not only promoting personally-destructive behavior and increasing misery, but eroding the social capital necessary for a market economy.<sup>311</sup>

*B. Other Values, to the Extent They Conflict With Self-Interest, Are Marginalized*

At times, while at the DOJ, I found myself passionately pursuing antitrust investigations to protect consumers of snack cakes, white bread, and premium-tier shampoo (which was priced below salon shampoos and above mid-tier and value-brand shampoos). Too often, I debated at length with defense counsel over issues, which in retrospect, may not have mattered much at all. My colleagues at the FTC were seeking to protect consumers of smokeless tobacco<sup>312</sup> and super-premium ice cream.<sup>313</sup> We never really questioned the

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309. Kahneman & Krueger, *supra* note 210, at 13 (based on net effect of the average of three positive and six negative adjectives by 909 working women in Texas).

310. BAUMAN, *supra* note 298, at 54.

311. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19–26 (2000); Richard Layard, *It Is Time for a Capitalism Based on Values*, FIN. TIMES, Mar. 12, 2009, at 15 (noting that a zero-sum mentality is often counterproductive and does not generally produce a happy workplace).

312. In *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 153 n.1 (D.D.C. 2000), Judge Hogan juxtaposed the government’s efforts to block a merger in the chewing tobacco industry on the theory that prices would likely increase post-merger, with the government’s attempt to stem the consumption of tobacco by increasing the prices through taxes, regulating advertising, and decreasing the amount of retail shelf-space devoted to this product. The court appreciated the FTC’s explanation that consumption would not likely decline post-merger, but that consumers would only pay more. *Id.* Thus, the court saw no health benefits in permitting the acquisition, and ultimately on antitrust principles, preliminarily enjoined the transaction. *Id.*

313. Press Release, Fed. Trade Comm’n, FTC to Challenge Nestle, Dreyer’s

conventional wisdom that increases in output were presumptively good.

Increases in output are often, but not always, beneficial.<sup>314</sup> Take for example resale price maintenance (RPM)<sup>315</sup> of status goods. Antitrust scholars for decades debated the proper legal standard for evaluating RPM. The U.S. courts, until recently, condemned RPM as per se illegal, favoring instead a policy whereby retailers could discount goods, if they so chose.<sup>316</sup> Paradoxically, the antitrust laws' focus on increased price competition and output can be self-defeating for some luxury goods, eventually making consumers worse off.

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Merger: Agency Will Allege \$2.8 Billion Ice Cream Deal Violates Antitrust Laws (Mar. 4, 2003), <http://www.ftc.gov/opa/2003/03/dreyers.shtm>.

314. The behavioral economics literature is exploring the paradox of choice. Under neoclassical economic theory, rational consumers would stop searching for (and demanding) additional variety if the additional choice's marginal emotional and cognitive costs exceed the marginal benefits. Market forces would set the optimal amount of choice, as rational consumers will keep demanding choice until the costs of one additional option outweigh its benefits. But in reality, additional choice at times can be detrimental, and the market does not always self-correct. Consumers, when confronted with too many choices, experience (i) choice/information overload (the presence of more choices makes decision-makers more likely to avoid choosing; in maintaining the status quo, consumers forgo potentially superior options which may have negative consequences for their future well-being); (ii) less confidence/greater dissatisfaction (when consumer preferences are unclear, the presence of more choices has been associated with lower confidence and greater dissatisfaction in choosing and paying more for purchases that make them less happy); and (iii) negative emotions (when people have to choose among negative outcomes, they are less satisfied with their decision than when the decision externally dictated). Simona Botti & Sheena S. Iyengar, *The Dark Side of Choice: When Choice Impairs Social Welfare*, 25 J. PUB. POL'Y & MARKETING 25, 26–28 (2006); see also BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004). As for the implications of the paradox of choice on the poor, see Marianne Bertrand et al., *Behavioral Economics & Marketing in Aid of Decision Making Among the Poor*, 25 J. PUB. POL'Y & MARKETING 8, 12 (2006).

315. Resale price maintenance refers to a manufacturer's or supplier's practice of "specify[ing] the minimum (or maximum) price at which the product must be re-sold to customers." ORG. FOR ECON. CO-OPERATION & DEV., GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 75 (1993), available at <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

316. The Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 895–96 (2007), departed from its ninety-plus year precedent and held that RPM should be evaluated under its rule-of-reason legal standard. To circumvent the per se prohibition of RPM before *Leegin*, manufacturers either could vertically integrate downstream by selling their products from their own stores or could operate within the narrow channel under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), whereby manufacturers could state their discounting policy and subsequently terminate those that violate the policy.

Under the model of conspicuous consumption, it may make more sense to allow RPM for luxury status goods. The value of certain luxury goods is in their symbol of accumulated wealth, not their inherent usefulness to improve the standard of living.<sup>317</sup> Indeed the less useful the item, Veblen argues, the greater its symbolic value.<sup>318</sup> The manufacturer may agree with retailers on a high retail price for its luxury goods to maintain the goods' status value. Retailers cannot discount the luxury items, and are required to invest some of their margin in promoting a luxurious "upscale" image.<sup>319</sup> Early adopters purchase the luxury good to signal the magnitude of their disposable income (for example having sufficient discretionary income to expend over \$400 on a silk scarf).

If retail price maintenance is per se illegal, however, then opportunistic retailers can increase sales by discounting the luxury item. More consumers can now afford the discounted luxury good. But similarly, the good's status value is cheapened. Early adopters eventually disapprove of the brand's commoditization, and switch to another status symbol. As consumers in each income group disapprove of the brand as cheap and vulgar, the manufacturer and retailers may lower price to maintain demand levels (primarily among consumers who previously could not afford the item). Eventually these consumers will find less status value in the particular silk scarf, which ends up in the thrift shop. Thus a manufacturer's RPM policy first signals to consumers its commitment to maintain a high retail price on its luxury goods, and second can actually slow down the hedonic treadmill. The item (e.g., Hermes scarf, Rolex watch) becomes an accepted symbol of conspicuous consumption; a

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317. See, e.g., Leslie H. Moeller et al., *The Superpremium Premium*, 37 STRATEGY + BUS., Winter 2004, at 4–5, available at [http://www.strategy-business.com/media/file/sb37\\_04401.pdf](http://www.strategy-business.com/media/file/sb37_04401.pdf) (discussing how high pricing "helps maintain the appearance of scarcity" and reinforces product's status).

318. Veblen's theory of waste involved expenditures that do "not serve human life or human well-being on the whole." VEBLEN, *supra* note 259, at 97. Two of his many examples of conspicuous consumption are expensive elegant clothing that demonstrate "the wearer's abstinence from productive employment," *id.* at 171, and fast horses (which are expensive, or wasteful and useless for industrial purposes). *Id.* at 142–43.

319. See RONALD N. LAFFERTY ET AL., IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES (1984) (discussing efforts of Levi Strauss and Florsheim Shoes to use RPM to signal "high quality" image).

prospective purchaser can be assured that retailer discounting will not “cheapen” the brand (although piracy issues remain).

On a macro level, antitrust’s per se prohibition of resale price maintenance can increase the output and consumption of status symbols. It fuels the continuous cycle of creating and satisfying new wants by accelerating the cycle of early adoption, emulation, and ultimately rejection of status symbols.

If increasing output is the goal, then as Galbraith observed, “any step to discourage borrowing or buying will be automatically opposed by the machinery for consumer-demand creation.”<sup>320</sup> Other values—to the extent they conflict—are sacrificed. As one example, the FTC successfully challenged Detroit-area auto dealers, who agreed to restrict their showroom hours, including closing on Saturdays.<sup>321</sup> The Detroit-area auto dealers argued, and the administrative law judge found, that they agreed to close on Saturdays to accomplish labor peace and in response to union and salespersons’ pressure.<sup>322</sup> There was no evidence, however, that the Saturday closing actually caused an increase in auto retail prices in the Detroit area, or that the hours reductions increased dealers’ gross margins.<sup>323</sup> Now suppose the Detroit-area auto dealers wanted to enable their employees to observe a religious Sabbath. To assure that no dealer obtained an unfair advantage by remaining open, they agreed among themselves to close on Saturday or Sunday. Their agreement would likely violate the antitrust laws.<sup>324</sup>

Today, religious norms are among the few counterbalances to self-interest.<sup>325</sup> For many years, the U.S.

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320. GALBRAITH, *supra* note 288, at 170.

321. *In re Detroit Auto Dealers Ass’n, Inc.*, 955 F.2d 457 (6th Cir. 1992).

322. *Id.* at 460.

323. *Id.* at 471 n.13. Although the court did not equate limitation of hours to price-fixing, it found no error in the FTC’s conclusion that controlling hours of operation in this business is a means of competition, and that this limitation may be an unreasonable restraint of trade. *Id.* at 472.

324. At some point, the activity may not involve “trade or commerce” under the Sherman Act. See, e.g., *Proctor v. Gen. Conference of Seventh-Day Adventists*, 651 F. Supp. 1505, 1524 (N.D. Ill. 1986) (holding the Sherman Act inapplicable to distribution of religious literature).

325. For example, senior clergy of the seven largest Protestant denominations, according to a 2008 survey, expressed many social concerns: (i) seventy-eight percent agreed that the federal government should do more to

had state laws that restricted labor and certain commercial activity on Sunday. As these Sunday Blue laws<sup>326</sup> have fallen to the wayside—especially when people can consume at any hour on cable shopping channels or the Internet—Sundays (and nearly all major religious holidays) have become ordinary days to labor and consume. But this repeal had attendant effects aside from increasing the opportunity to consume, and thereby increase output. States where Sunday Blue laws were repealed, according to one study, experienced a fifteen percent decline in attendance among weekly churchgoers and a nearly twenty-five percent drop in donations.<sup>327</sup> “I’m surprised [religious conservatives] haven’t picked up on this,” said one of the study’s coauthors.<sup>328</sup> “Just like people switch cars when gas goes up, this is a change in the price of going to church; you’ve got an opportunity cost, you can do something else instead, and that has changed behavior.”<sup>329</sup> Reducing church attendance has had other negative effects. Robert Putnam noted that “[f]aith communities in which people worship together are arguably the single most important repository of social capital in America.”<sup>330</sup> In a 2008 study, several economists found a one

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solve social problems, such as unemployment, poverty and poor housing, and more than forty percent strongly agree; (ii) sixty-seven percent of the clergy agreed that the government should guarantee health insurance for all citizens, even if it means raising taxes; (iii) sixty-nine percent said that more environmental protection is needed, even if it raises prices or costs jobs; and (iv) over eighty percent said they publicly expressed their views about hunger and poverty often in the last year, and three quarters said they addressed marriage and family issues often. Press Release, Public Religion Research, Broadest Ever Survey Gives in Depth Portrait of Mainline Clergy (Mar. 6, 2009), <http://www.publicreligion.org/objects/uploads/fck/file/Clergy%20Report/CVS%20press%20release%20%2003-06-09%20Final.pdf>.

326. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 422, 432–40 (1961) (outlining history of Sunday Closing laws or Sunday Blue laws, which with various exceptions, “generally proscribe all labor, business and other commercial activities on Sunday”).

327. Jonathan Gruber & Daniel M. Hungerman, *The Church Versus the Mall: What Happens when Religion Faces Increased Secular Competition?*, 123 Q. J. ECON. 831, 844, 848 (2008).

328. Justin Ewers, *Blue Laws: Easing Up on Sunday Liquor Sales*, U.S. NEWS & WORLD REP., July 8, 2008, <http://www.usnews.com/articles/news/national/2008/07/08/easing-up-on-sunday-liquor-sales.html>.

329. *Id.* The article also quotes David Laband, author of *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws*: “All of these repeal efforts are related to economics now. . . . There’s no vestige of a religious component anymore.” *Id.*

330. PUTNAM, *supra* note 311, at 66.

percent drop in overall voter turnout (which affected more Democratic than Republican vote shares) after the state repealed its Sunday Blue law.<sup>331</sup> This finding confirmed the earlier economic literature correlating church attendance with voter turnout.<sup>332</sup> The authors also noted the other evidence correlating church attendance to (i) lower levels of criminal activity, (ii) lower rates of substance abuse, (iii) better health status and outcomes, (iv) improved self-reported measures of well-being, and (v) greater marital stability.<sup>333</sup>

*C. To Increase Consumption, Privacy May Be Sacrificed*

Companies presumably employ optimal marketing programs to increase sales.<sup>334</sup> But technological advances now enable consumers to bypass advertisements in traditional print and television media. To maintain and increase output, companies must identify those particular consumers most susceptible to the sales pitch, and target them with a personalized message to induce them to consume. Marketing thus will become more invasive and individually targeted.

To better target consumers with advertising, marketers will increasingly rely upon vast amounts of data on individual consumers' purchasing behavior. One data collecting company, Acxiom, reportedly has consumer data on more than 195 million Americans, and employs, according to its website, "a household-level segmentation system that clusters U.S. households into one of [seventy] segments within [twenty-one] life stage groups based on specific consumer behavior and demographic characteristics," which includes "access to critical information such as which competitors they shop, product usage, media preferences, attitudes toward advertising, interests and expenditures—both nationally and

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331. Alan Gerber et al., *Does Church Attendance Cause People to Vote? Using Blue Laws' Repeal to Estimate the Effect of Religiosity on Voter Turnout 2* (Nat'l Bureau of Econ. Research, Working Paper No. 14303, 2008), available at <http://www.nber.org/papers/w14303.pdf>.

332. *Id.*

333. *Id.* at 3–4 (collecting studies).

334. POSNER, *supra* note 24, at 109 ("Increased sophistication in the marketing of goods and services enabled sellers to induce consumers to shift much of their savings, designed to protect their future consumption, into buying more consumer goods now.").

at a local market level.”<sup>335</sup> Credit rating agency Equifax, for example, advertises “‘advanced profiling techniques’ to identify people who show a ‘statistical propensity to acquire new credit’ within [ninety] days.”<sup>336</sup>

Neuromarketing, which studies consumer brain activity to advertising messages, will also increase.<sup>337</sup> As one neuromarketing firm that studied consumer responses to online and offline coupons stated, “companies now know the critical differences in subconscious responses across the categories that determine behavior, so they can make the most fully-informed strategic marketing decisions when it comes to couponing.”<sup>338</sup>

In this endeavor to increase consumption, every age group including children will be increasingly targeted with individualized advertising messages. For example, Procter & Gamble’s marketing unit, Tremor, enlists teenagers to build word-of-mouth advocacy for its products.<sup>339</sup> Discretionary spending by U.S. children aged three to eleven is “expected to grow from \$18 billion in 2005 to over \$21 billion by 2010, while families will spend over \$140 billion on consumer goods for their kids by 2010.”<sup>340</sup>

The United States today lacks a coordinated policy in

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335. PersoniX, Benefits of Market Segmentation—Demographic Segmentation, [http://www.personicx.com/what\\_is/default.aspx](http://www.personicx.com/what_is/default.aspx) (last visited Jan. 12, 2010); PersoniX, PersoniX and Consumer Research Data Sources, <http://www.personicx.com/products/research/default.aspx> (last visited Jan. 12, 2010).

336. Brad Stone, *Banks Mine Data and Woo Troubled Borrowers*, N.Y. TIMES, Oct. 22, 2008, at B1, available at [http://www.nytimes.com/2008/10/22/business/22target.html?\\_r=1](http://www.nytimes.com/2008/10/22/business/22target.html?_r=1).

337. Cecily Hall & Valerie Seckler, *Brands Pick Consumers’ Brains—and Scan Them*, WWD RETAIL, Oct. 14, 2009, at 8, available at <http://www.wwd.com/retail-news/brands-pick-consumers-brains-and-scan-them-2342437> (“The testing and use of neuromarketing ha[ve] roughly doubled [in 2009], compared with 2008, among the world’s 100 biggest brands . . . .”); Paul Root Wolpe, *Is My Mind Mine?: How Neuroimaging Will Affect Personal Freedom*, FORBES, Oct. 9, 2009, <http://www.forbes.com/2009/10/09/neuroimaging-neuroscience-mind-reading-opinions-contributors-paul-root-wolpe.html>.

338. Heien Leggatt, *Neuro-Marketing Firm Measures Consumer Response to Coupons*, BIZREPORT, Apr. 28, 2009, [http://www.bizreport.com/2009/04/neuro-marketing\\_firm\\_measures\\_consumer\\_response\\_to\\_coupons.html](http://www.bizreport.com/2009/04/neuro-marketing_firm_measures_consumer_response_to_coupons.html).

339. Richard H. Levey, *Customer Relationship Management: P&G Relies on Teens for Viral Marketing*, DIRECT MAG., Aug. 1, 2003, [http://directmag.com/mag/marketing\\_pg\\_relies\\_teens](http://directmag.com/mag/marketing_pg_relies_teens).

340. STRANGE & BAYLEY, *supra* note 213, at 79.

protecting privacy. Different federal and state laws protect different information in different industries to different degrees. Although the FTC has taken an increased interest in behavioral marketing,<sup>341</sup> the current state and federal laws are not a significant barrier to more intrusive marketing. Nor can the government adequately protect these privacy interests if maximizing consumption is its aim.

*D. Maximizing Output Requires More Makeovers*

Thomas Merton observed over sixty years ago:

We live in a society whose whole policy is to excite every nerve of the human body and keep it at the highest pitch of artificial tension, to strain every human desire to the limit and to create as many new desires and synthetic passions as possible, in order to cater to them with the products of our factories and printing presses and movie studios and all the rest.<sup>342</sup>

Marketing is no longer limited to paid advertisements, product placements, and stealth advertising. Some television programs today propagate Veblen's conspicuous consumption; the more television people watch, the more they overestimate others' affluence, and the more they spend.<sup>343</sup>

To increase demand, marketers can seek to alter prevailing norms, such as soft-drink producers promoting soda consumption in the morning.<sup>344</sup> But there comes a point when consumers reach the actual or perceived optimal

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341. See FED. TRADE COMM'N STAFF REPORT, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING: TRACKING, TARGETING, AND TECHNOLOGY (Feb. 2009). But FTC Commissioner Pamela Jones Harbour said in her concurring statement:

This staff report, while commendable, focuses too narrowly . . . . Threats to consumer privacy abound, both online and offline, and behavioral advertising represents just one aspect of a multifaceted privacy conundrum surrounding data collection and use. I would prefer that the Commission take a more comprehensive approach to privacy, and evaluate behavioral advertising within that broader context.

Press Release, Fed. Trade Comm'n, Concurring Statement of Commissioner Pamela Jones Harbour Regarding Staff Report: Self-Regulatory Principles for Online Behavioral Advertising (Feb. 12, 2009), <http://www.ftc.gov/opa/2009/02/behavad.shtm>.

342. THOMAS MERTON, THE SEVEN STOREY MOUNTAIN 148 (1998).

343. LAYARD, *supra* note 211, at 89.

344. *Wake Up and Smell the Cola*, NAT'L POST (Can.), July 24, 2007, <http://www.canada.com/topics/bodyandhealth/story.html?id=34ad64f0-e074-4a1b-ad9a-2a656687c343>.



number of goods (such as a sufficient number of television sets to accommodate every household member and potential guests) or level of services (such as the number of haircuts per month). To increase consumption further, consumers must be primed to makeover—to continually reinvent their homes, lifestyles, and physical appearances to comport with the latest trend. It is no longer replacing last year's fashions with this year's. Everything, including our physical appearance, is subject to makeovers.

New physical appearances can accompany new wardrobes, cars, homes, and consumer goods. Although the majority of Botox consumers are women between thirty-five and fifty, according to a study by the American Society for Aesthetic Plastic Surgery, patients between nineteen and thirty-four now account for fourteen percent of Botox users nationwide.<sup>345</sup> Hair dyes are marketed to project a new and better image. L'Oréal modified its slogan "Because I'm worth it" to "Because you're worth it" after concerns that the original appeared too money-oriented and self-centered.<sup>346</sup> But as one company executive stated, "[a]t the end of the day, we make people feel good, we build up their confidence."<sup>347</sup> The company is designing products to offer consumers in Africa "something they may not have thought they needed, such as an oscillating mascara wand."<sup>348</sup>

As governmental policies prime consumers to pursue their self-interest, then consumers are expected—when given the choice—to invest in themselves. Rational consumers are presumed to know what is in their self-interest, and thus are free within certain legal bounds to pursue their self-interest. Because people enjoy this freedom, their fate is presumed to

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345. Courtney Perkes, *The Young Face of Botox*, ORANGE COUNTY REG., July 1, 2008, <http://www.ocregister.com/articles/botox-says-neal-2080995-young-really>.

346. Angelique Chrisafis, *You're Worth It—if White. L'Oréal Guilty of Racism: Cosmetic Giant Fined for Recruitment Campaign in Paris*, GUARDIAN (U.K.), July 7, 2007, <http://www.guardian.co.uk/world/2007/jul/07/france.angeliquechrisafis>; Karen McVeigh et al., *Because They're Worth It: High-tech Cosmetics Giant L'Oréal is Making Eyes at Body Shop*, TIMES (London), Feb. 24, 2006, at 3, available at [http://business.timesonline.co.uk/tol/business/industry\\_sectors/retailing/article734423.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/retailing/article734423.ece).

347. Nicola Mawson, *L'Oréal Sets Its Sights on the African Woman*, BUS. DAY, Apr. 30, 2009, <http://www.businessday.co.za/Articles/Content.aspx?id=70458>.

348. *Id.*

arise from the consequences of their choices. Since consumers today have the choice of remaking their physical appearance, any shortcoming in their appearance represents a choice (and failing) by those consumers. In the world where self-interested consumers can continually remake themselves, one has only oneself to blame if unattractive, poor, or sick. The government is not responsible for one's poverty, because it operates outside the marketplace.

*E. Attitudes Toward Those Not Conforming to the Norm of Self-Interest Change*

In visiting Greece recently, my children were aghast at some of ancient Sparta's social policies. Unlike ancient Athens, with its literature, art, philosophy, and architecture, Sparta focused on perfecting its militaristic strength.<sup>349</sup> Accordingly, a father brought his newborn child to the elder men of his tribe. If the baby was considered "puny and deformed," they threw the baby into the Apothetae "the place of rejection" by Mount Taygetus.<sup>350</sup> Sparta's infanticide policy may seem barbaric today, but the individual behavior conformed to a prevailing societal goal: if the child was poorly endowed for health or strength, values which this militaristic society prized, then Spartans considered it better for the state and child for the child to die.

As governmental policies increasingly value self-interest, consumption, and increased output, there will be greater "contempt for all interests which do not contribute obviously to economic activity."<sup>351</sup> If status is determined by evidence of wealth, then people accordingly will "bend their energies to live up to that ideal."<sup>352</sup> Rather than temper the passion for wealth, a You're-on-Your-Own policy promotes conspicuous consumption. Much like the message to summer law associates who dine at a law partner's extravagant home, evidence of conspicuous consumption serves as an

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349. THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 8-9 (Robert B. Strassler ed., 1996) [hereinafter PELOPONNESIAN WAR] (contrasting Athens with Sparta, which was not adorned with "magnificent temples and public edifices"); PLUTARCH ON SPARTA 28 (Richard J.A. Talbert trans., 1988).

350. PLUTARCH ON SPARTA, *supra* note 349, at 27.

351. R.H. TAWNEY, THE ACQUISITIVE SOCIETY 46 (2004).

352. VEBLIN, *supra* note 259, at 84.

inducement for the undertaking and its accompanying sacrifices. The message also implies that those who end up in more modest homes driving less expensive cars somehow fell short along the way. If evidence of wealth is prized, those who jumped off the hedonic treadmill will enjoy low status. If rationality is defined as self-interested behavior, then the religious clergy, despite leading the pack in happiness and job satisfaction, are behaving irrationally and easier to marginalize. A life devoted to charity and community interest becomes anachronistic.

Although a You're-on-Your-Own Society may view social workers and the clergy as eccentric but harmless, its attitude toward the poor hardens. As Galbraith wrote, increasing "aggregate output leaves a self-perpetuating margin of poverty at the very base of the income pyramid,"<sup>353</sup> but "the competitive model had no place for individuals who, as the result of age, infirmity, industrial injury or congenital incompetence, had only a low or negligible marginal productivity."<sup>354</sup> The mentally ill, the infirm, or those too feeble to work must depend on whatever fragile support systems exist.<sup>355</sup>

A society's wisdom is not solely in its ingenious ways to create wealth, but in its attitudes toward poverty and wealth and its actions regarding both. For Pericles's Athens, wealth was employed "more for use than for show," and Athens placed "the real disgrace of poverty not in owning to the fact but in declining the struggle against it."<sup>356</sup> In the spirit of the 1960s, Pope John XXIII struck the same theme:

[T]he economic prosperity of any people is to be assessed not so much from the sum total of goods and wealth possessed as from the distribution of goods according to norms of justice, so that everyone in the community can develop and perfect himself. For this, after all, is the end toward which all economic activity of a community is by nature ordered.<sup>357</sup>

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353. GALBRAITH, *supra* note 288, at 79.

354. *Id.* at 35.

355. J. Pierre Loebel, *Completed Suicide in Late Life*, PSYCHIATRIC SERVICES, Mar. 2005, at 260, available at <http://psychservices.psychiatryonline.org/cgi/reprint/56/3/260.pdf> (discussing why the rate of completed suicide among older persons is the highest of any age group in the United States).

356. PELOPONNESIAN WAR, *supra* note 349, at 113.

357. Pope John XXIII, *Mater et Magistra*, in CATHOLIC SOCIAL THOUGHT:

Similarly Robert F. Kennedy in 1968 said,

But even if we act to erase material poverty, there is another greater task, it is to confront the poverty of satisfaction—purpose and dignity—that afflicts us all. Too much and for too long, we seemed to have surrendered personal excellence and community values in the mere accumulation of material things. Our Gross National Product, now, is over \$800 billion dollars a year, but that Gross National Product—if we judge the United States of America by that—that Gross National Product counts air pollution and cigarette advertising, and ambulances to clear our highways of carnage. It counts special locks for our doors and the jails for the people who break them. It counts the destruction of the redwood and the loss of our natural wonder in chaotic sprawl. It counts napalm and counts nuclear warheads and armored cars for the police to fight the riots in our cities. It counts Whitman's rifle and Speck's knife, and the television programs which glorify violence in order to sell toys to our children. Yet the gross national product does not allow for the health of our children, the quality of their education or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage, neither our wisdom nor our learning, neither our compassion nor our devotion to our country, it measures everything in short, except that which makes life worthwhile. And it can tell us everything about America except why we are proud that we are Americans.<sup>358</sup>

But in a You're-on-Your-Own society, aiding the poor is rational only if one financially benefits thereby. Moreover, under a zero-sum mentality, improving the poor's living standard represents the loss of power and prestige of those in the adjoining income bracket. If the homeless do not contribute to greater productivity, then self-interested taxpayers, who can privately insure for catastrophic events, should have little interest in helping them. The belief that all citizens should benefit equitably from the increase in national

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THE DOCUMENTARY HERITAGE 96 (David J. O'Brien & Thomas A. Shannon eds., 2004).

358. Robert F. Kennedy, Remarks at the University of Kansas (Mar. 18, 1968), *available at* <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/RFK/RFKSpeech68Mar18UKansas.htm>.

wealth is marginalized. Indeed, the hypothesis is that assisting the poor with tax dollars will diminish the self-interested taxpayers' incentives to maximize wealth.

As governmental policies prime citizens of the importance of self-interest, then even those inclined toward strong reciprocity and conditional cooperation will have negative perceptions toward the poor.<sup>359</sup> Welfare will increasingly represent, regardless of the empirical evidence, the poor pursuing their self-interest in shirking work. Taxpayer "handouts" to the poor will represent less personal consumption for wealthier taxpayers.<sup>360</sup> Thus, it will appear that the real disgrace of poverty is not in the failure of society's safety net but in the poor themselves, in either their selfishness or the repercussions of some individual character defect (in not offering society a service that commands a salary above the poverty level). Alberto Alesina and Edward L. Glaeser report a divergence of Americans' and Europeans' belief in the poor as lazy<sup>361</sup> or trapped in poverty,<sup>362</sup> and the reality.<sup>363</sup> President Ronald Reagan, for example:

[Over five years] told the story of the "Chicago welfare queen" who had [eighty] names, [thirty] addresses, [twelve] Social Security cards, and collected benefits for "four nonexistent deceased husbands," milking the government out of "over \$150,000." The real welfare recipient to whom Reagan referred was actually convicted for using two different aliases to collect \$8000. Reagan continued to use his version of the story even after the press pointed out the actual facts of the case to him.<sup>364</sup>

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359. Fehr & Fischbacher, *supra* note 109, at 168.

360. See, e.g., H.R. REP. NO. 104-75, pt. 1, at 417 (1995), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104\\_cong\\_reports&docid=f:hr075p1.104.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:hr075p1.104.pdf) (discussing increased disparagement against welfare recipients); Janine Jackson & Laura Flanders, *Public Enemy Number One?: Media's Welfare Debate Is a War on Poor Women*, FAIR, May/June 1995, <http://www.fair.org/index.php?page=1303>.

361. ALBERTO ALESINA & EDWARD L. GLAESER, *FIGHTING POVERTY IN THE U.S. AND EUROPE: A WORLD OF DIFFERENCE* 183-84 (2004) (stating that sixty percent of Americans believe the poor are lazy versus twenty-six percent of Europeans).

362. *Id.* at 184 (finding that twenty-nine percent of Americans believe the poor are trapped in poverty versus sixty percent of Europeans who hold this belief).

363. *Id.* at 60-68 (finding that the American poor generally work harder, and have a lower probability of exiting poverty, than the European poor).

364. *The Mendacity Index: Which President Told the Biggest Whoppers? You*

Income inequality and poverty simply cease to preoccupy the self-interested citizens' mind.<sup>365</sup>

*F. To Increase Consumption, the Debt Economy Must Grow*

"[E]very increase in consumption," Galbraith predicted, "will bring a further increase—possibly a more than proportional one—in consumer debt."<sup>366</sup> In promoting self-interest and consumption, one has to consider as well the costs of a debt economy.

Consumer indebtedness over the past thirty years has increased significantly.<sup>367</sup> If consumers act rationally toward debt and spending, increased debt is unremarkable. A few consumers may default in predicting incorrectly, but most rational consumers pursuing their self-interest would incur the optimal debt level. Moreover, debt to acquire an appreciating asset (such as a home mortgage) can have a disciplinary effect on otherwise discretionary income.

But the behavioral experiments show how consumers, unlike their rational wealth-maximizing counterparts, suffer heuristics in trading off spending in the short-term versus saving for the long-term: "consumers tend to underestimate the opportunity cost of current consumption."<sup>368</sup> Plus consumers are willing to spend more if they have a credit card.<sup>369</sup>

Leading up to the financial crisis, the credit card industry substantially increased its advertising spending and solicitations.<sup>370</sup> There were in recent years more than four

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*Decide*, WASH. MONTHLY, Sept. 2003, <http://www.washingtonmonthly.com/features/2003/0309.mendacity-index.html>.

365. GALBRAITH, *supra* note 288, at 69–73.

366. *Id.* at 146.

367. Federal Reserve Statistical Release: Consumer Credit, [http://www.federalreserve.gov/releases/g19/hist/cc\\_hist\\_sa.html](http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html) (last visited Dec. 31, 2009).

368. Victor Stango & Jonathan Zinman, *Exponential Growth Bias and Household Finance* (2 Tuck School of Bus., Working Paper No. 2008-41, 2008), available at <http://ssrn.com/abstract=1081633>; see also THALER, *supra* note 96, at 107–21; Rabin, *supra* note 88, at 670–71.

369. AKERLOF & SHILLER, *supra* note 78, at 128; THALER & SUNSTEIN, *supra* note 78, at 143.

370. In 2004, for example, on average three quarters of U.S. households received every month nearly six offers for a credit card, "even though response rates for those offers were at 0.3% compared with 0.9% in 2000." Fouad H. Nader, *The Credit Card Industry* 6 (Adrenale Corporation, Background Paper No. 15, 2005), [http://www.upu.int/news\\_centre/2005/en/paper\\_2005-08-](http://www.upu.int/news_centre/2005/en/paper_2005-08-)

credit cards for every man, woman, and child in the United States.<sup>371</sup> The percentage of Americans across age categories who carry a balance—and incur financing charges and interest payments—on their credit cards has increased.<sup>372</sup> For example, between 1970 and 2004, the percentage of Americans under the age of twenty with a credit card increased from two percent to thirty-seven percent, as did the percentage of those carrying a balance on their credit card (from twenty-seven percent to sixty-one percent). This same trend affected U.S. families.<sup>373</sup>

Americans are deeper in debt.<sup>374</sup> The percentage of household disposable income spent on debt service has increased.<sup>375</sup> Credit card debt, according to the Federal Reserve, increased twenty-five percent in the past decade, reaching \$963 billion in January 2009.<sup>376</sup> U.S. consumers pay approximately fifteen billion dollars annually in penalty fees,<sup>377</sup> and the “average outstanding credit card debt for households that have a card was \$10,679 at the end of 2008.”<sup>378</sup> Although debit cards have increased in popularity,

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15\_pitney-bowes15\_en.pdf. Since then, credit card solicitations have declined. According to one estimate, in the first quarter of 2009, U.S. credit card issuers sent fewer than 500 million offers, which represented the lowest quarterly total recorded since 2000. Press Release, Mintel Comperemedia, Americans Turn Away From Credit Cards (May 7, 2009), [http://www.comperemedia.com/press\\_releases/522](http://www.comperemedia.com/press_releases/522).

371. AKERLOF & SHILLER, *supra* note 78, at 128.

372. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON PRACTICES OF THE CONSUMER CREDIT INDUSTRY IN SOLICITING AND EXTENDING CREDIT AND THEIR EFFECTS ON CONSUMER DEBT AND INSOLVENCY 9 (June 2006), <http://www.federalreserve.gov/boarddocs/rptcongress/bankruptcy/bankruptcybillstudy200606.pdf>.

373. Between 1970 and 2004, the percentage of U.S. families with a credit card increased from sixteen percent to seventy-one percent, as did the percentage of those carrying a balance on their credit card (from thirty-seven percent to fifty-six percent). *Id.*

374. BD. OF GOVERNORS OF THE FED. RESERVE SYS., MONETARY POLICY REPORT TO THE CONGRESS 9 (2008), [http://www.federalreserve.gov/monetarypolicy/files/20080227\\_mprfullreport.pdf](http://www.federalreserve.gov/monetarypolicy/files/20080227_mprfullreport.pdf).

375. Federal Reserve Bank of St. Louis, Series: TDSP, Household Debt Service Payments as a Percent of Disposable Personal Income, <http://research.stlouisfed.org/fred2/series/TDSP> (last visited Dec. 31, 2009).

376. Michael McAuliffe, *Credit Card Debt Poses Risks For Consumers As President Calls For Reform*, MASSLIVE.COM, Apr. 27, 2009, [http://www.masslive.com/news/index.ssf/2009/04/credit\\_card\\_debt\\_poses\\_risks\\_f.html?category=Business](http://www.masslive.com/news/index.ssf/2009/04/credit_card_debt_poses_risks_f.html?category=Business).

377. *Id.*

378. Marcy Gordon, *House Passes Credit Card Bill That Helps Consumers*,

consumers paid in 2009 a record \$38.5 billion in overdraft fees, nearly double the amount reported in 2000.<sup>379</sup> Between 1997 and 2007, household debt increased from sixty-six percent to one hundred percent of U.S. GDP.<sup>380</sup>

In 2005, for the first time since the Great Depression, the U.S. Department of Commerce reported a negative personal savings rate.<sup>381</sup> The government-calculated average personal

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ASSOCIATED PRESS, May 1, 2009, [http://www.huffingtonpost.com/2009/04/30/house-passes-credit-card-\\_n\\_194126.html](http://www.huffingtonpost.com/2009/04/30/house-passes-credit-card-_n_194126.html). During the financial crisis, the major U.S. banks raised fees further. Eric Dash, *Bank Fees Rise as Lenders Try to Offset Losses*, N.Y. TIMES, July 2, 2009, at B1, available at <http://www.nytimes.com/2009/07/02/business/02fees.html>. To increase the salience of finance charges, section 201(a) of the Credit Card Accountability Responsibility and Disclosure Act of 2009, House Bill 627-11 ("Credit CARD Act of 2009"), requires a "Minimum Payment Warning" along the lines that making only the minimum payment will increase the amount of interest you pay and the time it takes to repay your balance. H.R. 627, 111th Cong (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-627>.

379. Saskia Scholtes & Francesco Guerrera, *Banks in \$38.5bn Windfall from Fees*, FIN. TIMES, Aug. 10, 2009, <http://www.ft.com/cms/s/0/ecca5750-8545-11de-9a64-00144feabdc0.html>. Ninety-three percent of the overdraft revenues come from about fourteen percent of the U.S. bank accounts, with the larger banks charging the highest fees. Ron Lieber & Andrew Martin, *The Card Game: Overspending on Debit Cards Is a Boon for Banks*, N.Y. TIMES, Sept. 9, 2009, at A1, available at <http://www.nytimes.com/2009/09/09/your-money/credit-and-debit-cards/09debit.html>. For credit-card accounts, the Credit CARD Act of 2009 changes the default option. See Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 102(a), 123 Stat. 1734, 1738–39. Under the Act, the credit card company cannot impose an over-the-limit fee for any extension of credit in excess of the previously-authorized credit limit unless the consumer expressly opted-in to the overdraft plan. *Id.* This provision, like many other provisions of the Act, takes effect in February 2010. See *id.* § 3, 123 Stat. at 1735. The behavioral economics literature predicts that such changes in default options can directly influence the outcome. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). This change in default options may prove an interesting natural experiment for the behavioral economists.

380. Martin Wolf, *Why Dealing With the Huge Debt Overhang Is So Difficult*, FIN. TIMES, Jan. 28, 2009, at 9.

381. U.S. Savings Rate Hits Lowest Level Since 1933: Consumers Depleting Savings to Buy Cars, Other Big-Ticket Items, ASSOCIATED PRESS, Jan. 30, 2006, <http://www.msnbc.msn.com/id/11098797>. However, comparing the government's current estimates of personal savings rate to that in earlier decades warrants caution as the government definition and methods of calculating personal savings changed over the years. U.S. Department of Commerce, Bureau of Economic Analysis, Frequently Asked Questions, [http://faq.bea.gov/cgi-bin/bea.cfg/php/enduser/std\\_adp.php?p\\_faqid=512&p\\_created=1236954941](http://faq.bea.gov/cgi-bin/bea.cfg/php/enduser/std_adp.php?p_faqid=512&p_created=1236954941) (last visited Dec. 31, 2009). Also the current government measurement of personal savings reflects the portion of personal income that remains after personal current taxes and outlays for personal consumption expenditures, nonmortgage interest payments, and net current transfers to the



savings rate between 1959 and 1984 trended upward, but steadily declined over the years (although it has been increasing after August 2008).<sup>382</sup>

As Galbraith observed, “[a]ll crises have involved debt that, in one fashion or another, has become dangerously out of scale in relation to the underlying means of payment.”<sup>383</sup> Between 1987 and 2006 (during Alan Greenspan’s tenure as chair of the U.S. Federal Reserve Board), public and private debt in the United States quadrupled from \$10.5 to forty-three trillion dollars.<sup>384</sup> While stable between 1952 and 1984, the percentage of total credit market debt as a share of U.S. GDP significantly increased thereafter.<sup>385</sup> By 2007, public and private debt was three times greater than that year’s GDP, which exceeded the prior record set in 1933. The ratio of U.S. public and private debt to GDP was 358 percent in the third quarter of 2008, the highest in U.S. history.<sup>386</sup> As the chief investment strategist at Raymond James & Associates said:

The “crack cocaine” of our generation appears to be debt.

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government and the rest of the world. So the government personal savings measure, as one example, excludes capital gains. For one estimate of alternative measures of personal savings and related concepts, see MARSHALL B. REINSORF, *ALTERNATIVE MEASURES OF PERSONAL SAVING*, SURVEY OF CURRENT BUSINESS (2007), [http://www.bea.gov/scb/pdf/2007/02%20February/0207\\_saving.pdf](http://www.bea.gov/scb/pdf/2007/02%20February/0207_saving.pdf).

382. Although changes in the way the government calculates the personal savings rate warrant caution in comparing rates over time, the government figures generally reflect first an upward trend: the personal savings rate averaged 7.98 percent between 1959 and 1964, 8.48 percent between 1965 and 1969, 9.91 percent between 1970 and 1974, 9.28 percent between 1975 and 1979, and 10.05 percent between 1980 and 1984. See Federal Reserve Bank of St. Louis, Download Data for Series: PSAVERT, Personal Savings Rate, <http://research.stlouisfed.org/fred2/series/PSAVERT/downloaddata?cid=112> (last visited Feb. 7, 2010) (averaging the “personal saving rate” column). Thereafter, the personal savings rate steadily declined: of 3.6 percent. See *id.* Similarly when the Department of Commerce used a consistent measure to calculate the personal saving rate, this rate reflected a downtrend since the early 1990s. U.S. Department of Commerce, Bureau of Economic Analysis, Frequently Asked Questions, [http://faq.bea.gov/cgi-bin/bea.cfg/php/enduser/std\\_adp.php?p\\_faqid=512&p\\_created=123695494](http://faq.bea.gov/cgi-bin/bea.cfg/php/enduser/std_adp.php?p_faqid=512&p_created=123695494) (last visited Dec. 31, 2009).

383. JOHN KENNETH GALBRAITH, *A SHORT HISTORY OF FINANCIAL EUPHORIA* 20 (1993); see also POSNER, *supra* note 24, at 48 (noting how a highly leveraged lender lending to a highly leveraged borrower is “courting financial disaster”).

384. KEVIN PHILLIPS, *BAD MONEY: RECKLESS FINANCE, FAILED POLITICS, AND THE GLOBAL CRISIS OF AMERICAN CAPITALISM* 5 (2008).

385. *Id.* at 7.

386. Wolf, *supra* note 380, at 9.

We just can't seem to get enough of it. And, every time it looks like the U.S. consumer may be approaching his maximum tolerance level, somebody figures out how to lever on even more debt using some new and more complex financing. For years, I have watched this leveraging up process, often noting that it was taking an ever increasing amount of debt to produce a dollar's worth of GDP growth.<sup>387</sup>

Marketing campaigns in part spurred this increase in debt. Besides inundating consumers with credit offers, lenders changed the perception toward debt. For example, while growing up, I often brought the monthly payment for my parents' thirty-year fixed mortgage to our neighborhood bank, where my parents had a Christmas savings account, and my sister and I had school savings accounts. To my recollection, the bank neither advertised nor promoted a second mortgage, which had a negative connotation. But as the *New York Times* chronicled, banks in the 1980s enlisted advertising staff from packaged goods companies like General Mills and General Foods to repackage debt into something socially acceptable and desirable. The banks spent billions relabeling "second mortgage," which, commented a former Citicorp executive, sounded "like hocking your house" to the "more innocent" equity access.<sup>388</sup> Thereafter, the output of second mortgages increased. Many consumers "unlocked" the equity from their homes, and the amount of outstanding home-equity loans increased from one billion dollars in the early 1980s to over one trillion.<sup>389</sup>

Accompanying greater debt are record delinquency rates.<sup>390</sup> As of 2008, delinquencies on home equity loans were

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387. PHILLIPS, *supra* note 384, at 1 (quoting Jeff Saut, chief investment strategist, Raymond James & Associates, September 2007).

388. Louise Story, *Home Equity Frenzy Was a Bank Ad Come True*, N.Y. TIMES, Aug. 15, 2008, at A1.

389. *Id.*

390. The delinquency rate for the American Bankers Association's consumer loan composite ratio, which tracks eight closed-end installment loan categories, rose in the fourth quarter of 2008 to its highest level since the ABA began tracking it in the mid-1970s. Press Release, Am. Bankers Ass'n, Consumer Delinquencies Continue Rising as Recession Intensifies in Fourth Quarter 2008: ABA Composite Ratio Hits New Record High (Apr. 2, 2009), <http://www.aba.com/Press+Room/040209DelinquencyBulletin.htm>. That record, however, was broken the next quarter. In the first quarter of 2009, the home equity loan delinquencies increased to 3.52 percent of all accounts, a new record; home equity lines of credit delinquencies also reached a new record—

forty-five percent higher than the average rate since 1990, and the portion of Americans whose home equity lines were more than thirty days past due was fifty-five percent higher than the average.<sup>391</sup> Counties in the U.S. with high mortgage delinquency rates in 2008 also tended to have high credit card delinquency rates.<sup>392</sup> Bankruptcy filings have increased.<sup>393</sup> In Nevada alone, bankruptcy filings in October 2008 were up seventy percent compared to filings in October 2007.<sup>394</sup> Moreover, the average family filing for bankruptcy in 2007 was burdened with more debt than typical bankruptcy filers in 2001: twenty-one percent more in secured debt (e.g., mortgages and car debt) and forty-four percent more in unsecured debt (e.g., credit cards).<sup>395</sup> The number of debtor cases filed in New York City's Civil Court tripled between 2000 and 2008; court officials estimated that 350,000 cases in 2008 would involve debt or credit cards.<sup>396</sup>

A debt-servicing economy has attendant costs. To entice consumers (including those with limited financial means) to

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1.89 percent overall. While credit card delinquencies increased to 4.75 percent of all accounts (just off the record of 4.81 percent set in 2005), the balances on those delinquent accounts rose to 6.6 percent of the value of all outstanding bank card debt, which itself is a new record. Press Release, Am. Bankers Ass'n, Consumer Delinquencies Rise Again in First Quarter 2009: Composite ratio inches higher, sets new record (July 7, 2009), <http://www.aba.com/Press+Room/070709DelinquencyBulletin.htm>.

391. Story, *supra* note 388.

392. Press Release, Fed. Reserve Bank of N.Y., Bank Cards and Mortgage Delinquency Maps Second Quarter 2008 (Nov. 25, 2008), [http://www.newyorkfed.org/newsevents/news/regional\\_outreach/2008/an081125.html](http://www.newyorkfed.org/newsevents/news/regional_outreach/2008/an081125.html) ("[C]ounties' bank card and mortgage delinquency rates were moderately positively correlated (correlation coefficient of +0.37)."). For the twelve months ending in June 2008, the Federal Reserve study found "bank credit card [sixty-plus] day delinquency rates increased in [sixty] percent of US counties covered (1,715 of the 2,837 counties covered) and mortgage [ninety-plus] day delinquency rates increased in [seventy-four] percent of US counties covered (2,106 counties)." *Id.*

393. Bankruptcy filings totaled 108,595 in October 2008, an average of 4,936 bankruptcies filed each business day. This was nearly 34 percent higher than the average for October 2007. Tara Siegel Bernard & Jenny Anderson, *Bankruptcies by Consumers Climb Sharply*, N.Y. TIMES, Nov. 16, 2008, at A1, available at <http://www.nytimes.com/2008/11/16/business/16consumer.html?pagewanted=1>.

394. *Id.*

395. *Id.*

396. Jim Dwyer, *In Civil Court, One Nation, Under Debt*, N.Y. TIMES, Oct. 11, 2008, at A19, available at <http://www.nytimes.com/2008/10/11/nyregion/11about.html>.

acquire more debt to consume more goods and services, some companies resort to deceptive practices.<sup>397</sup> Federal and state agencies, as a result, must respond to increasing consumer complaints involving debt. For example, six of the top twenty consumer complaints reported to the FTC in 2008 related to the issuance or collection of debt.<sup>398</sup> Similarly, consumer complaints about debt issuance, collection, and credit reports and repair are on many state attorney general offices' top-ten lists of consumer complaints.<sup>399</sup>

To deter fraud and promote consumers' informed use of credit, the Truth in Lending Act (TILA)<sup>400</sup> mandates certain

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397. For example, in recent Congressional testimony, an FTC official described his agency's efforts to combat deceptive advertising with both a proliferation of advertising outlets and "a proliferation of products and services and a parallel burgeoning of advertising claims about how these products will make us thinner, better looking, and healthier; improve the quality of our lives; make us richer; and even improve our environment." Fed. Trade Comm'n, Prepared Statement on Advertising Trends and Consumer Protection Before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation, United States Senate 1 (July 22, 2009), *available at* <http://www.ftc.gov/os/testimony/090722advertisingtestimony.pdf>. The deceptive advertising practices included "health and safety claims" (advertising claims for weight loss, cold prevention, improved concentration, and diabetes and cancer "cures"), the use of "endorsements and testimonials, environmental marketing or 'green' claims, and advertising that preys on victims of the economic downturn." *Id.* at 2.

398. These consisted of (i) identity theft (of which credit card fraud was the largest component) (twenty-six percent and top complaint overall), (ii) third-party and creditor debt collection (nine percent—second overall), (iii) credit bureaus, information furnishers and report users (three percent—sixth overall), (iv) banks and lenders (two percent—ninth overall), (v) advance-fee loans and credit protection/repair (one percent—fourteenth overall), and (vi) credit cards (one percent—eighteenth overall). Press Release, Fed. Trade Comm'n, FTC Releases List of Top Consumer Complaints in 2008 (Feb. 26, 2009), *available at* <http://www.ftc.gov/opa/2009/02/2008cmpts.shtm>.

399. See, e.g., CONSUMER SENTINEL NETWORK, DATA BOOK FOR JAN.–DEC. 2008 18–68 (2009), *available at* <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf>; *Health Care Tops N.C. Consumer Complaints*, CHARLOTTE BUS. J., Apr. 1, 2009, <http://www.bizjournals.com/charlotte/stories/2009/03/30/daily30.html>; Washington State Office of the Attorney General, 2008 Top Consumer Complaints, <http://www.atg.wa.gov/FileAComplaint/TopComplaints.aspx>.

400. 15 U.S.C. § 1601(a) (2006) ("[E]conomic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the

disclosures of the costs in acquiring debt. Despite the TILA's myriad disclosure provisions, lenders, brokers, and home improvement contractors still use high fee and high interest-rate home equity mortgages to mislead unsophisticated, low-income homeowners. To deter unscrupulous lending practices, Congress enacted the Home Ownership and Equity Protection Act of 1994 (HOEPA).<sup>401</sup> But TILA and HOEPA were criticized as ineffective in deterring the predatory lending and other abuses in the recent financial crisis.<sup>402</sup> The Federal Reserve and the Obama administration have prohibited additional lending practices, and required that information be disclosed in ways that better affect consumer behavior.<sup>403</sup>

Another debt trap, payday lending, has attendant costs.<sup>404</sup> Payday lending, which is legal in most states,<sup>405</sup> is

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uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.”).

401. *Id.* § 1639; *see also* FED. TRADE COMM’N, FTC FACTS FOR CONSUMERS, HIGH-RATE, HIGH-FEE LOANS (HOEPA/SECTION 32 MORTGAGES) (2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea19.pdf>.

402. Jeff Gelles, *Consumer Watch: Disclosure Failed This Time*, PHILA. INQUIRER, Sept. 7, 2009, [http://www.philly.com/inquirer/columnists/jeff\\_gelles/20090927\\_Consumer\\_Watch\\_Disclosure\\_failed\\_this\\_time.html](http://www.philly.com/inquirer/columnists/jeff_gelles/20090927_Consumer_Watch_Disclosure_failed_this_time.html) (quoting recent survey by Prof. Jeff Sovern of ineffectiveness of TILA disclosure requirements); *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 38–43 (2008).

403. *Will Credit Card Law Alter Consumers’ Behavior?*, NAT’L PUB. RADIO, May 22, 2009, <http://www.npr.org/templates/story/story.php?storyId=104426585>. The Credit CARD Act of 2009, among other things, (i) requires advance notice of rate increases and other significant changes as determined by the Federal Reserve; (ii) places limits on interest rate, fee, and finance charge increases applicable to outstanding credit card balances; (iii) prohibits double-cycle billing and penalties for on-time payments; and (iv) places restrictions on credit card solicitations to those under twenty-one years old. H.R. 627, 111th Cong (2009). Those under twenty-one who seek to open a credit card account must (i) have the signature of a cosigner, including the parent, legal guardian, spouse, or any other individual over twenty years old who has the means to repay the credit card debts or (ii) submit financial information showing their independent means of repaying any obligation arising from the proposed extension of credit. *Id.*

404. Typically a cash advance is made to a consumer in exchange for the consumer’s personal check, or the consumer’s authorization to debit the consumer’s deposit account electronically. In either case, the consumer pays a fee for the cash advance. On the due date, the consumer can repay the obligation or further defer repayment of the advance. One study of the payday lending industry found that ninety percent of its business comes from borrowers who assume five or more loans per year, and over sixty percent of the business comes from borrowers with twelve or more loans per year. URIAH KING & LESLIE PARRISH, *SPRINGING THE DEBT TRAP: RATE CAPS ARE ONLY PROVEN*

increasing: “Nationally, there are more than two payday lending storefronts for every Starbucks location; in [twenty-nine] of the [thirty-five] states with payday lending, payday storefronts outnumber McDonald’s restaurants.”<sup>406</sup> Congress in 2006 capped the annual interest of payday loans to U.S. military service members to a rate of thirty-six percent.<sup>407</sup> Borrowers generally renewed loans several times before paying them off, a Defense Department study concluded, and the resulting fees led to effective annual interest rates of 400 percent or more.<sup>408</sup> The military had pushed for the law, saying predatory payday loans saddled low-paid enlisted soldiers with debts that ruined their finances, jeopardized security clearances and undermined “troop readiness, morale, and quality of life.”<sup>409</sup>

As debt levels increase to fuel more consumption, so too does the risk of inaccurate reporting of consumers’ credit history. Thus, another byzantine statutory framework,

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PAYDAY LENDING REFORM, CENTER FOR RESPONSIBLE LENDING 3 (2007), <http://www.responsiblelending.org/payday-lending/research-analysis/springing-the-debt-trap.pdf>. One recent examination of payday lending found that “‘churning’ of existing borrowers’ loans every two weeks account[ed] for three-fourths of all payday loan volume.” LESLIE PARRISH & URIAH KING, PHANTOM DEMAND: SHORT-TERM DUE DATE GENERATES NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME, CENTER FOR RESPONSIBLE LENDING 3 (2009), <http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf>. The Center for Responsible Lending found: “This churning of loans to borrowers each pay period costs these households \$3.5 billion in extra fees each year.” *Id.* at 4.

405. In thirty-five states, the annual interest rate is either unregulated or over 100 percent. Consumer Federation of America, PayDay Loan Consumer Information, Legal Status, <http://www.paydayloaninfo.org/legal.asp> (last visited Jan. 12, 2010). One calculation of the annual percentage rate for a two-week \$250 loan based on the legal maximum interest rate showed a range of 156 percent and 1955 percent for these thirty-five states. *Id.*

406. KING & PARRISH, *supra* note 404, at 5–6 (stating that the payday lending industry has grown from around 500 locations in 1990 to over 22,000 locations across thirty-five states in 2009).

407. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670, 120 Stat. 2083, 2091 (2006); 32 C.F.R. § 232.4 (2008).

408. U.S. DEP’T OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 13 (2006), [http://www.defenselink.mil/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf).

409. *Id.* at 45. The Defense Department reported that the “debt trap is the rule, not the exception: the average borrower pays back \$834 for a \$339 loan.” *Id.* at 15. The thirty-six percent rate cap means lenders can charge no more than \$1.38 on a \$100 loan for two weeks—an amount some payday lenders say is too low to be profitable.

namely the Fair Credit Reporting Act,<sup>410</sup> seeks to help ensure that the credit bureaus furnish correct and complete information to businesses to use when evaluating credit applications.

As consumers assume more debt, there exists a greater likelihood of difficulties in repaying the principal, interest, and financing fees. This gives rise to abusive debt collection practices, which, in turn, has prompted statutory responses, such as the Fair Debt Collection Practices Act.<sup>411</sup>

But the statutory measures generally do not seek to curtail the output of debt. Many federal statutes, such as TILA, still focus instead on mandatory disclosures, with the assumption that rational self-interested consumers will choose the best outcome.<sup>412</sup>

### *G. The Environmental Costs from Increased Consumption*

As a governmental policy increasingly primes consumers to pursue their self-interest, consumers will seek to minimize the personal costs of their consumption. To accommodate their desire (and further the governmental policy of increased output), the government will not require that all the negative externalities from production and consumption be internalized in the cost of the goods and services.

Competition policy today generally strives to lower price and increase output, not to ensure that all the costs from production and consumption are internalized.<sup>413</sup> These negative externalities are left for other laws, if any. But the growing externalities from consumption, noted the OECD, have made many public goods (such as clean air, silence, clear space, clean water, splendid views, and wildlife diversity) “increasingly scarce.”<sup>414</sup> As a consequence, “[n]early every transaction of private goods carries an invisible cost, paid by

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410. 15 U.S.C. §§ 1681–1681x (2006).

411. *Id.* §§ 1692–1692p.

412. For a critique of this assumption see Susan Block-Lieb et al., *Disclosure as an Imperfect Means for Addressing Overindebtedness: An Empirical Assessment of Comparative Approaches*, in CONSUMER CREDIT, OVER-INDEBTEDNESS AND BANKRUPTCY: NATIONAL AND INTERNATIONAL DIMENSIONS (forthcoming 2009).

413. See, e.g., STRANGE & BAYLEY, *supra* note 213, at 79–80, 94–96 (discussing negative externalities).

414. *Id.* at 87.

everyone through degraded public goods.”<sup>415</sup>

As output for goods and services increases so too does the demand for energy. For example, although the average family size is fifteen percent smaller in 2001 than it was in 1970, the average home size is fifty-three percent larger.<sup>416</sup> More energy is needed to cool and heat these larger homes and keep their appliances working; not surprisingly, energy consumption per person increased fifty-two percent between 1949 and 2008.<sup>417</sup> With the increase in demand for energy, by August 2008, the value of oil in the ground (\$162,000 billion) exceeded the combined total value of all equity (\$52,300 billion) and debt markets (\$67,000 billion).<sup>418</sup>

As demand for energy increases (primarily supplied today by fossil fuels),<sup>419</sup> environmental externalities will also increase.<sup>420</sup> To accommodate bigger homes, real estate development occurs further from cities and inner suburbs, often without attention to public transport.<sup>421</sup> Aside from its environmental toll, the longer commute affects the family's social fabric. More people wake up earlier for longer commutes from their bigger homes, which warehouse their goods.<sup>422</sup> Between 1990 and 2000, “the number departing

415. *Id.*

416. Louis Uchitelle, *Economic View: Living in Denial, Comfortably, in a Big Home*, N.Y. TIMES, June 10, 2001, § 3 at 4. Home ownership has also increased. In 1901, nineteen percent of Americans owned their home, while in 2002–2003, sixty-seven percent of U.S. families did. U.S. BUREAU OF LABOR STATISTICS, *supra* note 214, at 68. In 1901, the size of the average U.S. family was 4.9 people; by 2002–2003, it was 2.5. Reflections, <http://www.bls.gov/opub/uscs/reflections.pdf> (last visited Jan. 12, 2010).

417. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY REVIEW 13 tbl.1.5 (2009) (increasing from 214 million to 327 million British Thermal Units (btu)), <http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf>.

418. Krishna Guha, *Two Challenges Highlight the Scale of the Bonanza*, FIN. TIMES, Aug. 11, 2008, at 4, available at [http://www.ft.com/cms/s/0/49b6ff0c-673a-11dd-808f-0000779fd18c.html?ncklick\\_check=1](http://www.ft.com/cms/s/0/49b6ff0c-673a-11dd-808f-0000779fd18c.html?ncklick_check=1).

419. ENERGY INFO. ADMIN., *supra* note 417, at xix fig.4.

420. Between 1949 and 2006, for example, the amount of CO<sub>2</sub> emissions from the residential sector increased from 320.6 million metric tons to 1197.9 million metric tons. U.S. Historical Data Series, Energy-Related Carbon Dioxide Emissions from the Residential and Commercial Sectors, by Fuel Type, 1949–2007, [www.eia.doe.gov/oiaf/1605/ggrpt/excel/historical\\_co2.xls](http://www.eia.doe.gov/oiaf/1605/ggrpt/excel/historical_co2.xls) (last visited Feb. 7, 2010).

421. Bradford McKee, *As Suburbs Grow, So Do Waistlines*, N.Y. TIMES, Sept. 4, 2003, <http://www.nytimes.com/2003/09/04/garden/as-suburbs-grow-so-do-waistlines.html?sec=health>.

422. The mean travel time, according to the U.S. Census, increased from 21.7 minutes (1980) to 22.4 minutes (1990) to 25.5 minutes (2000). Travel



from [twelve] midnight to 6:29 a.m. rose by nearly 4.8 million people, and increased from [eighteen] percent to [twenty] percent of the total.”<sup>423</sup>

As output increases, society must dispose of the increase in waste—including goods poorly made or once-fashionable. As Bauman observed: “Liquid modernity is a civilization of excess, redundancy, waste, and waste disposal.”<sup>424</sup> Between 1960 and 2007, the amount of solid waste increased from 2.68 to 4.62 pounds per person per day.<sup>425</sup> Residential waste is estimated to comprise between fifty-five percent and sixty-five percent of total municipal solid waste generation.<sup>426</sup>

This increase in waste from increased consumption also has an environment toll. “By cutting the amount of waste we generate back to 1990 levels,” estimated the United States Environmental Protection Agency, “we could reduce greenhouse gas emissions by [eighteen] million metric tons of carbon equivalent (MMTCE), the basic unit of measure for greenhouse gases.”<sup>427</sup> Recycling is not the sole solution. The

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Time to Work for the United States: 1990 and 1980 Census, <http://www.census.gov/population/socdemo/journey/ustime.txt> (last visited Jan. 1, 2010); see also CLARA RESCHOVSKY, UNITED STATES CENSUS BUREAU, JOURNEY TO WORK: 2000, CENSUS 2000 BRIEF 5 (2004), <http://www.census.gov/prod/2004pubs/c2kbr-33.pdf> (last visited Jan. 1, 2010) (“The proportions of trips in categories below [twenty] minutes all declined between 1990 and 2000, while the proportions in the categories of [twenty-five] minutes or more all increased. The proportion in the category [ninety] or more minutes nearly doubled, from 1.6 percent to 2.8 percent.”).

423. RESCHOVSKY, *supra* note 422, at 6.

424. BAUMAN, *supra* note 298, at 185.

425. U.S. ENVTL. PROTECTION AGENCY, OFFICE OF SOLID WASTE, MUNICIPAL SOLID WASTE IN THE UNITED STATES: 2007 FACTS AND FIGURES 5 (2008), available at <http://www.epa.gov/waste/nonhaz/municipal/pubs/msw07-rpt.pdf>. Fortunately 33.4 percent of waste in 2007 was recovered through recycling leaving 137 million tons discarded in landfills—fifty-four percent of all municipal solid waste. *Id.* at 3.

426. *Id.* at 11.

427. U.S. ENVTL. PROTECTION AGENCY, CLIMATE CHANGE AND WASTE, REDUCING WASTE CAN MAKE A DIFFERENCE 2, <http://www.epa.gov/climatechange/wycd/waste/downloads/cc-waste.pdf>. The EPA estimates that:

[I]ncreasing our national recycling rate from [thirty percent] in 2000 to [thirty-five percent] would reduce greenhouse gas emissions by another [ten] MMTCE, compared to landfilling the same material. Together, these levels of waste prevention and recycling would be comparable to annual emissions from the electricity consumption of nearly 4.9 million households.

*Id.* Waste reduction also “allow[s] more trees to remain standing in the forest, where they can continue to remove carbon dioxide from the atmosphere” and store the carbon, in a process called “carbon sequestration.” *Id.* at 2.

EPA found that preventing waste in the first place reduces emissions (i) from energy consumption, (ii) from incinerators, (iii) of methane from landfills, and (iv) of greenhouse gas from the combustion of waste.<sup>428</sup>

The attendant costs of increased output will accelerate as consumption for discretionary goods and services accelerates in developing countries like China and India.<sup>429</sup> If a developed nation (like the United States) actively promotes increased consumption of goods and services, it cannot plausibly pressure developing countries' residents to curb their consumption.

#### *H. Self-Interested Citizens' Disinterest in Public Goods*

One might question the desirability of a governmental policy to accelerate private consumption, especially as investments in public goods such as education, roads, infrastructure, and alternative energy lag. But a government policy that promotes both self-interest and private consumption forms a toxic cocktail. This policy will increase the risk of negative externalities from (and subsidization of) private consumption, and also create a disinvestment in public goods.

Under neoclassical economic theory, self-interested citizens have little incentive to invest in public goods and will free ride whenever possible.<sup>430</sup> They simply respond: "What's

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428. *Id.* ("When people reuse things or when products are made with less material, less energy is needed to extract, transport, and process raw materials and to manufacture products. The payoff? When energy demand decreases, fewer fossil fuels are burned and less carbon dioxide is emitted to the atmosphere.").

429. See, e.g., *Strength by Luxury Goods Shoppers in Asia and Online Bring Glimmers of Hope to Beleaguered Industry, Says Bain & Company in Release of Annual Worldwide Market Study*, REUTERS, Oct. 21, 2009, <http://www.reuters.com/article/pressRelease/idUS107473+21-Oct-2009+BW20091021> (projecting a twelve-percent year-over-year increase in luxury good sales in 2009 in mainland China, and projected sales growth in China, South Asia and Central Asia may cause Asia to overtake Europe and the Americas as the largest global luxury market region).

430. See, e.g., John J. Flynn, *The 'Is' and 'Ought' of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 CORNELL L. REV. 1095, 1132 (1986) (discussing flaws of neoclassical economic theory); cf. Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* 199–202 (Robert Pitofsky ed., 2008) (discussing limitations of theory with respect to RPM). Of course, some free riding exists (think public radio). So economists

in it for me?" If the free market is equated with promoting individual self-interest, then increased governmental spending on many public goods will often be seen as inferior to private consumption.<sup>431</sup> In pursuing their self-interest, consumers will often place a greater value on personal consumption. The perceived benefit of a new \$1000 stereo, for example, is often more tangible, immediate, and of greater personal value than the perceived benefit from a public good. People who are childless or who send their children to private schools benefit indirectly from investments in the public school (perhaps by higher real estate values). Additionally, attitudes toward taxes will shift. Indeed, the political rhetoric over the past thirty years touts how lower taxes improve welfare as consumers can consume more—accruing the full benefit for each dollar spent on personal consumption instead of a small benefit, if at all, from investments in public goods. Thus the push is to divert spending on these public goods by lowering taxes and thereby increase private consumption.

*I. Our Species' Survival Depends Upon Cooperation and Ability to Look Beyond Narrow Self-Interest*

One implication of the behavioral economic literature is that a social policy that promotes the perception that its citizens are self-interested can be self-defeating. As Fehr and Fischbacher conclude from their behavioral studies, the problem is not inherent selfishness, but rather the perception of how widespread selfishness is: "if people believe that cheating on taxes, corruption, or abuses of the welfare state are widespread, they themselves are more likely to cheat on taxes, take bribes, or abuse welfare state institutions."<sup>432</sup> A

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and neuroscientists are employing neurotechnology to have test subjects truthfully reveal how much they value a public good. *Scientists Develop Novel Use of Neurotechnology to Solve Classic Social Problem*, SCI. DAILY, Sept. 11, 2009, <http://www.sciencedaily.com/releases/2009/09/090910142358.htm>.

431. GALBRAITH, *supra* note 288, at 111.

432. Fehr & Fischbacher, *supra* note 109, at 167. For example, in 1995 the Minnesota Department of Revenue tested several ways to increase its residents' voluntary compliance with the state individual income tax. STEPHEN COLEMAN, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT STATE TAX RESULTS, MINNESOTA DEP'T OF REVENUE 1 (1996), available at [http://www.taxes.state.mn.us/legal\\_policy/research\\_reports/content/complnce.pdf](http://www.taxes.state.mn.us/legal_policy/research_reports/content/complnce.pdf). It mailed taxpayers different information on the importance of voluntary compliance. *Id.* Letter 1, mailed to about 20,000 taxpayers, made a rational

study of more than 5000 business (mostly MBA) and nonbusiness graduate students at U.S. and Canadian colleges and universities during the 2002–2003 and 2003–2004 academic years found that graduate business students cheat more than their nonbusiness-student peers. The students' perception that their peers were cheating had the largest influence in their behavior.<sup>433</sup>

Thus the behavioral economics experiments' larger implication is in preventing society's perception of civic duties as unraveling; once the conditional cooperators perceive others as acting selfishly, they too will act selfishly. Any social policy should discourage, rather than encourage, the assumption that most people act selfishly, and instead emphasize that others are cooperating in their civic duties.

This is important as the Internet and global commerce over the past twenty years have broadened social relationships and increased the interdependence of citizens throughout the world. As the financial crisis shows, economic risks are not isolated to particular regions.<sup>434</sup> Because individuals take part in events on a worldwide scale,

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argument for paying taxes (“[Y]our income tax dollars are spent on services that we Minnesotans depend on. Over [thirty] percent of state taxes go to support education. Another [eighteen] percent is spent on health care and support for the elderly and the needy. Local governments get about [twelve] percent of the state tax money, supporting services in your community such as law enforcement, parks, libraries and snow removal. . . . So when taxpayers do not pay what they owe, the entire community suffers.” (ellipses in original)). *Id.* at 5. Letter 2 appealed to a social norm about tax compliance, namely that the overwhelming majority accurately report the income taxes they owe:

According to a recent public opinion survey, many Minnesotans believe other people routinely cheat on their taxes. This is not true, however. Audits by the Internal Revenue Service show that people who file tax returns report correctly and pay voluntarily [ninety-three] percent of the income taxes they owe. Most taxpayers file their returns accurately and on time. Although some taxpayers owe money because of minor errors, a small number of taxpayers who deliberately cheat owe the bulk of unpaid taxes.

*Id.* at 5–6. Letter 1 did not affect compliance, while Letter 2 had a “moderately significant effect on the entire sample and a stronger effect within a large subgroup of taxpayers.” *Id.* at 18.

433. Donald L. McCabe et al., *Academic Dishonesty in Graduate Business Programs: Prevalence, Causes, and Proposed Action*, 5 ACAD. MGMT. LEARNING & EDUC. 294 (2006), available at [ftp://ftp.cba.uri.edu/Classes/Beauvais/MBA540/Readings/McCabe\\_2006.pdf](ftp://ftp.cba.uri.edu/Classes/Beauvais/MBA540/Readings/McCabe_2006.pdf).

434. POSNER, *supra* note 24, at 55 (noting how a neglected downside of distributing risk of mortgages through securitization is that risk is spread to otherwise safe markets).

individual “self-realization cannot be the supreme principle of ethics.”<sup>435</sup> To evolve, economies must rely on complex, large-scale cooperation.

This relationship between cooperation and market integration became apparent in an Ultimatum Game experiment in fifteen small-scale economies from twelve countries on four continents.<sup>436</sup> None of the societies behaved like self-interested maximizers. But the researchers found that the range of offers varied more amongst members of these small-scale economies than did the range of offers by university students. The differences among societies in “market integration” and “cooperation in production” explained a substantial portion of the behavioral variation among the different economies: “The higher the degree of market integration and the higher the payoffs to cooperation, the greater the level of cooperation and sharing in experimental games.”<sup>437</sup> Moreover, “the nature and degree of cooperation and punishment in the experiments,” they found, were “generally consistent with economic patterns of everyday life in these societies. In a number of cases, the parallels between experimental game play and the structure of daily life were quite striking.”<sup>438</sup>

Likewise, in reviewing the traits that appear with regularity in the cultures of high-performing and adaptive companies, a senior advisor to McKinsey & Co. identified ten

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435. BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 622 (Routledge Classics 2004) (1946); Pope John XXIII, *supra* note 357, at 94.

436. Gintis et al., *supra* note 91, at 158.

437. *Id.* The societies were rank-ordered in five categories—“market integration” (how often people buy and sell, or work for a wage), “cooperation in production” (whether production collective or individual), plus “anonymity” (how prevalent anonymous roles and transactions are), “privacy” (how easily can people keep their activities secret), and “complexity” (how much centralized decision-making occurs above the level of the household). *Id.* Using statistical regression analysis, only the first two characteristics, market integration and cooperation in production, were significant. *Id.*

438. *Id.* at 159; see also BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* 79–102 (2005) (noting that whenever America was mired in economic stagnation its democratic values stagnated as well). Hostility toward immigrants, the poor, and other competing groups, whether by nationality, religion, race, or gender, increased as these groups were seemingly threatened by others stealing their fixed, or dwindling, share of the pie. *Id.* In contrast, during periods of economic growth, our society slowly progressed from this zero-sum mentality toward openness, mobility, and democracy. *Id.*

illustrative performing, cooperating, and innovating norms.<sup>439</sup> These coincide with religious and ethical norms involving respect and reciprocity (for example, do unto others as you would have them do unto you), honesty, and trust.<sup>440</sup> All other routines of human cohabitation, norms and rules are "footnotes to that precept."<sup>441</sup>

### CONCLUSION

Sophocles said "he drew men as they ought to be, and Euripides as they were."<sup>442</sup> The neoclassical economic theories' assumption of self-interest represents neither how we ought to act nor how we actually act. The assumption is not descriptive, as many people look beyond their self-interest. Nor is it normative. Given the importance of trust, markets work as well, if not better, if people have compassion and empathy, are altruistic and cooperate even when not in their economic interest. "Without [these] prosocial emotions, we would all be sociopaths, and human society would not exist, however strong the institutions of contract, governmental law enforcement, and reputation."<sup>443</sup> Rather than make markets more efficient, self-interest at times leads to sub-optimal economic outcomes.

This article does not call for socialism or collectivism. Residents of communist countries were among the unhappiest lot.<sup>444</sup> Nor does this article call for the end of marketing, debt, or zero-sum competition. Many law schools are prime examples of zero-sum competition—one school's (or student's) advancement in rank, means another school's (or student's) decline in rank. Status competition is not normatively bad, but is misdirected. Some people, for example, voluntarily

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439. BEINHOCKER, *supra* note 78, at 370–71.

440. Not surprisingly, the larger religions emphasize pro-social norms—helping's one's neighbor, turning the other cheek. Gintis et al., *supra* note 93, at 30; BAUMAN, *supra* note 298, at 32–33 ("Accepting the precept of loving one's neighbor is the birth-act of humanity."). The early Christians, for example, were remarkable in owning everything in common, selling their goods and possessions and distributing the proceeds among themselves according to what each one needed, and sharing their food "gladly and generously." *Acts of Apostles* 2:44–47.

441. BAUMAN, *supra* note 298, at 33.

442. ARISTOTLE, *THE RHETORIC AND THE POETICS* 261 (Modern Library 1984).

443. Bowles & Gintis, *supra* note 121, at 433.

444. LAYARD, *supra* note 211, at 32–33.

compete (and use Internet peer pressure) to alter their energy consumption, driving, and exercise habits.<sup>445</sup> Nor should government policies necessarily curtail output, especially when many throughout the world are malnourished, sick, and lack adequate water supplies and other necessities.

Instead, this article seeks to identify the risks as governmental policies advocate increases in output and self-interest as invariably good. No doubt policymakers at times can assume the worst, and ask what would happen if its citizens acted selfishly as neoclassical economic theory predicts. But even here, care is needed. If the government assumes its citizens solely pursue their self-interest, its policies may signal distrust or actually promote widespread self-interest, leading to suboptimal results (such as citizens shirking their civic duties by free riding or cheating). In no event should the government actively promote self-interested behavior. While “no change of system or machinery can avert those causes of social *malaise* which consist in the egotism, greed, or quarrelsomeness of human nature,” wrote R.H. Tawney, “what it can do is to create an environment in which those are not the qualities which are encouraged.”<sup>446</sup>

Thus a governmental policy that assumes self-interested citizens is misguided. It ignores how moral, ethical, and social norms hinder undesirable conduct and promote desirable behavior—at times more effectively than financial incentives and penalties.<sup>447</sup> In understanding the drivers of behavior beyond the simplistic assumption of wealth-maximization, policymakers can better understand how informal social norms can promote the desired objectives. Money, at times, is an inefficient mechanism to motivate, noted behavioral economist Dan Ariely. “Social norms are not only cheaper, but often more effective as well.”<sup>448</sup>

Nor is increased output always beneficial. Economic activity’s proper place should always remain “as the servant,

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445. Tim Bradshaw, *Peer Groups that Harness an Online Community Spirit*, FIN. TIMES, Aug. 6, 2009, at 12.

446. TAWNEY, *supra* note 351, at 180.

447. Gintis et al., *supra* note 93, at 4 (noting how effective social policies are “those that support socially valued outcomes not only by harnessing selfish motives to socially valued ends, but also by evoking, cultivating, and empowering public-spirited motives”).

448. ARIELY, *supra* note 78, at 86.

not the master, of society.”<sup>449</sup> Consequently, improved social conditions for all citizens must accompany economic development. The economics professor Simon Kuznets warned of the shortcomings in using his GDP measure to infer a nation’s welfare. Thus, government officials must develop better tools to determine whether its (in)actions have the desired effect.<sup>450</sup>

Competition policy’s greatest failing has been its failure to understand better how competition works in particular markets in particular communities at particular time periods and the interplay among private institutions, government institutions, and informal social, ethical, and moral norms. By undertaking more empirical research, competition authorities will better understand the dynamics of particular markets and how legal and informal norms interact to influence individual behavior and competition generally. William Kovacic, among others, has long called for more empirically-driven research policies.<sup>451</sup> Ultimately, we should reorient our social policies to reach Keynes’s promised land, and to return to some of the most sure and certain principles of religion and traditional virtue—that avarice is a vice, that the exaction of usury is a misdemeanor, and the love of money is detestable, that those walk most truly in the paths of virtue

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449. TAWNEY, *supra* note 351, at 183.

450. On a positive note, the Stiglitz-Sen-Fitoussi commission examined “how to improve standard GDP; how to incorporate new measures of economic, social, and environmental sustainability into the data; and how to devise fresh indicators for assessing quality of life.” John Thornhill, *A Measure Remodelled*, FIN. TIMES, Jan. 28, 2009, at 9, available at [http://www.ft.com/cms/s/0/243c94da-ecdc-11dd-a534-0000779fd2ac.html?ncklick\\_check=1](http://www.ft.com/cms/s/0/243c94da-ecdc-11dd-a534-0000779fd2ac.html?ncklick_check=1); see REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS (2009), [http://www.stiglitz-sen-fitoussi.fr/documents/rapport\\_anglais.pdf](http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf); see also Joseph Stiglitz, *Progress, What Progress?*, OECD OBSERVER, Apr. 2009, at 27, available at [http://www.oecdobserver.org/news/fullstory.php/aid/2793/Progress,\\_what\\_progress\\_.html](http://www.oecdobserver.org/news/fullstory.php/aid/2793/Progress,_what_progress_.html).

451. See, e.g., William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 922 (2009) (“Investments in knowledge have long-term capital qualities. Investments in activities—research, workshops, partnerships with academia—that build knowledge help ensure that the agency stays abreast of important developments in economic theory, empirical study, and legal analysis. Among other applications, this knowledge-building is a crucial element of effective case selection. A superior knowledge base increases the agency’s ability to attempt more complex and demanding matters, helps the agency ground its cases in the best possible conceptual and empirical foundations, and provides assurance that the agency will not find itself trapped in the wrong analytical model.”).



and sane wisdom who take least thought for the morrow. We shall once more value ends above means and prefer the good to the useful. "We shall honour those who can teach us how to pluck the hour and the day virtuously and well, the delightful people who are capable of taking direct enjoyments in things, the lilies of the field who toil not, neither do they spin."<sup>452</sup>

Self-interested behavior does not necessarily yield a happier, healthier society. The financial crisis can provide the needed impetus to look beyond the current toils and invest in a better competition policy for future generations.

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452. KEYNES, *supra* note 263, at 372.

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