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

*Maurice E. Stucke**

Table of Contents

Introduction	2
I. Competition Policy before 2007	5
A. Chicago School’s Assumption of Self-Interest	7
B. Chicago School’s View of Self-Correcting Markets.....	9
II. The Financial Crisis’s Silver Lining	12
A. Behavioral Economics Conception of Strong Reciprocity.	15
B. Competition Policies, Like Other Governmental Policies, Can Affect Human Behavior.	25
C. Criticisms of Behavioral Economics	26
IV. Should Self-Interest be the Norm?.....	29
A. In Defense of Self-Interest	30
B. Issues if Self-Interest Is the Desired Norm	33
1. Self-Interest, at Times, Can Undermine, Rather Than Support, a Market Economy.	33
2. Reconciling Self-Interest’s Conflict With Religious, Ethical, and Social Norms.	36
3. How Does Self-Interest Improve Individual Welfare?.....	37
C. Why Do Many People Whose Basic Needs Are Met Yearn to Consume More Goods and Services?	40
D. If Self-Interest Does Not Yield Greater Happiness, What Does?.....	48
IV. Risks if Social Policies Promote Self-Interest	50
A. Promoting Self-Interest Quickens the Hedonic Treadmill.....	53
B. Other Values, to the Extent They Conflict With Self-Interest, Are Marginalized.	57
C. To Increase Consumption, Privacy May Be Sacrificed.	61
D. Maximizing Output Requires More Makeovers.	63

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E. Attitudes Towards Those Not Conforming to the Norm of Self-Interest Change.	65
F. To Increase Consumption, the Debt Economy Must Grow.....	69
G. The Environmental Costs from Increased Consumption.	78
H. Self-Interested Citizens’ Disinterest in Public Goods.....	81
I. Our Species’ Survival Depends Upon Cooperation and Ability to Look Beyond Narrow Self-Interest.	82
Conclusion	85

INTRODUCTION

Until the recent financial crisis, U.S. competition policymakers relying on the neoclassical economic theories of Milton Friedman and others associated with the University of Chicago generally assumed competition to be “a self-initiating process,” which, when left mostly alone by government regulators, will allocate resources efficiently toward users who value them the most.¹ 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.”² These economic theories define rational behavior as people with perfect knowledge and willpower pursuing their self-interest.

This orthodoxy is now under attack. As Commissioner J. Thomas Rosch of the Federal Trade Commission recently said, “One thing is clear to me: the orthodox and unvarnished Chicago School of economic theory is on life support, if it is not dead.”³ He added, “[I]n the real world – as opposed to the worlds of political and economic theory – markets are not

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/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf.

² ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATION 3 (2007).

³ J. Thomas Rosch, Commissioner, Federal Trade Commission, Implications of the Financial Meltdown for the FTC, New York Bar Association Annual Dinner, New York, NY, Jan. 29, 2009, <http://ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf>.

perfect; . . . imperfect markets do not always correct themselves; and . . . business people do not always behave rationally.”⁴ Likewise in shelving the Bush administration’s highly-criticized Section 2 Report,⁵ 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.”⁶ The new AAG 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 regulation, ill-considered deregulatory measures, and inadequate antitrust oversight contributed to the current condition.⁷

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. This Article

⁴ Rosch, *Financial Meltdown*, *supra* note 3, at 5.

⁵ U.S. DEP’T 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>.

⁶ 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, http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm.

⁷ Christine A. Varney, Assistant Attorney General, Antitrust Div., U.S. Dep’t of Justice, *Vigorous Antitrust Enforcement in This Challenging Era*, Remarks as prepared for the Center for American Progress 4-5 (May 11, 2009), <http://www.usdoj.gov/atr/public/speeches/245777.htm>.

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.⁸ I discuss elsewhere how behavioral economics can inform merger analysis⁹ and cartel¹⁰ and monopolization cases.¹¹ This Article addresses one assumption of the Chicago School's neoclassical economic theories – namely, that people pursue their self-interest, which for this Article's purpose, means people seeking to maximize their wealth and other material goals, and generally not caring about other social goals, to the extent they conflict with personal wealth maximization.¹² This assumption of self-

⁸ But among the promising signs, FTC Commissioner Rosch has been interested in behavioral economics' implications on competition policy. See *Antitrust Law Enforcement: What To Do About The Current Economics Cacophony?*, Remarks of J. Thomas Rosch, Commissioner, Fed. Trade Comm'n before the Bates White Antitrust Conference, Washington, D.C. (June 1, 2009), <http://www.ftc.gov/speeches/rosch/090601bateswhite.pdf>; Implications of the Financial Meltdown for the FTC, Remarks of J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, New York Bar Association Annual Dinner, New York, NY (Jan. 29, 2009), <http://www.ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf>. At its 2008 annual meeting, the American Antitrust Institute's keynote speaker and panelists discussed the applicability of behavioral economics to competition policy. Audio available at <http://www.antitrustinstitute.org/Archives/2008conferenceaudio.ashx>. The AAI's transition report also recommends the empirical analysis to further this new antitrust realism. AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 26 (cartels), 172 (mergers), 185, 200-01, 272-75 (media industries) (2008). The FTC in April 2007 sponsored a conference on behavioral economics and consumer protection issues. <http://www.ftc.gov/be/consumerbehavior/index.shtml>. Scholars and competition authorities in the European Union are also looking at the applicability of behavioral economics to competition policy. See, e.g., Competition Law Forum on Behavioral Economics, hosted by the British Institute of International and Comparative Law, London, England (July 2009).

⁹ See Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007); *New Antitrust Realism*, GCP (Global Competition Policy) MAG., Jan. 2009, available at <http://ssrn.com/abstract=1323815>.

¹⁰ Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443.

¹¹ Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497.

¹² 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

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 Chicago School's 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 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 if governmental policies prime persons to pursue their self-interest.

I. COMPETITION POLICY BEFORE 2007

Antitrust ideologies in the United States generally have a 30- to 40-year lifespan. Since the late 1970s, the Chicago School's neoclassical economic theories have shaped U.S. antitrust policy. Two qualifications are required 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.¹³ At times, its theorists have clashed over competition policy¹⁴ or in their beliefs in market forces.¹⁵ Nobel laureate

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.

¹³ 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 of or modifications in Director's original ideas").

¹⁴ 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. 101, 109.

¹⁵ For a recent disagreement between Judge Posner and Easterbrook, see *Jones v.*

Ronald H. Coase, who is commonly associated with the Chicago School, for example, rejected the self-interest assumption as “consumers without humanity.” He observed that the “rational utility maximizer of economic theory bears no resemblance to the man on the Clapham bus or, indeed, to and man (or woman) on any bus.”¹⁶ Coase advocated for more empirical analysis of the legal institutions that will make the competitive system work more efficiently.¹⁷ During this financial crisis, Richard A. Posner, another Chicago School theorist, reconsidered some of his earlier beliefs.¹⁸

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. 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.”¹⁹

With these caveats in mind, the Chicago School is 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.”²⁰ But if this universal “general economic theory” existed, then economists would not band together under

Harris Assoc., 537 F.3d 728 and 527 F.3d 627 (7th Cir. 2008).

¹⁶ R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 3-4 (1988).

¹⁷ R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992).

¹⁸ Marcus Baram, *Judge Richard Posner Questions His Free-Market Faith In “A Failure Of Capitalism,”* HUFFINGTON POST, Apr. 20, 2009 (interview with Posner) (seeing “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 expressed support for the idea of changing bankruptcy law to make it easier for homeowners who face foreclosure.”), http://www.huffingtonpost.com/2009/04/20/judge-richard-posner-disc_n_188950.html; RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009).

¹⁹ Kovacic, *Double Helix*, *supra* note 14, at 170.

²⁰ Posner, *Chicago School*, *supra* note 13, at 933-34.

the labels of Chicago School, post-Chicago School, evolutionary theorists, New Institutional Economics, behavioral economics, etc. So unlike behavioral economics, the Chicago School's neoclassical economic theories are derived "from the assumption that businessmen are rational profit-maximizers."²¹

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."²²

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."²³ The first assumption, "[o]ne of the hallmarks of rational decision making, is . . . that preferences, whatever they may be, are stable."²⁴ If human preferences gyrate unpredictably (such as desiring money one day, abhorring it the next), then human behavior is unpredictable.

Next, economists must identify (preferably empirically) these stable

²¹ Posner, *Chicago School*, *supra* note 13, 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, "It 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, *Chicago School*, *supra* note 13, at 931 n.13.

²² ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS I.2.2 (Methuen & Co., Ltd. 1904) (1776).

²³ 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).

²⁴ Terrence Chorvat & Kevin McCabe, *Neuroeconomics and Rationality*, 80 CHI.-KENT L. REV. 1235, 1238 (2005).

preferences. Economists have not uniformly accepted what this stable preference is; it can range from humans maximizing their expected utility, to self-interest, to wealth maximization.²⁵ 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 since it maximized their utility). But the theory's predictive value diminishes.²⁶ 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.²⁷

To bolster their theories' predictive abilities and simplify their models, certain economists assume that humans have a stable universal preference of maximizing their financial well-being.²⁸ "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."²⁹ So if motivated by money, self-interested humans should uniformly respond to changes in exogenous financial incentives and disincentives in a way that can be measured and predicted.

Today "[a]lmost all economic models assume that all people are exclusively pursuing their material self-interest and do not care about 'social' goals per se."³⁰ Thus, "the average human being is about 95

²⁵ Russell B. Korobkin & Thomas S. Ulen, *Law & Behavioral Science: Removing the Rationality Assumption from Law & Economics*, 88 CAL. L. REV. 1051, 1060–67 (2000) (outlining spectrum of rational choice theory).

²⁶ *Id.* at 1061–66.

²⁷ *Id.* at 1065.

²⁸ ISRAEL M. KIRZNER, *THE ECONOMIC POINT OF VIEW: AN ESSAY IN THE HISTORY OF ECONOMIC THOUGHT* 38 (2d ed. 1976) (describing desire of Jevons and Edgeworth, both early users of mathematical methods in economics, to use self-interest to turn economics into a science).

²⁹ Parisi, *supra* note 23, at xii

³⁰ Richard A. Posner, *The Value of Wealth: A Comment on Dworkin & Kronman*, 9 J. LEGAL STUD. 243, 247 (1980) ("Partly because there is no common currency in which to

percent selfish in the narrow sense of the term.”³¹ As Chicago School proponent 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.”³² Karl Marx and Friedrich Engels agreed.³³

B. Chicago School’s View of Self-Correcting Markets

Although few, if any, markets are characterized by perfect competition,³⁴ under the Chicago School’s assumptions, markets are composed of self-interested participants, with perfect knowledge and

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); Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 754–60.

³¹ Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. OF ECON. PERSPECTIVES 159, 159 (1993), quoting GORDON TULLOCK, *THE VOTE MOTIVE* (1976).

³² George Stigler, *Economics or Ethics?*, in TANNER LECTURES ON HUMAN VALUES (S. McMurrin ed., 1981); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 119 (1978) (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, Chicago School, *supra* note 13, at 931 (Chicago School’s theory offered “powerful simplifications,” such as “rationality, profit maximization, 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. 1665 n.4 (2003) (collecting additional sources).

³³ 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.”).

³⁴ 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.” A perfectly competitive market assumes transparent prices, highly elastic demand curves, easy entry and exit, and informed producers and consumers. 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. JOHN BLACK, *A DICTIONARY OF ECONOMICS* 348 (1997); William J. Kolasky, *What Is Competition? A Comparison of U.S. and European Perspectives*, 49 ANTITRUST BULL. 29, 31 (2004).

willpower; most markets are competitive or are working themselves to the competitive solution; mergers and vertical arrangements among manufacturers, its distributors and its retailers often generate efficiencies; and market forces likely will redress any firm's attempt to exercise market power.³⁵

The government is generally thought to operate outside the free market, and must justify the necessity of its intervening and displacing competition. 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."³⁶ 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).

President Reagan told the nation, "government is not the solution to our problem; government is the problem,"³⁷ So too the Chicago School underscores how government interference in the market likely causes greater harm, in inhibiting the market's efficient allocation of scarce resources, than good. The concern is that market forces may not readily overcome governmental restraints on competition, the way these forces can

³⁵ Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 266 (2001) (describing Chicago School policies); Bork, *supra* note 32, at 405-06.

³⁶ Posner, Chicago School, *supra* note 13, at 933; *see also* 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/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf; Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986).

³⁷ Ronald Reagan, First Inaugural Address (Jan. 20, 1981), <http://www.reaganlibrary.com/reagan/speeches/first.asp>.

overcome market-created impediments. Consequently, the Chicago School's greater concern is that governmental intervention will increase the risk of false positives,³⁸ and thereby chill procompetitive market behavior and which market forces cannot readily redress. It has less concern about false negatives,³⁹ as self-interested firms through entry or expansion will correct most market failures.

The Chicago School beliefs burned brightest during the George W. Bush administration. In speeches⁴⁰ and amicus briefs in support of defendants,⁴¹ 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.⁴²

³⁸ 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.*, 127 S. Ct. 2705, 2718 (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)).

³⁹ False negatives here involve characterizing anticompetitive behavior as procompetitive or competitively neutral.

⁴⁰ *See* Stucke, *Monopolies*, *supra* note 11, at 531; 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 Regulation Report, June 12, 2009, at 2.

⁴¹ *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109 (2009), *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 Company, Inc.*, 549 U.S. 312 (2007), *available at* <http://www.usdoj.gov/atr/cases/f217900/217988.htm>; Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), *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), *available at* <http://www.usdoj.gov/atr/cases/f209200/209209.htm>.

⁴² The Bush administration advocated the Court to adopt a no-economic-sense legal standard. Brief for the United States & Fed. Trade Comm. as Amici Curiae Supporting Petitioner at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), *available at* <http://www.usdoj.gov/atr/cases/f201000/201048.pdf> ("Where . . . plaintiff asserts that

The DOJ officials did not prosecute any monopolistic abuses,⁴³ and criticized foreign competition authorities for prosecuting Microsoft for certain monopolistic practices.⁴⁴ They repeated a stock phrase here and abroad about turning upon the successful competitor, once it prevails.⁴⁵ They advocated an antitrust hierarchy that emphasized cartel prosecutions and deemphasized challenges of mergers and monopolistic practices.⁴⁶

II. THE FINANCIAL CRISIS'S SILVER LINING

In the financial crisis, policymakers today are re-examining fundamental issues such as the efficiency of markets and the role of legal, social, and ethical norms in a market economy. The Chicago School ideology that private market forces left alone will allocate goods and services efficiently

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.”); *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. In their amicus briefs in *Trinko*, several, including Judge Bork, criticized the Administration’s proposed legal standard as inconsistent with the D.C. Circuit’s en banc *Microsoft* decision: “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 in the Digital Age as Amici Curiae Supporting Respondent at 4, *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

⁴³ *See* Stucke, *Monopolies*, *supra* note 11, at 500-01; Rosch, *Financial Meltdown*, *supra* note 3, at 3-4.

⁴⁴ *See* Stucke, *Monopolies*, *supra* note 11, at 501.

⁴⁵ The oft-quoted line is Judge Learned Hand’s “The successful competitor, having been urged to compete, must not be turned upon when he wins.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.). Ironically the DOJ, which under the Bush administration never 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, at 2.

⁴⁶ *See* Stucke, *Monopolies*, *supra* note 11, at 500-01.

has been discredited. This is not to say, as F.A. Hayek discussed after the Great Depression, that a centrally-planned economy is the remedy.⁴⁷ Rather the concern is that former policymakers veered too close to one extreme, namely laissez-faire dogma. 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 lack perfect knowledge or will-power. This introspection may cast our attention to greater concerns about the many left behind. Many Americans today are upset over the growing disparity between the wealthy and everyone else.⁴⁸ 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.⁴⁹ That changed dramatically over the next 30 years. Although the disparity between the rich and poor has widened globally, observed the OECD, “nowhere has this trend been so stark as in the United States.”⁵⁰ Despite its high employment

⁴⁷ F.A. HAYEK, *THE ROAD TO SERFDOM* 93–94 (Univ. of Chi. Press 2007) (1944).

⁴⁸ John Thornhill, *Poll Shows Wide Dislike of Wealth Gap*, FIN. TIMES, May 18 2008, at http://www.ft.com/cms/s/0/86c4edea-250f-11dd-a14a-000077b07658.html?nclick_check=1; David Frum, *The Vanishing Republican Voter*, N.Y. Times (Sunday Mag.), Sept. 7, 2008, at 50. This displeasure over the wealth disparity exists in the EU as well. John Thornhill et al., *Accent on égalité*, FIN. TIMES, June 9, 2008, at 7.

⁴⁹ Thomas Lemieux, *For Equality, Education Matters*, SCIENCE, Sept. 26, 2008, at 1779.

⁵⁰ OECD, *Country Note: United States*, in *GROWING UNEQUAL?: INCOME*

rate, the United States has 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).⁵¹ Washington, D.C., in fact, had in 2007 the highest income disparity in the United States⁵² and was among the 10 states and territories with the highest poverty rate.⁵³

The United States ranks among the bottom of OECD nations for earnings mobility between generations.⁵⁴ In other words, contrary to the Horatio Alger belief, the poor in the United States are likely to produce the next generation of poor. Ironically, today's wealth disparity is estimated to exceed the levels during the robber-baron era when the Sherman Act was promulgated.⁵⁵

Utilitarian welfare economics is agnostic about distributional effects

DISTRIBUTION AND POVERTY IN OECD COUNTRIES (2008), at <http://www.oecd.org/dataoecd/47/2/41528678.pdf>. 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 ECONOMY OF THE NEW GILDED AGE* (2008).

⁵¹ OECD, *Are We Growing Unequal?* 2-3 (Oct. 2008), <http://www.oecd.org/dataoecd/48/56/41494435.pdf> [hereinafter OECD Inequality Report].

⁵² The Gini coefficient for D.C. in 2007 was .542, compared to the national average of .467. The Gini index shows how much income distribution differs from a proportionate distribution (e.g., 20% of the population holding 20% of the income), and varies from 0 (perfect equality) to 1 perfect inequality (one person controls all the wealth). U.S. CENSUS BUREAU, *INCOME EARNINGS, AND POVERTY: DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 9-10* (Aug. 2008) [hereinafter 2007 Census Survey].

⁵³ *Id.* at 21 (16.4% of D.C. residents were in poverty, compared to 13% of Americans overall).

⁵⁴ OECD Inequality Report, *supra* note 51, at 7; *see also* Lawrence Mishel et al., *The State of Working America 2008/2009* 5 (ILR Press 2009).

⁵⁵ Peter H. Lindert, *When Did Inequality Rise in Britain and America?*, 9 J. INCOME DISTRIBUTION 11, 13 (2000); *see also* Mishel et al., *supra* note 54, at 3 (“Data on income concentration going back to 1913 show that the top 1% of wage earners now hold 23% of total income, the highest inequality level in any year on record, bar one: 1928.”). Senator Sherman identified this inequality of condition, of wealth, and opportunity as the greatest threat to disturbing social order: 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 (1890) (statement of Sen. Sherman), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 113, 122 (Earl W. Kintner ed., 1978).

from the exercise of market power.⁵⁶ But under social contract theory, many would consent *ex ante* to a competition policy only if the gains and losses are distributed somewhat evenly. As the income gap widens in the U.S., those left behind have less incentive to perpetuate the prevailing competition policies. In recently reflecting on the financial crisis, Peter Sutherland, chairman of BP and Goldman Sachs International, compared the social safety net support in Denmark with the Anglo-Saxon economies: “I do think we need to reflect on a certain culture of excess.”⁵⁷

A. Behavioral Economics Conception of Strong Reciprocity.

The Chicago School’s theories are derived from the assumption of humans as rational, self-interested, and with perfect willpower. Behavioral economics, in contrast, uses facts and methods from other social sciences such as psychology, neuroscience, and sociology to understand the limits of this assumption.⁵⁸ Testing this rationality assumption in actual experiments,⁵⁹ behavioral economists find that humans systematically and predictably do not behave under certain scenarios as neoclassical economic

⁵⁶ Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 SW. J. L. & TRADE AM. 211, 219-20 (2007) (proponents of this perspective on aggregate efficiency or wealth do not answer the deontological questions of power and how opportunity is distributed).

⁵⁷ Harry Eyres, “*I’m not really a businessman at all*,” FIN. TIMES, Jan. 3 & 4, 2009, at 3.

⁵⁸ For interesting surveys of the behavioral economics research, see GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS* (Princeton Univ. Press 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* (Colin F. Camerer et al. eds., 2004); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487 (1998); Prentice, *supra* note 32. For a broader survey of literature attacking the conventional economic theories, see ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: THE RADICAL REMAKING OF ECONOMICS AND WHAT IT MEANS FOR BUSINESS AND SOCIETY* (2007).

⁵⁹ Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, in *BEHAVIORAL ECONOMICS*, *supra* note 58, at 7.

theory predicts.⁶⁰ 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. Neither the state nor private economic agents are endowed with perfect knowledge, but adopt a “satisficing and adaptive behavior.”⁶¹ Individuals lack willpower and knowingly act contrary to their long-term interests (for example overeating, imbibing too much alcohol, and smoking). And as this Article discusses, humans can be far more charitable and fair than the theoretical self-interested counterpart.

Even apart from behavioral economics, the neoclassical economic theories’ assumption of rational self-interested behavior suffers several flaws. First, the neoclassical economic model of perfect competition itself has problems, including its incompleteness; it has little to say about productive and dynamic efficiency.⁶² But even 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 Chicago School assumptions are correct, be equally efficient, 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

⁶⁰ Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237, 242-43 (2008).

⁶¹ François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 851 (2004).

⁶² Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951, 967-68 (2008).

relationship exists between the two concepts: The greater the infirmities of the assumptions underlying perfect competition, the less practicable a centrally-planned economy becomes.

Second, even before behavioral economics, individuals adhering to religious or ethical norms rejected the assumption that humans solely pursue their self-interest. As C.S. Lewis said, homogeneity in motivation inheres in vices rather than virtues: “How monotonously alike all the great tyrants and conquerors have been: how gloriously different are the saints.”⁶³ The many ways to live a virtuous life enrich our world; the tyrants’ pursuit of their narrow self-interest only deadens it.⁶⁴ 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.⁶⁵ Even Posner recognized that economic analysis “long ago abandoned the model of hyperrational, emotionless, unsocial, supremely egoistic, nonstrategic man (or woman).”⁶⁶ Some economists today acknowledge other-regarding

⁶³ C.S. LEWIS, *MERE CHRISTIANITY* 226 (1952). For beautifully written account of the diversity of several saints’ lives, and their lives’ impact on one Jesuit priest, see JAMES MARTIN, *MY LIFE WITH THE SAINTS* (2006).

⁶⁴ See SAINT FRANCIS DE SALES, *INTRODUCTION TO THE DEVOUT LIFE* 34 (Vantage Spiritual Classics 2002) (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 VI.6-9* 170 (Modern Library Classics 2003) CORNELIUS TACITUS, *THE ANNALS* 139 (Modern Library Classics 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.”).

⁶⁵ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS*, part I, section 1, line 1 (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 *PHILOSOPHY & PUBLIC AFFAIRS* 317 (1977).

⁶⁶ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1552 (1998).

behavior.⁶⁷ The issue for them is under what circumstances, and to what degree, do people pursue their self-interest. Yet as Matthew Rabin observed, many economists, including experimental economists, still cling to the assumption of self-interest.⁶⁸

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 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.”⁶⁹ 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.”⁷⁰

The psychological and experimental economic evidence shows that people care about treating others, and being treated, fairly.⁷¹ 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.⁷²

⁶⁷ Korobkin & Ulen, *supra* note 25, at 1134; Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUROPEAN ECON. REV. 657, 665 (2002).

⁶⁸ Rabin, *Perspective*, *supra* note 67, at 667.

⁶⁹ Samuel Bowles, *Policies Designed for Self-interested Citizens May Undermine “The Moral Sentiments”*: Evidence from Economic Experiments, SCIENCE, June 20, 2008, at 1606.

⁷⁰ 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.*

⁷¹ Jolls et al., *supra* note 58, at 1479.

⁷² Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS

So rather than self-interest, employers may appeal to fairness concerns.⁷³ Likewise, in the behavioral experiments, people care about resources being equitably distributed, not solely about resources going to those with the greater use.⁷⁴

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 Chicago School's theories: "[P]eople have a tendency to cooperate until experience shows that those with whom they're interacting are taking advantage of them."⁷⁵ Especially when given the option of punishing free-riders (even when it involves a personal cost), people cooperate at much higher levels than neoclassical economic theory predicts.⁷⁶

Our "strong reciprocity" to cooperate with others and punish unfair behavior is also displayed in the Ultimatum Game. In this behavioral economics experiment, you are given some money, and must offer another person some portion thereof. If the other person accepts your offer, both of you can keep the money. If the other person rejects your offer, neither of you keep the money. A Chicago School economist predicts that you will offer the smallest amount – one penny. If everyone acts in their self-interest, you selfishly want as much money as possible; the other person recognizes that a penny is better than nothing. But actual experiments of this Ultimatum Game in over twenty countries show the contrary. Most

OF COOPERATION IN ECONOMIC LIFE 32 (MIT Press 2005).

⁷³ 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.").

⁷⁴ Rabin, *Perspective*, *supra* note 67, at 665.

⁷⁵ RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 14 (1992); *see also* Prentice, *supra* note 32, at 1698.

⁷⁶ Gintis et al., *Moral Sentiments*, *supra* note 72, at 15.

offer significantly more than the nominal amount (ordinarily 40% to 50% of total amount available) and recipients about half the time reject nominal amounts (less than 20% of the total amount available).⁷⁷ Consequently, most receivers in this game forgo wealth to punish unfair offers, and offerors generally offer more than the nominal profit-maximizing amount.⁷⁸

These results cannot be explained as the participants' maximizing their reputation or goodwill; the same results occur in anonymous one-shot games.⁷⁹ Even when the game is repeated ten times to allow for learning, similar results follow.⁸⁰ In the Dictator Game, a variation of the Ultimatum 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.⁸¹

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.⁸² Upon transfer, the recipient gets triple the amount. So if A and B decide to keep their money, each earns £10; if both decide to transfer, each earns £30. If one transfers her money, but the other does not, then the sharer loses out. She gets nothing, while the recipient gets £20.

⁷⁷ Thaler, Winner's Curse, *supra* note 75, at 21–35; Jolls et al., *supra* note 58, at 1489–93; Werner Guth, Rolf Schmittberger & Bernard Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 371–74, 375 tbls. 4 & 5 (1982); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S291 tbl.2 (1986).

⁷⁸ Stucke, Behavioral, *supra* note 9, at 530.

⁷⁹ Jolls et al., *supra* note 58, at 1492.

⁸⁰ *Id.* at 1490.

⁸¹ Nava Ashraf et al., *Adam Smith, Behavioral Economist*, 19 J. OF ECON. PERSP. 131, 135–36 (2005).

⁸² Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS & MATERIAL INTERESTS, *supra* note 58, at 165.

(A, B payoffs)	B Shares	B Keeps
A Shares	£30, £30	0, £20
A Keeps	£20, 0	£10, £10

Neoclassical economic theory predicts that self-interested players will keep their £10 and not cooperate. Instead many test subjects cooperate in these situations.⁸³

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.⁸⁴ 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,⁸⁵ the rules of the game,⁸⁶ and 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.⁸⁷ But as humans 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.⁸⁸ In fact

⁸³ Fehr & Fischbacher, *supra* note 82, at 165.

⁸⁴ *Id.* at 155.

⁸⁵ 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. If both believe the other will share, both will share. If both believe the other is selfish, neither will share. Even persons prone to sharing will not share if they believe that the other will defect. Thus, the suboptimal equilibrium (defect, defect) arises. *Id.* at 167.

⁸⁶ If the game's rules are changed so that the selfish players must decide first, the equilibrium shifts. If the first-mover knows that her partner is naturally cooperative, the selfish player will opt for cooperation as the payoff is greater. *Id.*

⁸⁷ Because punishment is costly for the punisher (which the punisher does not recoup through cooperation), self-interested players would not punish. 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.

⁸⁸ Fehr & Fischbacher, *supra* note 82, at 169.

the punishment mechanism has a positive effect in deterring free-riding; in repeat games, contributions steadily increase until nearly all participants contribute 100% of their endowment.⁸⁹

Neoclassical economic theory predicts that financial incentives should motivate, and penalties should deter, behavior. So if law firm associates are disgruntled in working longer hours, 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?

The behavioral economics literature shows that humans are not solely motivated by, and may act contrary to, self-interest, for reasons of praise as well as “shame, guilt, empathy, or sensitivity to social sanction.”⁹⁰ At times, financial incentives and ethical norms are complements. But in most behavioral experiments, financial rewards when they displace social, moral, or ethical norms decrease (not increase) motivation or the likelihood of achieving the desired results.⁹¹ Indeed, mixing financial norms into ethical or social settings may be counterproductive.

Professor Dan Ariely, for example, did several experiments when social and market norms clashed. Participants were divided into three groups. Each group performed the same mundane task. One group (the social-norm group) was not compensated, but asked to undertake the task as a favor. In the first study, the social-norm group outperformed the group whose members received \$5 compensation for the task, which outperformed the group whose members received 50 cents for the task.⁹² In the second study, the two groups did not receive cash but a gift of comparable value (a

⁸⁹ *Id.* at 169-70. In the last few periods of the multi-period games, the actual rate of punishment is low. *Id.* at 170.

⁹⁰ See Samuel Bowles & Herbert Gintis, *Origins of Human Cooperation*, in *GENETIC AND CULTURAL EVOLUTION OF COOPERATION* 429, 432-33 (Peter Hammerstein ed., 2003).

⁹¹ Bowles, *supra* note 69, at 1605-6.

⁹² Ariely, *supra* note 58, at 69-71.

Snickers bar for the 50-cents group and a box of Godiva chocolate for the \$5 group). The two groups performed as hard as the social-norm group.⁹³ When in the third study the gifts were monetized to the two groups – a “50-cent Snickers bar” or a “\$5-box of Godiva chocolates -- these two groups again devoted less effort than the social-norm group.⁹⁴

Other behavioral experiments show the flipside -- how appealing to an ethical norm can deter unwanted behavior.⁹⁵ At times, highlighting an ethical norm more effectively deters unwanted behavior than other penalties. One experiment involved citizens preparing their income tax statements.⁹⁶ It attempted to compare the effect of penalties with appeals to conscience. For the penalty group, the emphasis was on the severity of

⁹³ *Id.* at 72-73.

⁹⁴ *Id.* at 73. Similarly more lawyers volunteered to donate their services for free to needy retirees than when they were offered a relatively small amount (\$30 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., *Moral Sentiments*, *supra* note 72, 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.” Uri Gneezy & Aldo Rustichini, *Incentives, Punishment, and Behavior*, in *ADVANCES IN BEHAVIORAL ECONOMICS*, *supra* note 58, at 572, 573. One group of high schoolers was given a pep talk of the importance of these donations. A second group, in addition to the pep talk, was promised 1% of the amount collected (to be paid from an independent source). A third group was promised an even greater financial incentive (10% of the amount collected). Under neoclassical economic theory, the third group, motivated by the greater financial incentive, should collect the most donations. Instead, the groups promised the 1% and 10% 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.

⁹⁵ In one experiment, MIT students were divided into three groups. The control group, which could not cheat, solved on average 3 problems on a test; the second group, which could cheat as they self-reported the number of right answers, reported solving on average 5.5 problems on the same test. The third group, like the second group could cheat, but they signed at the beginning of the test “I understand that this study falls under the MIT honor system.” (MIT, in fact, does not have an honor code.) The third group self-reported on average 3 problems, the same number as the control group, which could not cheat. Ariely, *supra* note 58, 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. That group could, but did not, cheat (compared to the group asked to recite beforehand 10 books they read in high school). *Id.* at 207-08.

⁹⁶ Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 283–99 (1967).

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.”⁹⁷ The conscience appeal, overall, had a stronger affect on income reported than did the threat of penalties. 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.⁹⁸

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).”⁹⁹ Professors Gneezy and Rustichini considered what impact, if any, a monetary fine had on curbing undesired behavior (namely parents who picked up their children late from private day-care centers).¹⁰⁰ 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. 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. Instead, the average number of late-arriving parents increased for these day-care centers. Moreover, after the fine was canceled, the average number of late-arriving parents did not return to the pre-fine levels. For the control group, on the other hand, where no fine was imposed, there

⁹⁷ *Id.* at 286–87.

⁹⁸ *Id.* at 299. *See also* Greenfield, *supra* note 10, at 615–17 (noting that perceptions of fairness and justice may in certain situations play a greater role in motivating behavior than incentives or penalties).

⁹⁹ Gintis et al., *Moral Sentiments*, *supra* note 72, at 20.

¹⁰⁰ Gneezy & Rustichini, *supra* note 94, at 581–86.

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. 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. The introduction of the fine monetized that lateness into an additional service, offered at a relatively low price.

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

Individuals are not always charitable or selfish. As Subpart A discusses, human behavior can depend on many factors. The way questions or experiments are framed, for example, may affect behavior. One 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.¹⁰¹ Using market terminology, such as "exchange," to describe an experiment reduces fair-minded behavior.¹⁰²

At times, priming individuals about money can lead to selfish, less desirable behavior.¹⁰³ One series of experiments involved nonconscious reminders of the concept of money.¹⁰⁴ Compared to the control group,

¹⁰¹ Fehr & Fischbacher, *supra* note 82, at 165.

¹⁰² Bowles, *supra* note 69, at 1606.

¹⁰³ 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) (in experiment of leaving "lost" letters with \$10 in cash in classrooms, higher rate of return (56%) for 32 letters left in upper-economics classes than 32 letters left in upper-level classes in other disciplines (31%)); T.D. Stanley & Ume Tran, *Economics Students Need Not Be Greedy: Fairness and the Ultimatum Game*, 27 J. OF SOCIO-ECON. 657, 660 (1998) (in Ultimatum Game conducted at small liberal arts college, with about 1000 undergraduate students, found that the 7 economic majors were less motivated by self-interest than the 9 other students in their experiment).

¹⁰⁴ 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"). Those primed with money had to phrases involving money. Kathleen D. Vohs et al., *The Psychological Consequences of Money*, SCIENCE, Nov. 17, 2006, at 1154 – 1156.

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.¹⁰⁵ Those primed with money in get-acquainted conversations put more physical distance between themselves than in the control group.¹⁰⁶ 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.¹⁰⁷

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). 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

¹⁰⁵ Vohs et al., *Money*, *supra* note 104, at 1154 – 1156; *see also* Benedict Carey, *Just Thinking About Money Can Turn the Mind Stingy*, N.Y. TIMES, Nov. 21, 2006, at F6.

¹⁰⁶ Vohs et al., *supra* note 104, at 1156.

¹⁰⁷ *Id.* In another experiment, the participants played the board game Monopoly. After seven minutes, the game was cleared leaving the participants with one of three different amounts of Monopoly play money: \$4,000 (high-money condition); \$200 (low-money condition) and no money (control condition). For the high- and low-money condition participants, their play money remained in view for the rest of the experiment. Each participant in the high-money group was asked to imagine a future with abundant finances. Those in the low-money group were asked to imagine a future with strained finances. Those in the control group (which received no money at the end) were asked about their plans for tomorrow. An accident was staged: one confederate to the experiment (who did not know the participant's priming condition) spilled 27 pencils before the participant. 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.* at 1155.

actual market transactions.¹⁰⁸ For example, researchers expanded the Ultimatum Game experiment to fifteen small-scale economies from twelve countries on four continents.¹⁰⁹ 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.¹¹⁰

A second criticism of behavioral economics is that the Chicago School's theories, while imperfect, are a good approximate. Many firms benefit from the division of labor, and accordingly train or hire experts to capture the benefits from specialized knowledge. Market participants typically 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. 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 lawyers, and the academic rat race."¹¹¹ (Basically the fair-minded are relegated to monopoly industries, government work or subsidization, or religious organizations that do not compete for converts.)

No doubt humans can learn from their mistakes and improve their reasoning and willpower. For example, frequent and more experienced

¹⁰⁸ For one recent survey of the literature, see Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. OF ECON. LIT. 315 (2009). For an earlier informative examination of the criticisms of behavioral economics and responses thereto, see Prentice, *supra* note 32.

¹⁰⁹ The groups studied included (i) three foraging groups (the Hadza of East Africa, the Au and Gnau 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).

¹¹⁰ Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1468-69 (2003) (citing some of research).

¹¹¹ Posner, *Rational Choice*, *supra* note 66, at 1570.

sports cards traders display less of an endowment effect¹¹² for sports cards (such as baseball trading cards) and other items such as chocolates and mugs.¹¹³ 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 wouldn't 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. But this criticism misconstrues the purpose of behavioral economics. Its purpose is to augment, not displace, neoclassical economic theory by providing more realistic assumptions of human behavior, such as incurring personal costs to punish unfair behavior.¹¹⁴

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. If private market participants are predictably irrational, so too are governmental agents. But while market forces provide greater incentives for private market participants to improve their willpower

¹¹² The endowment effect is 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, WINNER'S CURSE, *supra* note 75, at 70–74.

¹¹³ John A. List, *Neoclassical Theory Versus Prospect Theory: Evidence from the Marketplace*, 72 *ECONOMETRICA* 615 (2004); John A. List, *Does Market Experience Eliminate Market Anomalies?*, 118 *QUARTERLY J. OF 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.

¹¹⁴ Jolls et al., *supra* note 58, at 1475.

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.¹¹⁵

Anecdotes exist when government paternalism led to 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 where 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.¹¹⁶

IV. SHOULD SELF-INTEREST BE THE NORM?

Part III shows that the assumption of self-interest is not descriptive. As the behavioral economics literature shows, many people generally care

¹¹⁵ For more on behavioral economics' policy implications on the role of government, see Sunstein & Thaler, *Nudge*, *supra* note 58; Edward L. Glaeser, *Paternalism & Psychology*, 73 U. CHI. L. REV. 133-56 (2006); Gregory Mitchell, *Libertarian Paternalism Is Not 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); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics & the Case for 'Asymmetric Paternalism'*, 151 U. PA. L. REV. 1211-1254 (2003).

¹¹⁶ For example, rational investors may know that noise traders are acting irrationally e.g., individual investors buying stock on hope that past price increases will continue with future price increases. But the rational trader may short the stock as it 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 stocks when it appears more likely that market appears ripe for a downturn.

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. Since human behavior can vary, this Part addresses whether self-interest should be the norm, in that self-interested behavior is the desired end, or alternatively 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.”¹¹⁷ Greed and selfishness are essentially 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.”¹¹⁸ Society should encourage self-interest, which drives markets toward more efficient outcomes. The government need not intervene since rational market participants primed to pursue their self-interest will prevent or quickly cure most market failures (in the form of arbitrage).

As one noted economist and biographer of Keynes recently observed, “Ever since modern economics started in the 18th century it has presented

¹¹⁷ MICHAEL JACKMAN, CROWN'S BOOK OF POLITICAL QUOTATIONS: OVER 2500 LIVELY QUOTES FROM PLATO TO REAGAN 31 (1982).

¹¹⁸ Joseph Cardinal Ratzinger, *Market Economy and Ethics* (1985), http://www.acton.org/publications/occasionalpapers/publicat_occasionalpapers_rattinger.php?view=print.

itself as a predictive discipline, akin to a natural science.”¹¹⁹ 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.¹²⁰ 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.”¹²¹ Instead, the economist’s role is prescriptive.¹²²

Others may argue for a weaker form of self-interest, namely to maximize individual liberty to choose between charity or 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. But to press the issue further, why shouldn’t self-interest be the norm? Indeed unless one adopts a strict rationalism model, one cannot avoid this issue.

Under a rationalism model, humans deliberate which among the many destinations (such as fame, fortune, or power) is the proper end (which represents the highest and most complete end), and the means of attaining that end. Rationality, for Aristotle, reflected deliberations on the end

¹¹⁹ Robert Skidelsky, *How to Rebuild a Shamed Subject*, FIN. TIMES, Aug. 6, 2009, at 11; see also 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).

¹²⁰ Bork, *supra* note 32, at 120-21.

¹²¹ Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1670 (1998).

¹²² *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.”).

(happiness), and the means to attain that end (living a virtuous life).¹²³ Behavior motivated by wealth maximization was neither rational, in accord with a virtuous life, nor likely to lead to happiness, but rather an appetite devoid of rationality.¹²⁴ This rationalism model is consistent with the weaker form of self-interest. Humans through reason alter their behavior to progress toward the desired end. As their cognitive abilities and willpower improve, humans will choose the virtuous life. Thus, dictating self-interest as the norm is unnecessary. Rather, under this model, the objective is to enable humans to make the wisest choices by affording them the liberty and ability to improve their cognitive abilities and willpower.

Responding to the rationalism model, Dostoyevsky remarked, “The trouble with man is that he’s stupid. Phenomenally stupid.”¹²⁵ Some humans persist in desiring rather than reasoning. Contrary to the rationalism 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.¹²⁶ 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.¹²⁷ Even for Aristotle, knowledge about the proper means was insufficient. Virtue arises from routinely exercising the desired behavior. By cultivating and habituating the desired behavior through repetition, one more likely responds similarly

¹²³ ARISTOTLE, *NICOMACHEAN ETHICS*, BOOK ONE (Martin Oswald trans., 1962).

¹²⁴ *Id.* at 60–65.

¹²⁵ FYODOR DOSTOYEVSKY, *NOTES FROM UNDERGROUND* 109 (Andrew R. MacAndrew trans. 1961).

¹²⁶ Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOLOGICAL REV.* 814, 818-19 (2001); *see also* Matthew Rabin, *Psychology and Economics*, 93 *AM. ECON. REV.* 1449, 1450-52 (2003); Kahneman, *Maps*, *supra* note 110, at 1450.

¹²⁷ Haidt, *supra* note 126, at 818-19.

in future decisions: “So too we become just by doing just actions, temperate by temperate actions, and courageous by courageous actions.”¹²⁸

Consequently under a rationalism 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.”¹²⁹ So 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.”¹³⁰ It can maximize output of snake oil or products that eventually wipe out the economy.¹³¹ Fielding congressional questioning during the financial crisis, the embattled former Fed Chairman Alan Greenspan expressed his “distress” in discovering a “flaw” in his free-market beliefs: “Those of us who have

¹²⁸ ARISTOTLE, *supra* note, at 23.

¹²⁹ ARISTOTLE, *supra* note, at 24.

¹³⁰ Akerlof & Shiller, *supra* note 58, at 26.

¹³¹ See Anthony Faiola et al., *What Went Wrong?*, WASH. POST, Oct. 15, 2008, at A1 (noting several Clinton and Bush administrations officials’ opposition to regulation of derivatives).

looked to the self-interest of lending institutions to protect shareholder's equity (myself especially) are in a state of shocked disbelief.”¹³²

Granted humans 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.”¹³³ In athletic contests, some cooperation and trust are required, and the athletes generally abide by unwritten rules to ensure a fair contest.¹³⁴ Likewise 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.¹³⁵ 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.¹³⁶

Posner assumes that self-interested individuals will seek out, while

¹³² Kara Scannell & Sudeep Reddy, *Greenspan Admits Errors to Hostile House Panel*, WALL ST. J., Oct. 24, 2008, <http://online.wsj.com/article/SB122476545437862295.html>.

¹³³ Amartya Sen, *Adam Smith’s Market Never Stood Alone*, FIN. TIMES, March 11, 2009, at 9; *see also* Ashraf et al., *supra* note 81, at 136 (collecting some of the literature on importance of trust in market economies).

¹³⁴ For example, professional cyclists (generally from different teams) often breakaway from the main body of riders (the peloton). To prevent the peloton from catching them, the breakaway cyclists must cooperate by taking turns riding up front. To take advantage of the slipstream, the cyclists often ride behind one another. Thus, the cyclist up front is working harder than others in the paceline. *See* Bicycle Racing Terminology: A Primer, at <http://www.amgentourofcalifornia.com/Peloton/glossary.html>. 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, at http://news.bbc.co.uk/go/pr/fr/-/sport2/hi/other_sports/cycling/tour_de_france_2003/3086279.stm.

¹³⁵ 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 (Yale Univ. Press 1977).

¹³⁶ Bowles, *supra* note 69, at 1608.

unusually fair people will avoid or be forced out of, highly competitive businesses and academia.¹³⁷ His empirically-unsupported assumption is that those with this maladaptive trait of fairness are somehow at a competitive disadvantage. 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.¹³⁸ 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.”¹³⁹ Likewise the directors of Harvard Negotiation Project in their national bestseller emphasized negotiators to identify and discuss the relevant fairness standard(s).¹⁴⁰ As the behavioral experiments show, consumers 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 that the consumers’ motivation increases as their personal costs decrease.¹⁴¹

Contrary to Posner’s assumption, firms must be sensitive to fairness concerns,¹⁴² 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,

¹³⁷ Posner, *Rational Choice*, *supra* note 66, at 1570.

¹³⁸ Akerlof & Shiller, *supra* note 58, at 19.

¹³⁹ *Id.* at 20.

¹⁴⁰ ROGER FISHER ET AL., *GETTING TO YES* 151-57 (2d ed. 1991).

¹⁴¹ Matthew Rabin, *Incorporating Fairness Into Game Theory & Economics*, 83 AM. ECON. REV. 1281, 1282 (1993).

¹⁴² Fairness may be determined by a reference transaction set by legal, social, or ethical norms. Jolls et al., *supra* note 58, at 1496.

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 humans solely pursue their self-interest. Many businesses after a natural disaster 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 and customer loyalty.¹⁴³

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

None of the major religions promote self-interest as a virtue. 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:

[w]hen 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.¹⁴⁴

Aside from religious norms, children through schooling, volunteer activities, and other forms of socialization are taught altruism, compassion¹⁴⁵ and empathy. If the goal is to promote self-interest, it makes

¹⁴³ Kahneman et al., *Fairness*, supra note 73, at 735 (discussing surveyed individuals' adverse reaction to grocery store raising prices when its competitor is temporarily forced to close); Jolls et al., supra note 58, 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); Stucke, Behavioral, supra note 9, at 561-62 (discussing how actual firm behavior may deviate from that of self-interested firms).

¹⁴⁴ JONATHAN SACKS, *TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY* (2005).

¹⁴⁵ To envy commonly opposes compassion, which is "love, insofar as it 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 1996).

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 humans at times lack the capacity to reach moral judgments through pure reason. Thus a principal pathway to moral judgments is empathy.¹⁴⁶ Studies find that psychopaths understand the rules of social behavior and their action's harmful consequences, but they simply do not care.¹⁴⁷ By putting oneself in the other person's position, one may experience multiple competing intuitions,¹⁴⁸ which helps mitigate self-serving bias,¹⁴⁹ and has been identified as the "single most effective skill in negotiation."¹⁵⁰

3. How Does Self-Interest Improve Individual Welfare?

Although happiness is complex, economists since the 1990s have increasingly analyzed the determinants of happiness in different countries.¹⁵¹ The economic literature shows happiness weakly related to income.¹⁵² In the U.S., higher-income individuals (those in the highest decile) reported on average the highest level of happiness.¹⁵³ 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

¹⁴⁶ Haidt, *supra* note 126, at 819.

¹⁴⁷ *Id.* at 824.

¹⁴⁸ *Id.* at 819.

¹⁴⁹ Jolls et al., *supra* note 58, at 1503-4.

¹⁵⁰ WILLIAM URY, GETTING PAST NO 19 (1993).

¹⁵¹ Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LIT. 402, 404 (2002).

¹⁵² In multivariate regressions, income as it correlates to subjective happiness evaluations has a low coefficient. Frey & Stutzer, *supra* note 151, at 410; *see also* Elizabeth Dunn et al., *Spending Money on Others Promotes Happiness*, SCIENCE, March 21, 2008, at 1687.

¹⁵³ Frey & Stutzer, *supra* note 151, at 410 (on a three-point scale ranging from not to happy (1), pretty happy (2), and very happy (3), the tenth decile between 1994-96 had a mean happiness rating of 2.36, which was slightly higher than the ninth decile's mean of 2.3).

strong correlation between *increases* in wealth and subjective happiness. For example, the mean income (adjusted for inflation) of the top decile in the U.S. increased 33% between 1972 and 1996, but the mean happiness rating for that wealthy group remained the same.¹⁵⁴

Studies also show that once countries' gross domestic product (GDP) per capita exceeds a moderate income level (\$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."¹⁵⁵ For example, per capita income (adjusted for inflation) in the U.S. more than doubled between 1945 and 1991, but Americans are not necessarily happier.¹⁵⁶ The percentage of "very happy" Americans has not increased; nor has the percentage of "not very happy" Americans substantially decreased.¹⁵⁷

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.¹⁵⁸ Since the Sherman Act, average family income (adjusted for inflation) increased threefold.¹⁵⁹ The percentage of

¹⁵⁴ *Id.*

¹⁵⁵ Daniel Kahneman et al., *Would You Be Happier If You Were Richer? A Focusing Illusion*, SCIENCE, June 30, 2006, at 1909; see also DANIEL NETTLE, HAPPINESS 15, 72-73 (Oxford Univ. Press 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*, J. ECON. PERSP. 3, 15-16 (2006) (despite China's real income per capita increasing by a factor of 2.5 between 1994-2005, no increase in reported life satisfaction, and an increase in percentage who are dissatisfied); Frey & Stutzer, *supra* note 151, at 413 (Japan's income per capita increased six-fold between 1958 and 1991, while average life satisfaction remained unchanged).

¹⁵⁶ Frey & Stutzer, *supra* note 151, at 403; RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 29-30 (2005); Di Tella & MacCulloch, *supra* note 155, at 26.

¹⁵⁷ Layard, *supra* note 156, at 29-30.

¹⁵⁸ TRACEY STRANGE & ANNE BAYLEY, OECD INSIGHTS: SUSTAINABLE DEVELOPMENT 79 (2008).

¹⁵⁹ In 1901 the average U.S. family's income was \$750. In 2002-03, this family's real

total expenditures on discretionary items more than doubled since 1901 (with most of the increases between 1901 and 1984).¹⁶⁰ In 1901, the average U.S. family devoted 79.8% of its spending to food, clothing, and housing. By 2002–03, U.S. families reduced spending on necessities to 50.1%.¹⁶¹

With increases in discretionary income, Americans can consume more goods and services. Unlike the Kramdens in the 1950s television show, *The Honeymooners*, Americans today no longer consider automobiles,¹⁶² television sets,¹⁶³ washer and dryers,¹⁶⁴ and telephones as luxuries.¹⁶⁵ A

income, expressed in 1901 dollars, would have increased threefold, to \$2,282. U.S. Bureau of Labor Statistics, U.S. Department of Labor, *100 Years of U.S. Consumer Spending Data for the Nation, New York City, and Boston* (2006) (online version), available at <http://www.bls.gov/opub/uscs/reflections.pdf> [hereinafter *BLS Report*].

¹⁶⁰ In 2002–03, the average U.S. family could allocate 49.9% (\$20,333) of total expenditures for various discretionary consumer goods and services, while the average family in 1901 could allocate only 20.2%, or \$155, for discretionary spending. *Id.*

¹⁶¹ *Id.* at 66. In 1901, U.S. households allotted 42.5% of their expenditures for food; by 2002–03, food's share of spending dropped to 13.2%. By the 21st century, however, the average U.S. family allocated just 58.1% of food spending for food eaten at home and 41.9% for food eaten away from home. *Id.*

¹⁶² Between 1934 and 1936, 44.4% of U.S. households owned an automobile. In New York City and Boston, where well-developed public transportation was available, the percentages were 14.8 and 14.1, respectively. By the 21st century, 88% of U.S. households had at least one vehicle, with the average U.S. family owning two. In New York City, the average household owned 1.4 vehicles; in Boston, 1.6. *Id.* at 69.

¹⁶³ The percentage of U.S. homes with a television set went from 9% in 1950 to 87.1% in 1960, to 98% in 1978. http://www.tvhistory.tv/Annual_TV_Households_50-78.JbbPG

¹⁶⁴ The percentage of housing units with clothes washers ranged from 57% for the lowest income level (less than \$15,000); 72% (\$15,000-\$29,999); 82% (\$30,000-\$49,999); 89% (\$50,000-\$74,999); and 94% for the highest income level (\$75,000 or more). For clothes dryers, the percent of households is 45% for the lowest income level and 92% for the highest income level. Having both a washer and dryer is related to the type of housing unit the respondent lives in. Ninety-one percent of residents in single-family, detached homes have a washer and a dryer; only 19% of residents in large apartment buildings (5 or more rental units) have both. Energy Information Administration, U.S. Dep't of Energy, *The Effect of Income on Appliances in U.S. Households*, <http://www.eia.doe.gov/emeu/recs/appliances/appliances.html>

¹⁶⁵ Some appliances are common in the home regardless of income level, such as refrigerators (99.9% of households), cooking appliances (which includes the standard oven with stove-top burners, separate stove and ovens, and toaster ovens) (99.7%), and color televisions (98.9%). Energy Information Administration, 2001 Residential Energy Consumption Survey.

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 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.¹⁶⁶

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, further increases in income and consumption, the happiness literature predicts, will not correlate with the greater happiness.

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

One could argue that humans inherently know what makes them happy. For centuries humans across cultures revealed through their choices (such as purchasing lottery tickets) their desire for wealth. Also although many economic models assume humans as rational maximizers, some economists are skeptical of the happiness research, believing that humans cannot accurately assess their happiness. So economists assess utility from people’s preferences, not by their subjective beliefs or intentions, but by their actual choices. Looking at human’s actual choices is a more objective method to infer individuals’ utility. Consequently, since people’s choices reveal their preference for wealth, self-interest is a proper norm.

As Part III shows, people in the Ultimatum Game and other behavioral experiments do not always choose to maximize wealth. But behavioral

¹⁶⁶ BLS Report, *supra* note 159, at 70.

economics also casts doubt on this assumption of revealed preferences.¹⁶⁷ Although this Article focuses on bounded self-interest, the behavioral experiments identify many heuristics and biases that systematically appear in human decision-making.¹⁶⁸ As 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.”¹⁶⁹ Rather than inferring utility from observed choices, some economists now seek to capture happiness directly by measuring individuals’ subjective well-being.¹⁷⁰ 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?¹⁷¹

The happiness studies show how humans inaccurately predict first, the impact of future life events on their happiness (such as junior professors’ prediction if denied tenure),¹⁷² second their adaptation to their new

¹⁶⁷ George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. OF PUBLIC ECON. 1795, (2008); Kahneman & Krueger, *supra* note 155, at 3-4; Frey & Stutzer, *supra* note 151, at 404-05.

¹⁶⁸ 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, *Maps*, *supra* note 110, at 1456-57. For example, rational individuals with stable preferences, unlike actual consumers, would not distinguish between merchants (a) requiring customers to pay a 5% surcharge for using a credit card or (b) giving customers a 5% discount for paying cash. ITM Research, *The Abolition of the No-Discrimination Rule* at 7-8 (March 2000), <http://ec.europa.eu/comm/competition/antitrust/cases/29373/studies/netherlands/report.pdf>.

¹⁶⁹ Kahneman & Krueger, *supra* note 155, at 3.

¹⁷⁰ *Id.* at 18-21 (proposing U-index measure of the proportion time an individual spends in an unpleasant state).

¹⁷¹ Layard, *supra* note 156, at 48.

¹⁷² Nettle, *supra* note 155, at 15, 72-73.

condition (whether a physical disability or winning the lottery),¹⁷³ and third the strong effects of relative rather than absolute wealth on satisfaction.¹⁷⁴ People often predict greater happiness if they were only wealthier. But “increases in income have mostly a transitory effect on individuals’ reported life satisfaction.”¹⁷⁵ Winners of large amounts of money in lotteries, for example, have a temporary boost in happiness.¹⁷⁶ Individuals may desire more goods and services, but after obtaining them, they become preoccupied with obtaining other goods and services.¹⁷⁷

Many people do not care solely about absolute levels of wealth or personal consumption, but changes in their wealth and consumption relative to others.¹⁷⁸ 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.¹⁷⁹ We compete by comparing ourselves to the wealth and consumption of our peers and the

¹⁷³ Di Tella & MacCulloch, *supra* note 155, at 36 n.7 (collecting sources).

¹⁷⁴ Nettle, *supra* note 155, at 73; Layard, *supra* note 156, at 41-43. Similarly, humans rarely choose things in absolute terms, but their relative advantage to other things. Ariely, *supra* note 58, at 2. As Professor Ariely discusses, by adding a third more expensive choice, for example, the marketer can steer consumers to a more expensive 2nd choice. In one behavioral economics study, 100 MIT students were offered three choices for the *Economist* magazine: (i) Internet-only subscription for \$59 (16 students); (ii) print-only subscriptions for \$125 (0 students); and (iii) print-and-Internet subscriptions for \$125 (84 students). 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. Instead 68 students opted for Internet-only subscription for \$59 (up from 16 students) and only 32 students chose print-and-Internet subscriptions for \$125 (down from 84 students). *Id.* at 5-6.

¹⁷⁵ Kahneman et al., *Focusing Illusion*, *supra* note 155, at 1909.

¹⁷⁶ Nettle, *supra* note 155, at 75. Even people with acquired disabilities or health problems show considerable, but always not complete, adaptation to happiness. *Id.* at 83.

¹⁷⁷ Nettle, *supra* note 155, at 15; Kahneman et al., *Focusing Illusion*, *supra* note 155, at 1909-10.

¹⁷⁸ Rabin, *Perspective*, *supra* note 67, at 661.

¹⁷⁹ Kahneman et al., *Focusing Illusion*, *supra* note 155, at 1909; *see also* David Neumark & Andrew Postlewaite, *Relative Income Concerns and the Rise in Married Women’s Employment*, 70 J. PUBLIC ECON. 157 (1998) (finding that women’s employment decisions are positively related to sisters’ employment decision; women, whose sisters live nearby and worked the past year, are all else being equal about 10 to 15 percent more likely to work than women whose sister did not work).

socio-economic class immediately above us; after adapting to the higher rung, we strive for more.¹⁸⁰

Behavioral economists describe this “focusing illusion” in pursuing happiness as “[n]othing in life matters quite as much as you think it does while you are thinking about it.”¹⁸¹ One example of this bias came from a recent experiment, which reaffirmed “[t]here is more happiness in giving than in receiving.”¹⁸² First the study’s authors found from a nationally representative survey that personal spending was unrelated to happiness, but spending more of one’s income on others predicted greater happiness.¹⁸³ Higher prosocial spending (e.g., gifts for others and donations to charity) was associated with significantly greater happiness.¹⁸⁴ The study’s authors next did 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.”¹⁸⁵ In a third experiment, participants, after rating their happiness in the morning, were told to spend the money in the envelope (either \$5 or \$20) by 5 p.m. that day. One group was 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 5 p.m. the participants were asked about their happiness. Although the amount of money the participants received (\$5 or \$20) did not have a significant effect on their happiness, participants who gave the

¹⁸⁰ Ariely, *supra* note 58, at 17-18.

¹⁸¹ Daniel Kahneman & Richard H. Thaler, *Utility Maximization & Experienced Utility*, 20 J. ECON. PERSPECTIVES 221, (2006); David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy?*, PSYCHOLOGICAL SCIENCE, Sept. 1998, at 340-41.

¹⁸² Acts of the Apostles 20:36, New Jerusalem Bible (1990).

¹⁸³ Dunn et al., *supra* note 152, at 1687.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1688.

money away reported greater post-windfall happiness than did participants who spent it on themselves.¹⁸⁶

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? People predict poorly. The authors found that 63% of the university students predicted personal spending would make them happier than prosocial spending, and that \$20 would make them happier than \$5.¹⁸⁷

Although the happiness economic literature empirically tested this focusing illusion, the ancient Greeks and Romans, early Christian theologians,¹⁸⁸ and economists such as Adam Smith and Thorstein Veblen warned readers about it. Some gadgets are purchased, Seneca said, not because of their inherent utility, but "because others have bought them or they're in most people's houses."¹⁸⁹ 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

¹⁸⁶ Dunn et al., *supra* note 155, at 1688.

¹⁸⁷ *Id.* 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, 1998, at 1849. At the beginning of each auction round, the loss-frame group members were given \$15 and told that if they won the auction for that round, they would get the payoff from the auction and could keep the \$15 (but they would have to return the \$15 if they lost). The bonus-frame group members were told that if they won that auction round they would get at the end of the round a \$15 bonus. This framing should not affect a rational self-interested player: the winner of each round gets an extra \$15, the loser gets nothing. Nonetheless the loss-treatment group members outbid the bonus-treatment group members, which outbid the baseline group. (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, their name becomes fainter. Those that win any auction item get to have their donated brick used in the school.)

¹⁸⁸ SAINT AUGUSTINE, CONFESIONS 33, 49-50 (Penguin 1961); SAINT THOMAS AQUINAS, COMPENDIUM THEOLOGIAE, *reprinted as* ACQUINAS'S SHORTER SUMMA 353-356 (2002).

¹⁸⁹ Lucius Annaeus Seneca, *Letter CXXIII*, in LETTERS FROM A STOIC 227 (Penguin Robin Campbell trans. 2004).

you'll be fancying yourself to be short of things you need to the exact extent to which you lag behind him."¹⁹⁰ 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."¹⁹¹ 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 demonstrated in his experiment on one flatterer Damocles, tyrants cannot be happy.¹⁹² "There is a sickness that infects all tyrants, they cannot trust their friends."¹⁹³ Similarly a key factor in predicting happiness in a country is the proportion of its citizens who say that others can be trusted.¹⁹⁴

Adam Smith in 1759 likewise decried status competition.¹⁹⁵ 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.¹⁹⁶ On the deathbed, they

¹⁹⁰ Seneca, *Letter CIV*, *supra* note 189, at 186.

¹⁹¹ Plutarch, *On Contentment*, in *ESSAYS 222* (Ian Kidd ed., Robin H. Waterfield trans., Penguin 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."

¹⁹² MARCUS TULLIUS CICERO, *ON THE GOOD LIFE* 84-85 (Michael Grant trans. 1971).

¹⁹³ 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* 170 (Modern Library Classics 2003).

¹⁹⁴ Layard, *supra* note 156, at 68-69.

¹⁹⁵ Smith, *The Theory of Moral Sentiments* IV.I.6-7:

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.

¹⁹⁶ *Id.* at IV.I.8.

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.”¹⁹⁷ Self-deception, for Adam Smith, drives market productivity.¹⁹⁸

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 attached to wealth.”¹⁹⁹ The accumulation of goods and services forms the conventional basis of esteem. He too noted how the hedonic treadmill never stops: “the 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.”²⁰⁰ Chronically dissatisfied with his present lot, man will strain to place “a wider and ever-widening pecuniary interval between himself and the average standard.”²⁰¹ For Veblen, like the social scientists before him, people’s ideal of consumption lies just beyond their immediate reach.²⁰²

This treadmill has confounded consumers for centuries. John Maynard

¹⁹⁷ *Id.* Thus the trinkets’ real purpose is to “more effectually gratify that love of distinction so natural to man.” *Id.*

¹⁹⁸ *Id.* at IV.I.10.

¹⁹⁹ THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 26 (Penguin ed. 1994).

²⁰⁰ *Id.* at 31.

²⁰¹ *Id.*

²⁰² *Id.* at 103-4.

Keynes, for example, assumed that as a result of increased productivity and living standards, people in developed economies would work only 15 hours per week. 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.”²⁰³ 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 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 semicriminal, 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.²⁰⁴

So why aren't many Americans, Europeans and Asians working today 15- or even a 20-hours per week? While predicting the rise in productivity and real living standards, Keynes “underestimated the appeal of materialism.”²⁰⁵

²⁰³ John Maynard Keynes, *Economic Possibilities for our Grandchildren*, in *ESSAYS IN PERSUASION* 358-373 (1963).

²⁰⁴ *Id.* at 358-373.

²⁰⁵ Jonathan Guthrie, *Bad Books and Long Lunches Will Not Make Us Whole*, *FIN. TIMES*, Apr. 30, 2009, at 9 (quoting Prof. Alan Manning).

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?”²⁰⁶ Others accept Aristotle’s belief that the path toward happiness is practicing virtue, yet disagree that perfect happiness is attainable on earth.²⁰⁷ 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.²⁰⁸ But 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 80% 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.²⁰⁹ 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

²⁰⁶ Dostoyevsky, *supra* note 125, at 111.

²⁰⁷ See, e.g., Aquinas, *supra* note 188, at 197-98.

²⁰⁸ 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 151, at 406; Kahneman & Krueger, *supra* note 155, at 6-7. One study for example examined the correlation between the responses of two questions: “How happy are you?” and “How many dates did you have last month?” When the happiness question was asked first, no correlation was found between the responses. But when the dating question was asked first, there was a significant correlation between the two questions’ responses. 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. Norbert Schwartz & Fritz Strack, *Reports of Subjective Well-Being: Judgmental Processes & Their Methodological Implications*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 63-65 (Daniel Kahneman et al. eds. 1999).

²⁰⁹ Layard, *supra* note 156, at 71.

the environment.²¹⁰ One's financial situation in contrast has a weak correlation with happiness.²¹¹ Personal control -- the ability to control one's life or achieve a spiritual indifference²¹² -- according to a British life satisfaction study, is a better predictor of happiness than income.²¹³

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.²¹⁴ Sophocles observed that the noblest work is when a person helps others with all her gifts and native strength.²¹⁵ Likewise, the most satisfying jobs were, as one recent survey found, "especially those involving caring for, teaching, and protecting others and creative pursuits,"²¹⁶ not those jobs with the highest salaries or that reward self-interest. Heading the list were members of the clergy (87.3% very satisfied), followed by physical therapists (with the second highest mean score and 78.1% very satisfied) and firefighters (80.1% very satisfied).²¹⁷ Occupations with the happiest reported people were the clergy (67.2% very happy) and firefighters (57.2% very happy).²¹⁸

Closer to home, many lawyers have left financially lucrative positions

²¹⁰ *Id.* at 62-73; Nettle, *supra* note 155, at 85, 87.

²¹¹ Layard, *supra* note 156, at 64.

²¹² St. Ignatius of Loyola described this spiritual indifference, "we 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." ST. IGNATIUS OF LOYOLA, *MANRESA OR THE SPIRITUAL EXERCISES OF ST. IGNATIUS* 22 (Burns & Oates 1881).

²¹³ Nettle, *supra* note 155, at 73.

²¹⁴ *Id.* at 156-57.

²¹⁵ Sophocles, *Oedipus the King*, in *THE THREE THEBAN PLAYS* 176 (Robert Fagles trans. 1984).

²¹⁶ Tom W. Smith, *Job Satisfaction in the United States*, NORC/University of Chicago (Apr. 17, 2007), <http://www-news.uchicago.edu/releases/07/pdf/070417.jobs.pdf>.

²¹⁷ *Id.*

²¹⁸ *Id.*

for more satisfying work. A 2008 survey asked, “If you could change one aspect of your job as a lawyer, which one of the following would it be?”²¹⁹ The surveyed lawyers’ top two choices were (i) decreased job stress (31%) and (ii) fewer hours at work or more personal time (30%). Only 2% identified higher salaries/compensation.

IV. RISKS IF SOCIAL POLICIES PROMOTE SELF-INTEREST

As Parts II and III address, the Chicago School’s 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).

A Chicago School theorist might agree that humans 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 comparable 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 to maximize total welfare (or for others consumer welfare).²²⁰ 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.”²²¹ Restrictions on the output of goods and services

²¹⁹ Robert Half Legal, *Lawyers Seek Less Stress on the Job* (Oct. 7, 2008), <http://www.roberthalflegal.com>.

²²⁰ See Stucke, *Advocacy*, *supra* note 62, at 991-1008 (discussing the dispute over the terms’ meaning and how the concepts are actually measured).

²²¹ Bork, *supra* note 32, at 122; *see also* Chicago Professional Sports Ltd. Partnership v. National 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

are suspect.²²² Antitrust seeks to prevent collusion among competitors to increase prices above and reduce output below competitive levels.²²³ 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.

But policymakers can become restless with 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 whenever humans seek to maximize their wealth? "Greed is the foundation of much economic activity."²²⁴ Likewise, if society is harmed whenever competitors agree to reduce output, doesn't it follow that increases in output necessarily benefit society?²²⁵

In markets with a downward sloping demand curve, increases in output generally are associated (absent price discrimination) with lower prices (or to put it differently, as price decreases, consumer demand for the product increases). As the firm's output increases, productive efficiencies accrue,

consumers, there is no antitrust problem.") (Easterbrook, J.).

²²² *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 107-8 (1984) (*NCAA*) ("[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (*BMI*) (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. Indiana Gas Co., Inc.*, 350 F.3d 623, 627 (7th Cir. 2003) (antitrust laws designed to encourage productive efficiencies, higher output, and lower prices) (Easterbrook, J.).

²²³ *NCAA*, 468 U.S. at 107, quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

²²⁴ *Kumpf v. Steinhaus*, 779 F.2d 1323, 1326 (7th Cir. 1985) (Easterbrook, J.).

²²⁵ *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.") (quoting *BMI*, 441 U.S. at 18-23).

enabling the firm to 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.²²⁶ All benefit thereby. “Production and consumption together form the backbone of the economy,” observed the OECD.²²⁷

Even without governmental prodding, profit-maximizing firms will continue their efforts 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. Just as policymakers are reevaluating their economic theories, so too U.S. consumers during this financial crisis are reevaluating their economic behavior. While on the treadmill, many U.S. consumers were predisposed to consuming. But in this financial crisis, they are curtailing spending and increasing personal savings.²²⁸ In one 2008 survey, 84% were inclined “to buy less stuff” and 90% were considering opting for a simpler life.²²⁹ Fewer Americans in 2009 (compared to those surveyed in 2006) found various household items as necessities.²³⁰ Perhaps the financial crisis has suspended the era of

²²⁶ JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 102 (1998).

²²⁷ Strange & Bayley, *supra* note 158, at 81.

²²⁸ Jonathan Birchall & Jenny Wiggins, *Retail Suppliers Chase the Value in a Shift to Thrift*, FIN. TIMES, May 7, 2009, at 13; Jack Healy, *Consumers in U.S. Increase Savings While Spending Less*, N.Y. TIMES, Feb. 3, 2009.

²²⁹ *BrainReserve Survey Details America's "Culture of Recession,"* Marketwire, Sept. 10, 2008, <http://www.marketwire.com/press-release/Faith-Popcorn%27S-Brainreserve-898522.html>.

²³⁰ Rich Morin & Paul Taylor, *Luxury or Necessity? The Public Makes a U-Turn*, Pew Research Center, Apr. 23, 2009 (microwave (only 47% viewed it a necessity; down from

super-sized stores, homes, cars, meals, parents, and children.²³¹

But during a recession teetering on a depression, government authorities remain tempted to exhort consumers to get back on the hedonic treadmill and make up for lost output. This temptation is especially significant after U.S. industrial output in September 2008 experienced its biggest decline in 34 years.²³² Consequently, this Part identifies several risks if the government either through soft paternalism or hard policies promotes self-interest and increased output.

A. Promoting Self-Interest Quickens the Hedonic Treadmill.

As the OECD observed, “We 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.”²³³ 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 if no demand exists for them. Unless the incremental output is exported elsewhere, domestic consumers must purchase the extra carrots. To induce consumers to continually acquire more, their desire for goods and

68% in 2006); television set (52%, down 12 percentage points from 2006 and the smallest share since the question was first asked over 35 years ago); car (-3% to 88%); clothes dryer (-17% to 66%); home computer (-1% to 50%); cable or satellite television (-10% to 23%); and dishwasher (-14% to 21%), <http://pewsocialtrends.org/pubs/733/luxury-necessity-recession-era-reevaluations>.

²³¹ Centers for Disease Control and Prevention, Overweight and Obesity (survey data from 1976–1980 and 2003–2006 show that the prevalence of obesity has increase for children aged 2–5 years from 5.0% to 12.4%; for those aged 6–11 years, from 6.5% to 17.0%; and for those aged 12–19 years, prevalence increased from 5.0% to 17.6%), <http://www.cdc.gov/obesity/childhood/prevalence.html>; Elizabeth Kolbert, *Why Are Americans Fat?*, NEW YORKER, July 20, 2009, at 73-76.

²³² Daniel Pimlott & James Politi, *Output Falls at Fastest Rate in 34 Years*, FIN. TIMES, Oct. 17, 2008, at 5.

²³³ STRANGE & BAYLEY, *supra* note 158, at 79.

services must remain ungratified: “The higher level of production has, merely, a higher level of want creation necessitating a higher level of want satisfaction.”²³⁴ The benchmark for consumption must continually exceed society’s current possessions.²³⁵ 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.”²³⁶ Thus to increase output of consumer goods and services, a consumerism ethic must be ingrained, namely “the fallaciousness of resting satisfied.”²³⁷ At times consumption becomes a patriot duty.²³⁸

To ingrain this consumerism ethic, the government need not advocate increased consumption per se. It can instead appeal to envy, status competition, or correlate 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

²³⁴ Galbraith, *supra* note 226, at 129.

²³⁵ ZYGMUNT BAUMAN, DOES ETHICS HAVE A CHANCE IN A WORLD OF CONSUMERS 169 (Harvard Univ. Press 2008). As Coco Chanel said, “Luxury is a necessity that begins where necessity ends.”

²³⁶ Bauman, *supra* note 235, at 149.

²³⁷ *Id.* at 148.

²³⁸ 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, September 20, 2001, available at <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*, at 2003 WL 42248 (White House). 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*, at 2005 WL 1874659 (White House).

from actual wealth. For output to continually increase, status must be afforded not to wealth per se, but 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 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."²³⁹ 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 spot.²⁴⁰

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 (predicting greater happiness from increased wealth and consumption and not accounting their adaptation to their 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.²⁴¹ Indeed, although real income (adjusted for inflation) per head has nearly doubled since 1972, the percentage of

²³⁹ Veblen, *supra* note 199, 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.

²⁴⁰ *Id.* at 32 ("since the struggle is substantially a race for reputability on the basis of an invidious comparison, no approach to a definitive attainment is possible.").

²⁴¹ Joseph M. Sirgy, *Materialism & Quality of Life*, 43 SOCIAL INDICATORS RESEARCH 227 (1998).

Americans who say they are satisfied with their financial situation has fallen.²⁴²

As consumers are implored to increase consumption, along the way, they too become “commodities on the consumer and labor markets.”²⁴³ 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 2000 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 commuting²⁴⁴ than those with lower family incomes.²⁴⁵ And commuting in another study ranked as the worst activity of the day.²⁴⁶

As citizens are primed of the importance of self-interest, it should be unsurprising if they behave selfishly. A consumerism utopia does not concern itself about caring over others, wrote sociologist Zygmunt Bauman; instead 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,

²⁴² Layard, *supra* note 156, at 42.

²⁴³ Bauman, *supra* note 235, at 58.

²⁴⁴ Kahneman et al., *Focusing Illusion*, *supra* note 155, at 1910.

²⁴⁵ Among wealthy industrialized countries, U.S. workers in 1997 worked the longest hours -- 1,966 hours per capita, which is 4% longer than the 1,883 hours U.S. workers worked in 1980. The United States' trend was contrary to a world-wide trend in industrialized countries that saw the number of work hours remain steady or decline. In Norway and Sweden hours worked in 1997 were, respectively, 1,399 and 1,552 per year. International Labor Organization, Americans work longest hours among industrialized countries, Japanese second longest. *Europeans Work Less Time, But Register Faster Productivity Gains* New ILO Statistical Volume Highlights Labour Trends Worldwide, ILO/99/29, Sept. 5, 1999, http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_071326/index.htm; see also Mishel et al., *supra* note 54, at Table 3.2 (describing trend of increased productivity and annual working hours between 1967 and 2006).

²⁴⁶ Kahneman & Krueger, *supra* note 155, at 13 (based on net affect of the average of three positive and six negative adjectives by 909 working women in Texas).

bent on solo performances and solo performances only, never has enough.”²⁴⁷ 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.²⁴⁸

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

At times, while at the DOJ, I found myself passionately pursuing 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, I question mattered much at all. My colleagues at the FTC were seeking to protect consumers of smokeless tobacco²⁴⁹ and super-premium ice cream.²⁵⁰ We never really questioned the conventional wisdom that increases in output were presumptively good.

Increases in output are often, but not always, beneficial. Antitrust scholars for decades debated the proper legal standard for evaluating resale price maintenance.²⁵¹ The U.S. courts, until recently, condemned resale

²⁴⁷ Bauman, *supra* note 235, at 54.

²⁴⁸ Richard Layard, *Now Is the Time for a Less Selfish Capitalism*, FIN. TIMES, March 12, 2009, at 15 (noting that a zero-sum mentality is often counterproductive and does not generally produce a happy workplace).

²⁴⁹ In *FTC v. Swedish Match*, 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. 131 F. Supp. 2d 151, 153 n.1 (D.D.C. 2000). The court appreciated the FTC’s explanation that consumption would not likely decline post-merger, but that consumers would only pay more. Thus, the court saw no health benefits in permitting the acquisition, and ultimately on antitrust principles, preliminarily enjoined the transaction. *Id.*

²⁵⁰ Fed. Trade Comm’n, Press Release, *FTC to Challenge Nestle, Dreyer’s Merger: Agency Will Allege \$2.8 Billion Ice Cream Deal Violates Antitrust Laws* (March 3, 2003), <http://www.ftc.gov/opa/2003/03/dreyers.shtm>.

²⁵¹ Resale price maintenance (“RPM”) refers to a manufacturer’s or supplier’s practice of “specif[ying] the minimum (or maximum) price at which the product must be re-sold to

price maintenance as per se illegal, favoring instead a policy whereby retailers could discount goods, if they so chose.²⁵² Paradoxically the antitrust laws' focus on increased price competition and output is self-defeating for some luxury goods, eventually causing consumers to be worse off.

Under the model of conspicuous consumption, it may make more sense to allow resale price maintenance for luxury goods. The value of certain luxury goods is in their symbol of accumulated wealth, not their inherent usefulness to improve the standard of living. (Indeed the less useful the item, Veblen argues, the greater its symbolic value.) 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.²⁵³ Early adopters purchase the brand to signal the magnitude of their disposable income (for example having sufficient discretionary income to expend over \$400 on a silk scarf).

If RPM 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 the good's status value likewise cheapens. Early adopters eventually disapprove of the brand's commoditization, and switch to another status symbol. As consumers in

customers." OECD, Glossary of Industrial Organisation Economics and Competition Law 75 (1993), <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

²⁵² The Supreme Court in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007) departed from its 90+ 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.

²⁵³ 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).

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 by signaling to consumers its commitment to maintain a high retail price on its luxury goods, a manufacturer can actually slow down the hedonic treadmill. The item (e.g., Hermes scarf, Rolex watch) becomes an accepted symbol of conspicuous consumption; a prospective purchaser can be assured that retailer discounting will not “cheapen” the brand (although piracy issues remain).

But 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.”²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ 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

²⁵⁴ Galbraith, *supra* note 226, at 170.

²⁵⁵ *In re Detroit Auto Dealers Ass’n, Inc.*, 955 F.2d 457 (6th Cir. 1992).

²⁵⁶ *Id.* at 460.

margins.²⁵⁷ 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.²⁵⁸

Religious norms are among the few counterbalances today against self-interest.²⁵⁹ The U.S. for many years had state laws that restricted labor and certain commercial activity on Sunday. As these Sunday Blue laws have fallen on 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 besides increasing the opportunity to consume, and thereby increase output. States where Sunday Blue laws were repealed, according to one study, experienced a 15% decline in attendance among weekly churchgoers and a nearly 25% drop in donations.²⁶⁰ “I’m

²⁵⁷ *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 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.

²⁵⁸ At some point, the activity may not involve “trade or commerce” under the Sherman Act. *See, e.g., Proctor v. General Conference of Seventh-Day Adventists*, 651 F. Supp. 1505, 1524 (N.D.Ill. 1986) (holding that Sherman Act inapplicable to distribution of religious literature).

²⁵⁹ For example, senior clergy of the seven largest Protestant denominations, according to a 2008 survey, expressed many social concerns: (i) 78% agreed that the federal government should do more to solve social problems, such as unemployment, poverty and poor housing, and more than 40% strongly agree; (ii) 67% of the clergy agreed that government should guarantee health insurance for all citizens, even if it means raising taxes; (iii) 69% said that more environmental protection is needed, even if it raises prices or costs jobs; and (iv) over 80% 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. Public Religion Research, *Broadest Ever Survey Gives In-Depth Portrait of Mainline Clergy* (March 6, 2009), <http://www.publicreligion.org/objects/uploads/fck/file/Clergy%20Report/CVS%20press%20release%20%2003-06-09%20Final.pdf>.

²⁶⁰ Jonathan Gruber & Daniel M. Hungerman, *The Church vs. The Mall: What Happens when Religion Faces Increased Secular Competition?*, 123 QUARTERLY J. OF ECON. 831-862 (2008).

surprised [religious conservatives] haven't picked up on this," said one the study's coauthors. "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."²⁶¹ Reducing church attendance has had other negative effects. Robert Putnam noted that "Faith communities in which people worship together are arguably the single most important repository of social capital in America."²⁶² Several economists in their 2008 study found a 1% drop in overall voter turnout (which affected more Democratic than Republican vote shares) after the state repealed its Sunday Blue law. This finding confirmed the earlier economic literature correlating church attendance with voter turnout.²⁶³ 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.²⁶⁴

C. To Increase Consumption, Privacy May Be Sacrificed.

Companies presumably are employing the optimal marketing programs to increase sales. To further 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.

²⁶¹ Justin Ewers, *Blue Laws: Easing Up on Sunday Liquor Sales*, U.S. NEWS & WORLD REPORT, July 8, 2008, at <http://www.usnews.com/articles/news/national/2008/07/08/easing-up-on-sunday-liquor-sales.html>. 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.*

²⁶² ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 66 (2000).

²⁶³ Alan Gerber et al., *Does Church Attendance Cause People to Vote? Using Blue Laws' Repeal to Estimate the Effect of Religiosity on Voter Turnout*, NBER Working Paper 14303 (Sept. 2008), <http://www.nber.org/papers/w14303.pdf>.

²⁶⁴ Gerber et al., *supra* note 263, at 3-4 (collecting studies).

Vast amounts of data are collected daily on consumer purchasing behavior to better target consumers with advertising. 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 70 segments within 21 life stage groups based on specific consumer behavior and demographic characteristics. . . . [including] access to critical information such as which competitors they shop, product usage, media preferences, attitudes toward advertising, interests and expenditures – both nationally and at a local market level.”²⁶⁵ Credit rating agency Equifax, for example, advertises “‘advanced profiling techniques’ to identify people who show a ‘statistical propensity to acquire new credit’ within 90 days.”²⁶⁶

Neuromarketing, which studies consumers’ brain activity to advertising messages, will increase. 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.”²⁶⁷

In this endeavor to increase consumption, every age group including children will be increasingly targeted with individualized advertising messages. Procter & Gamble’s marketing unit, Tremor, for example, enlists teenagers to build word-of-mouth advocacy for its products.²⁶⁸

²⁶⁵ Acxiom Corporation, What Is PersoniX?, Better Information = Better Marketing Decisions, http://www.personix.com/what_is/default.aspx.

²⁶⁶ Brad Stone, *Banks Mine Data and Woo Troubled Borrowers*, N.Y. TIMES, Oct. 22, 2008.

²⁶⁷ Helen 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.

²⁶⁸ 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/.

Discretionary spending by U.S. children aged 3 to 11 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.”²⁶⁹

The United States today lacks a coordinated policy in 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,²⁷⁰ the current state and federal laws do not represent 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 that “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.”²⁷¹ Marketing is no longer limited to paid advertisements, product placements, and stealth advertising. Some television programs today propagate Veblen’s conspicuous consumption. So the more television people watch, the more they

²⁶⁹ Strange & Bayley, *supra* note 158, at 79.

²⁷⁰ 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.” Concurring Statement of Commissioner Pamela Jones Harbour Regarding Staff Report, “Self-Regulatory Principles For Online Behavioral Advertising,” <http://www.ftc.gov/opa/2009/02/behavad.shtm>.

²⁷¹ THOMAS MERTON, *THE SEVEN STOREY MOUNTAIN* 148 (1998).

overestimate others' affluence, and the more they spend.²⁷²

To increase demand, marketers can seek to alter prevailing norms (such as soft-drink producers promoting soda consumption in the morning).²⁷³ But there comes a point when consumers reach the actual or perceived optimal number of goods (toasters, blenders, television sets, etc.) or level of services (such as the number of hair cuts 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 35 and 50, according to a study by the American Society for Aesthetic Plastic Surgery,²⁷⁴ patients between 19 and 34 now account for 14% of Botox users nationwide.²⁷⁵ 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.²⁷⁶ But as one

²⁷² Layard, *supra* note 156, at 89.

²⁷³ *Wake Up and Smell the Cola*, NATIONAL POST, July 24, 2007, at <http://www.canada.com/topics/bodyandhealth/story.html?id=34ad64f0-e074-4a1b-ad9a-2a656687c343>.

²⁷⁴ Colin Stewart, *Are Botox Injections Really Dropping? -- Data Show Women Turning Away, But Allergan and Orange County Doctors Don't See It*, OC REGISTER, Feb. 28, 2008, <http://www.ocregister.com/money/botox-plastic-percent-1989339-survey-injections>.

²⁷⁵ Courtney Perkes, *The Young Face of Botox: Young Women in Their 20s Turn to Shots to Prevent Wrinkles From Forming*, OC REGISTER, July 1, 2008, <http://www.ocregister.com/articles/botox-says-neal-2080995-young-really>.

²⁷⁶ Angelique Chrisafis, *You're worth it - if white. L'Oréal guilty of racism: Cosmetic giant fined for recruitment campaign in Paris*, THE GUARDIAN, 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*, THE TIMES, Feb. 24, 2006, http://business.timesonline.co.uk/tol/business/industry_sectors/retailing/article734423.ece.

company executive stated, “At the end of the day, we make people feel good, we build up their confidence.”²⁷⁷ The company is designing products to offer African consumers “something they may not have thought they needed, such as an oscillating mascara wand.”²⁷⁸

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-interests. Because humans enjoy this freedom, their fate is presumed to arise from their choices’ consequences. 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, since it operates outside the marketplace.

E. Attitudes Towards 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, Sparta focused not on literature, art, philosophy, or architecture but in perfecting its militaristic strength. Accordingly, the 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.²⁷⁹ Sparta’s infanticide policy may seem barbaric today, but the individual behavior conformed to the prevailing societal goal: if the child

²⁷⁷ Nicola Mawson, *L’Oréal sets its sights on the African woman*, BUSINESS DAY, Apr. 30, 2009, <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A990169>.

²⁷⁸ *Id.*

²⁷⁹ PLUTARCH ON SPARTA 27 (trans. Richard J.A. Talbert 1988).

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.”²⁸⁰ If status is determined by evidence of wealth, then people accordingly will “bend their energies to live up to that ideal.”²⁸¹ Rather than temper the passion for wealth, a You’re-on-Your-Own policy promotes conspicuous consumption. Much like summer law associates who dine at a law partner’s extravagant home, evidence of conspicuous consumption serves as an 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 period,”²⁸² 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

²⁸⁰ R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* 46 (Dover 2004).

²⁸¹ Veblen, *supra* note 199, at 84.

²⁸² Galbraith, *supra* note 226, at 79.

negligible marginal productivity.”²⁸³ The mentally ill, the infirm, or those too feeble to work must depend on whatever fragile support systems exist.²⁸⁴

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 owing to the fact but in declining the struggle against it.”²⁸⁵ In the spirit of the 1960s, Pope John XXIII struck the same theme: “the 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.”²⁸⁶ 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

²⁸³ *Id.* at 35.

²⁸⁴ J. Pierre Loebel, *Completed Suicide in Late Life*, PSYCHIATRIC SERVICES, March 2005, at 260 (discussing why the rate of completed suicide among older persons is the highest of any age group in the United States).

²⁸⁵ THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 113 (Robert B. Strassler ed., 1996).

²⁸⁶ Pope John XXIII, *Mater et Magistra*, in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 96 (David J. O’Brien & Thomas A. Shannon eds., 2004).

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.²⁸⁷

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 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 for those inclined toward strong reciprocity and conditional cooperation will have negative perceptions toward the poor.²⁸⁸ Welfare will increasingly represent, regardless of the empirical evidence, the poor pursuing their self-interest in shirking work, not contributing to overall productivity, but wanting taxpayer handouts, which represent less

²⁸⁷ Remarks of Robert F. Kennedy at the University of Kansas, March 18, 1968, available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/RFK/RFKSpeech68Mar18UKansas.htm>.

²⁸⁸ Fehr & Fischbacher, *supra* note 82, at 168.

personal consumption for wealthier taxpayers.²⁸⁹ Thus the real disgrace of poverty is not in the failure of society's safety net but the poor themselves, in 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 lazy²⁹⁰ or trapped in poverty,²⁹¹ and the reality.²⁹² President Ronald Reagan, for example, over five years,

told the story of the "Chicago welfare queen" who had 80 names, 30 addresses, 12 Social Security cards, and collected benefits for "four nonexisting deceased husbands," bilking 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 \$8,000. Reagan continued to use his version of the story even after the press pointed out the actual facts of the case to him.²⁹³

Income inequality and poverty, Galbraith wrote over 50 years ago, simply cease to preoccupy the citizens' mind.²⁹⁴

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

As Galbraith also predicted, "every increase in consumption will bring a further increase – possibly a more than proportional one – in consumer

²⁸⁹ See, e.g., H.R. Rep. 104-75(I) (1995) (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, at <http://www.fair.org/index.php?page=1303>.

²⁹⁰ ALBERTO ALESINA & EDWARD L. GLAESER, *FIGHTING POVERTY IN THE U.S. AND EUROPE: A WORLD OF DIFFERENCE* 183-4 (Oxford 2004) (60% of American believe the poor are lazy versus 26% of Europeans).

²⁹¹ *Id.* at 184 (29% of Americans believe the poor are trapped in poverty versus 60% of Europeans).

²⁹² *Id.* at 60-68 (American poor generally work harder, and have a lower probability of exiting poverty, than European poor).

²⁹³ *The Mendacity Index: Which president told the biggest whoppers? You decide*, WASHINGTON MONTHLY, Sept. 2003, at <http://www.washingtonmonthly.com/features/2003/0309.mendacity-index.html>.

²⁹⁴ Galbraith, *supra* note 226, at 69-73.

debt.”²⁹⁵ Consumer indebtedness over the past thirty years has increased significantly. If consumers act rationally toward debt and spending, increased debt is unremarkable. A few consumers may default in predicting incorrectly, but many 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.”²⁹⁶ Plus consumers are willing to spend more if they have a credit card.²⁹⁷

Leading up to the financial crisis, the credit card industry substantially increased its advertising spending and solicitations. In 2004, for example, on average three quarters of U.S. households received every month nearly 6 offers for a credit card, even though response rates for those offers were at 0.3% compared with 0.9% in 2000.²⁹⁸ Today more than four credit cards exist for every man, woman, and child in the United States.²⁹⁹ The percentage of Americans across age categories who carry a balance (and incur financing charges and interest payments) on their credit cards has

²⁹⁵ *Id.* at 146.

²⁹⁶ Victor Stango & Jonathan Zinman, *Fuzzy Math and Household Finance: Theory and Evidence*, 2 Tuck School of Bus. Working Paper No. 2008-41 (Nov. 2007), at <http://ssrn.com/abstract=1081633>; see also Thaler, Winner’s Curse, *supra* note 75, at 107-121; Rabin, *Perspective*, *supra* note 67, at 670-71.

²⁹⁷ Akerlof & Shiller, *supra* note 58, at 128; Thaler & Sunstein, *supra* note, at 143.

²⁹⁸ Fouad H. Nader, Adrenal Corporation, *Background Paper: The Credit Card Industry* 6 (Aug. 25, 2005), http://www.upu.int/news_centre/2005/en/paper_2005-08-15_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. Mintel Comperemedia, Press Release, *Americans Turn Away From Credit Cards* (May 7, 2009), http://www.comperemedia.com/press_releases/522.

²⁹⁹ Akerlof & Shiller, *supra* note 58, at 128.

increased.³⁰⁰ For example, between 1970 and 2004, the percentage of Americans under the age of 20 with a credit card increased from 2% to 37%, and the percentage of those carrying a balance on their credit card increased from 27% to 61%. For all U.S. families, between 1970 and 2004, the percentage with a credit card increased from 16% to 71%, and the percentage of those carrying a balance on their credit card increased from 37% to 56%.

Americans are deeper in debt.³⁰¹ The percentage of household disposable income spent on debt service has increased.³⁰² Credit card debt, according to the Federal Reserve, increased 25% in the past decade, reaching \$963 billion in January 2009.³⁰³ U.S. consumers pay approximately \$15 billion annually in penalty fees,³⁰⁴ and the “average outstanding credit card debt for households that have a card was \$10,679 at the end of 2008.”³⁰⁵ Although debit cards have increased in popularity, consumers paid in 2009 a record \$38.5 billion in overdraft fees, nearly double that reported in 2000.³⁰⁶ Between 1997 and 2007, household debt

³⁰⁰ BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 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) [hereinafter *2006 Credit Study*].

³⁰¹ Board of Governors of the Federal Reserve System, *Monetary Policy Report to the Congress* 9 (Feb. 2008), at <http://www.federalreserve.gov/boarddocs/hh/2008/february/fullreport.pdf>.

³⁰² <http://research.stlouisfed.org/fred2/series/TDSP>.

³⁰³ Michael McAuliffe, *Credit Card Debt Poses Risks For Consumers As President Calls For Reform*, THE REPUBLICAN, Apr. 27, 2009, http://www.masslive.com/news/index.ssf/2009/04/credit_card_debt_poses_risks_f.html?category=Business.

³⁰⁴ *Id.*

³⁰⁵ Marcy Gordon, *House Passes Credit Card Bill That Helps Consumers*, ASSOCIATED PRESS, May 1, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043000311.html?sub=AR&sid=ST200904300332>.

³⁰⁶ Saskia Scholtes & Francesco Guerrera, *Banks in \$38.5bn Windfall from Fees*, FIN. TIMES, Aug. 10, 2009, at 1. Ninety percent of the revenues comes from about 10% of the U.S. bank accounts, with the larger banks charging the highest fees. *Id.*

increased from 66% to 100% of U.S. GDP.³⁰⁷

For 2005, the U.S. Department of Commerce reported a negative personal savings rate in the U.S, the first time since the Great Depression.³⁰⁸ The government-calculated average personal savings rate between 1959 and 1984 trended upward, but steadily declined over the years (although it has been increasing since August 2008).³⁰⁹

As Galbraith observed, “All crises have involved debt that, in one fashion or another, has become dangerously out of scale in relation to the underlying means of payment.”³¹⁰ Between 1987 and 2006 (during Alan

³⁰⁷ Martin Wolf, *Why Dealing With the Huge Debt Overhang Is So Difficult*, FIN. TIMES, Jan. 28, 2009, at 11.

³⁰⁸ Associated Press, *U.S. Savings Rate Hits Lowest Level Since 1933: Consumers Depleting Savings to Buy Cars, Other Big-Ticket Items*, Jan. 30, 2006, at <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. Dep’t 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. 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 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. Reinsdorf, *Alternative Measures of Personal Saving*, SURVEY OF CURRENT BUSINESS, Feb. 2007, available at http://www.bea.gov/scb/pdf/2007/02%20February/0207_saving.pdf.

³⁰⁹ Although changes in the way the government calculates the personal saving rate warrant caution in comparing personal saving rates over time, the government figures generally reflect first an upward trend: the personal saving rate averaged 8.1% between 1959 to 1964, 8.5% (1965-69), 9.9% (1970-74); 9.3% (1975-79) and 10.4% (1980-84). Thereafter, it steadily declined: from 7.7% (1985-89) to 6.5% (1990-94) to 3.8% (1995-99) to 2.1% (2000-04) to 1% (2005-Feb. 2009). U.S. Department of Commerce: Bureau of Economic Analysis, *Personal Income and Outlays, A Guide to the National Income and Product Accounts of the United States (NIPA)* (<http://www.bea.gov/national/pdf/nipaguid.pdf>). Similarly when the Department of Commerce used a consistent measure to calculate personal saving rate, the personal saving rate reflected a downtrend since the early 1990s. U.S. Dep’t 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.

³¹⁰ JOHN KENNETH GALBRAITH, *A SHORT HISTORY OF FINANCIAL EUPHORIA* 20 (1993).

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 \$43 trillion.³¹¹ While stable between 1952 and 1984, the percentage of total credit market debt as a share of U.S. GDP significantly increased thereafter.³¹² 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% in the third quarter of 2008, the highest in U.S. history.³¹³ As the chief investment strategist at Raymond James & Associates said,

The 'crack cocaine' of our generation appears to be debt. 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."³¹⁴

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' 30-year fixed mortgage to our neighborhood bank, where my parents had a Christmas savings account, and my sister and I had a school savings account. The bank neither advertised nor promoted to my recollection 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

³¹¹ KEVIN PHILLIPS, *BAD MONEY: RECKLESS FINANCE, FAILED POLITICS, AND THE GLOBAL CRISIS OF AMERICAN CAPITALISM* 5 (2008).

³¹² *Id.* at 7.

³¹³ Martin Wolf, *Why Dealing With the Huge Debt Overhang Is So Difficult*, *FIN. TIMES*, Jan. 28, 2009, at 11.

³¹⁴ Phillips, *supra* note 311, at 1 (quoting Jeff Saut, chief investment strategist, Raymond James & Associates, September 2007).

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.³¹⁵ 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 \$1 billion in the early 1980s to over \$1 trillion.³¹⁶

Accompanying greater debt are record delinquency rates.³¹⁷ As of 2008, delinquencies on home equity loans are 45% higher than the average rate since 1990, and the portion of Americans whose home equity lines are more than 30 days past due is 55% higher than the average.³¹⁸ Counties in the U.S. with high mortgage delinquency rates in 2008 also tended to have high credit card delinquency rates.³¹⁹ Bankruptcy filings increased an

³¹⁵ Louise Story, *Home Equity Frenzy Was a Bank Ad Come True*, N.Y. TIMES, Aug. 15, 2008.

³¹⁶ *Id.*

³¹⁷ The delinquency rate for the American Bankers Association’s consumer loan composite ratio, which tracks eight closed-end installment loan categories, rose in fourth quarter of 2008 to its highest level since the ABA began tracking it in the mid-1970’s. Am. Bankers Ass’n, Press Release, *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% of all accounts, a new record; home equity lines of credit delinquencies also reached a new record, to 1.89% overall. While credit card delinquencies increased to 4.75% of all accounts (just off the record of 4.81% set in 2005), the balances on those delinquent accounts rose to 6.6% of the value of all outstanding bank card debt, which itself is a new record. Am. Bankers Ass’n, Press Release, *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>.

³¹⁸ Story, *supra* note 315.

³¹⁹ Federal Reserve Bank of New York, *Bank Cards and Mortgage Delinquency Maps Second Quarter 2008* (Nov. 25, 2008) (finding that counties’ bank card and mortgage delinquency rates were moderately positively correlated (correlation coefficient of +0.37)), http://www.newyorkfed.org/newsevents/news/regional_outreach/2008/an081125.html. For the twelve months ending in June 2008, the Federal Reserve study found “bank credit card 60+ day delinquency rates increased in 60 percent of US counties covered (1,715 of the 2,837 counties covered) and mortgage 90+ day delinquency rates increased in 74 percent of US counties covered (2,106 counties).”

estimated 31% in 2008; Nevada alone had a 65% increase in filings.³²⁰ Moreover, the average family filing for bankruptcy in 2007 was burdened with more debt than typical bankruptcy filers in 2001: 21% more in secured debt (e.g., mortgages and car debt) and 44% more in unsecured debt (e.g., credit cards) than 2001 filers.³²¹ The number of debtor cases filed in New York City's Civil Court tripled between 2000 and 2008; court officials estimate that 350,000 cases in 2008 will involve debt or credit cards.³²²

A debt-servicing economy has attendant costs. To entice consumers (including those with limited financial means) to acquire more debt to consume more goods and services, some companies resort to deceptive practices. 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.³²³ Similarly, consumer complaints about debt issuance, collection, and credit reports and repair are on many state attorney general offices' top-ten consumer complaint lists.³²⁴

To deter fraud and promote consumers' informed use of credit, the Truth in Lending Act (TILA)³²⁵ mandates certain disclosures of the costs in

³²⁰ Tara Siegel Bernard & Jenny Anderson, *Downturn Drags More Consumers Into Bankruptcy*, N.Y. TIMES, Nov. 16, 2008, at 29.

³²¹ *Id.*

³²² Jim Dwyer, *In Civil Court, One Nation, Under Debt*, N.Y. TIMES, Oct. 11, 2008.

³²³ Identity theft (of which credit card fraud was the largest component) (26% and top complaint overall), (ii) third-party and creditor debt collection (9% -- second overall); (iii) credit bureaus, information furnishers and report users (3% -- 6th overall); (iv) banks and lenders (2% -- 9th overall); (v) advance-fee loans and credit protection/repair (1% -- 14th overall); and (vi) credit cards (1% -- 18th overall). Fed. Trade Comm'n, *FTC Releases List of Top Consumer Complaints in 2008* (Feb. 26, 2009).

³²⁴ See, e.g., CONSUMER SENTINEL NETWORK, DATA BOOK FOR JAN.-DEC. 2008 18-68 (Feb. 2009); *Health care tops N.C. consumer complaints*, CHARLOTTE BUS. J., Apr. 1, 2009, at <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>.

³²⁵ 15 U.S.C. § 1601(a) ("economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the

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).³²⁶ But TILA and HOEPA were criticized as ineffective in deterring the predatory lending and other abuses in the recent financial crisis. The Federal Reserve and the Obama administration have prohibited additional lending practices, and required that information be disclosed in ways to better affect consumer behavior.³²⁷

Another debt trap, payday lending, has attendant costs.³²⁸ Payday

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

³²⁶ 15 U.S.C. § 1639; see also Fed. Trade Comm'n, *FTC Facts for Consumers, High-Rate, High-Fee Loans* (HOEPA/Section 32 Mortgages), <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea19.pdf>.

³²⁷ National Public Radio, *Will Credit Card Law Alter Consumers' Behavior?*, Morning Edition, May 22, 2009, <http://www.npr.org/templates/story/story.php?storyId=104426585>.

³²⁸ 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 90% of its business comes from borrowers who assume five or more loans per year, and over 60% of the business comes from borrowers with 12 or more loans per year. Uriah King & Leslie Parrish, *Springing the Debt Trap: Rate Caps are Only Proven Payday Lending Reform*, Center for Responsible Lending (Dec. 2007), available at 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 accounted 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 (July 9, 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.

lending, which is legal in most states,³²⁹ is increasing: “Nationally, there are more than two payday lending storefronts for every Starbucks location; in 29 of the 35 states with payday lending, payday storefronts outnumber McDonald’s restaurants.”³³⁰ Congress in 2006 capped the annual interest of payday loans to U.S. military service members to 36%.³³¹ 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% or more.³³² The military pushed for the law, saying the 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.”³³³

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, namely the Fair Credit Reporting Act,³³⁴ seeks to help ensure that the credit bureaus furnish correct and complete information to

³²⁹ In 35 states, the annual interest rate is either unregulated or over 100%. 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% and 1955% for these 35 states. Consumer Federation of America, *PayDay Loan Consumer Information, Legal Status*, <http://www.paydayloaninfo.org/lstatus.cfm>.

³³⁰ Parrish & King, Phantom Demand, *supra* note 328, at 5-6 (payday lending industry has grown from around 500 locations in 1990 to over 22,000 locations across 35 states in 2009).

³³¹ Public Law 109-364, the John Warner National Defense Authorization Act for Fiscal Year 2007, Section 670, “Limitations on Terms of Consumer Credit Extended to Service Members and Dependents,” (October 17, 2006); 32 C.F.R. § 232 (Limitations on Terms of Consumer Credit Extended to Service Members and Dependents).

³³² U.S. Dep’t of Defense, *Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* 12 (Aug. 9, 2006), available at http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf [hereinafter DOD Predatory Lending Report].

³³³ DOD Predatory Lending Report, *supra* note 332, 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.” *Id.* at 15. The 36% 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.

³³⁴ 15 U.S.C. § 1681 et seq.

businesses to use when evaluating credit applications.

As consumers assume more debt, a greater likelihood exists of their 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.³³⁵

But today's statutory measures generally do not seek to curtail the output of debt. Many federal statutes, such as TILA, focus instead on mandatory disclosures, with the assumption that rational self-interested consumers will choose the best outcome.³³⁶

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. 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."³³⁷ As a consequence, nearly "every transaction of private goods carries an invisible cost, paid by everyone through degraded public goods."³³⁸

³³⁵ 15 U.S.C. § 1692 et seq.

³³⁶ 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).

³³⁷ Strange & Bayley, *supra* note 158, at 87.

³³⁸ *Id.*

As output for goods and services increases so too does the demand for energy. For example, although the average family size is 15% smaller in 2001 versus 1970, the average home size is 53% larger.³³⁹ More energy is needed to cool and heat these larger homes and keep their appliances working; not surprisingly, energy consumption per person increased 52% between 1949 and 2008 (from 214 million btu to 327 million btu).³⁴⁰ In fact 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).³⁴¹

As demand for energy increases (primarily supplied today by fossil fuels),³⁴² environmental externalities will also increase.³⁴³ To accommodate bigger homes, real estate development occurs further from cities and inner suburbs, often without attention to public transport.³⁴⁴ Besides 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.³⁴⁵ Between 1990 and 2000, "the number

³³⁹ Louis Uchitelle, *Economic View: Living In Denial, Comfortably, In a Big Home*, N.Y. TIMES, June 10, 2001. Home ownership has also increased. In 1901, 19% of Americans owned their home, while in 2002–03, 67% of U.S. families did. BLS Report, *supra* note 159, at 68. In 1901, the size of the average U.S. family was 4.9 people; by 2002–03, it was 2.5. <http://www.bls.gov/opub/uscsc/reflections.pdf>.

³⁴⁰ Energy Information Administration, *Table 1.5 Energy Consumption, Expenditures, and Emissions Indicators, 1949-2008*, in ANNUAL ENERGY REVIEW (June 26, 2009), <http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf>.

³⁴¹ Krishna Guha, *Two Challenges Highlight the Scale of the Bonanza*, FIN. TIMES, Aug. 11, 2008, at 3.

³⁴² Energy Information Administration, *Figure 4. Primary Energy Consumption by Source*, <http://www.eia.doe.gov/emeu/aer/pdf/perspectives.pdf>.

³⁴³ Between 1949 and 2006, for example, the amount of CO₂ emissions from a residential home increased from 320.6 million metric tons to 1197.9 million metric tons.

³⁴⁴ Bradford McKee, *As Suburbs Grow, So Do Waistlines*, N.Y. TIMES, Sept. 4, 2003, at <http://www.nytimes.com/2003/09/04/garden/as-suburbs-grow-so-do-waistlines.html?sec=health>.

³⁴⁵ The mean travel time, according to the US Census, increased from 21.7 minutes (1980) to 22.4 minutes (1990) to 25.5 minutes (2000). See Travel Time to Work for the United States: 1990 and 1980 Census, <http://www.census.gov/population/socdemo/journey/ustime.txt>;

departing from 12 midnight to 6:29 a.m. rose by nearly 4.8 million people, and increased from 18 percent to 20 percent of the total.”³⁴⁶

As output increases, society must dispose 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.”³⁴⁷ Between 1960 and 2007, the amount of solid waste increased from 2.68 to 4.62 pounds per person.³⁴⁸ Residential waste is estimated to comprise between 55% and 65% of total municipal solid waste generation.³⁴⁹ 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 U.S. Environmental Protection Agency, “we could reduce greenhouse gas emissions by 18 million metric tons of carbon equivalent (MMTCE), the basic unit of measure for greenhouse gases.”³⁵⁰ Recycling is not the sole solution. Preventing waste in the first place, found

<http://www.census.gov/prod/2004pubs/c2kbr-33.pdf>; Clara Reschovsky, U.S. Census Bureau, *Journey to Work: 2000 Census 2000 Brief 5* (March 2004) (“The proportions of trips in categories below 20 minutes all declined between 1990 and 2000, while the proportions in the categories of 25 minutes or more all increased. The proportion in the category 90 or more minutes nearly doubled, from 1.6 percent to 2.8 percent”), <http://www.census.gov/prod/2004pubs/c2kbr-33.pdf>.

³⁴⁶ Reschovsky, *supra* note 345, at 6.

³⁴⁷ Bauman, *supra* note 235, at 185.

³⁴⁸ U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2007 9 (Nov. 2008), available at <http://www.epa.gov/waste/nonhaz/municipal/pubs/msw07-rpt.pdf>. Fortunately 33.4% of waste in 2007 was recovered through recycling leaving 137 million tons discarded in landfills (54% of all municipal solid waste). *Id.* at 3.

³⁴⁹ *Id.* at 4.

³⁵⁰ U.S. ENVIRONMENTAL 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 increasing our national recycling rate from 30% in 2000 to 35% would reduce greenhouse gas emissions by another 10 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. Waste reduction also allows 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.*

the EPA, reduces emissions (i) from energy consumption; (ii) from incinerators; (iii) of methane from landfills; and (iv) of greenhouse gas from the combustion of waste.³⁵¹

The attendant costs of increased output will accelerate as consumption for discretionary goods and services accelerates in developing countries like China and India. 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. They simply respond, "What's 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.³⁵² In pursuing their self-interest, consumers will often place a greater value on personal consumption as its perceived benefit (such as a new \$1000 stereo) is often more tangible, immediate, and of greater personal value than the perceived benefit from a public good. For example,

³⁵¹ *Id.* at 2 ("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.").

³⁵² Galbraith, *supra* note 226, at 111.

people who are childless or who send their children to private schools benefit indirectly from investments in the public school (perhaps higher real estate values). Attitudes toward taxes will shift. Indeed, the political rhetoric over the past thirty years is how lower taxes improves 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 the perception of how widespread selfishness is: “[I]f 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.”³⁵³ For example, in 1995 the Minnesota Department of Revenue tested several ways to increase its residents’ voluntary compliance with the state individual income tax. It mailed taxpayers different information on the importance of voluntary compliance.³⁵⁴ Letter 1, mailed to about 20,000 taxpayers, made a rational argument for paying taxes.³⁵⁵ Letter 2 appealed to a social norm about tax compliance, namely that the

³⁵³ Fehr & Fischbacher, *supra* note 82, at 167.

³⁵⁴ Stephen Coleman, *The Minnesota Income Tax Compliance Experiment State Tax Results*, Minnesota Dep’t of Revenue, Apr. 1996, available at http://www.taxes.state.mn.us/legal_policy/research_reports/content/complnce.pdf.

³⁵⁵ *Id.* at 5 (“your income tax dollars are spent on services that we Minnesotans depend on. Over 30 percent of state taxes go to support education. Another 18 percent is spent on health care and support for the elderly and the needy. Local governments get about 12 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.”).

overwhelming majority accurately report the income taxes they owe.³⁵⁶ 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.”³⁵⁷

A study of more than 5,000 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.³⁵⁸

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

³⁵⁶ *Id.* at 5-6. The letter said,

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 93 percent of 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 93 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.

³⁵⁷ *Id.* at 18. The average refund, for example, was lower for the Letter 2 group (\$108) than control group (\$120) and Letter 1 group (\$153). To measure the compliance strategies’ impact on voluntary compliance, the state agency looked at changes from 1993 to 1994 in reported income and taxes paid by groups of taxpayers subject to the different strategies. These changes were compared with changes in a control group of taxpayers who were not affected by the experiment.

³⁵⁸ Donald L. McCabe et al., *Academic Dishonesty in Graduate Business Programs: Prevalence, Causes, and Proposed Action*, 5 ACADEMY OF MANAGEMENT LEARNING & EDUCATION 294 (2006), ftp://ftp.cba.uri.edu/Classes/Beauvais/MBA540/Readings/McCabe_2006.pdf.

are cooperating in their civic duties.

This is important as the Internet and global commerce over the past 20 years broadened social relationships and increased the interdependence of citizens throughout the world. To evolve, economies must rely on complex, large-scale cooperation. As the financial crisis shows, economic risks are not isolated to particular regions. Since individuals take part in events on a worldwide scale, individual self-realization cannot be the supreme principle of ethics.³⁵⁹

Not surprisingly, the larger religions emphasize pro-social norms — helping’s one’s neighbor, turning the other cheek.³⁶⁰ As Bauman writes, “Accepting the precept of loving one’s neighbor is the birth-act of humanity.”³⁶¹ All other routines of human cohabitation, norms and rules are “footnotes to that precept.”³⁶²

Likewise when conducting their Ultimatum Game experiment in fifteen small-scale economies from twelve countries on four continents, 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.³⁶³ The differences among societies in “market integration” and “cooperation in production” explained a substantial portion of the behavioral variation between the different economies: “The higher the degree of market integration and the higher the payoffs to cooperation, the

³⁵⁹ BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 684 (1972); Pope John XXIII, *Mater et Magistra*, *supra* note 286, at 94.

³⁶⁰ Gintis et al., *Moral Sentiments*, *supra* note 72, at 30.

³⁶¹ BAUMAN, *supra* note 235, at 32-33. 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.” New Jerusalem Bible, Acts of Apostles 2:44-47.

³⁶² Bauman, *supra* note 235, at 33.

³⁶³ Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 *EVOLUTION & HUM. BEHAV.* 153, 154 (2003).

greater the level of cooperation and sharing in experimental games.”³⁶⁴ 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.”³⁶⁵

Likewise, in reviewing traits that appear with regularity in studies of cultures of high-performing and adaptive companies, a senior advisor to McKinsey & Co. identified ten illustrative performing, cooperating, and innovating norms.³⁶⁶ 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.

CONCLUSION

Sophocles said “he drew men as they ought to be, and Euripides as they were.”³⁶⁷ The Chicago School’s assumption of self-interest neither represents how we ought to act or 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, empathy, are altruistic and cooperate

³⁶⁴ The societies were rank-ordered in five categories— “market integration” (how often do people buy and sell, or work for a wage), “cooperation in production” (is production collective or individual), plus “anonymity” (how prevalent are anonymous roles and transactions), “privacy” (how easily can people keep their activities secret), and “complexity” (how much centralized decision-making occurs above the level of the household). Using statistical regression analysis, only the first two characteristics, market integration and cooperation in production, were significant, and they together accounted for 66 of the variation among societies in mean ultimatum game offers. *Id.* at 158.

³⁶⁵ *Id.* BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* 79–102 (2005) (describing 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. In contrast, during periods of economic growth, our society slowly progressed from this zero-sum mentality toward openness, mobility, and democracy).

³⁶⁶ Beinhocker, *supra* note 58, at 370–71.

³⁶⁷ ARISTOTLE, *THE RHETORIC AND THE POETICS* 261 (Modern Library 1984).

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.”³⁶⁸ Rather than making 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.³⁶⁹ 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 misdirected. Some people, for example, voluntarily compete (and use Internet peer pressure) to alter their energy consumption, driving, and exercise habits.³⁷⁰ 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

³⁶⁸ Bowles & Gintis, *Origins of Human Cooperation*, *supra* note 90, at 433.

³⁶⁹ Layard, *supra* note 156, at 32-33.

³⁷⁰ Tim Bradshaw, *Peer Groups that Harness an Online Community Spirit*, FIN. TIMES, Aug. 6, 2009, at 12.

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.”³⁷¹

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. 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.”³⁷² In understanding the drivers of behavior (beyond the simplistic assumption of wealth-maximization), policymakers can better understand how informal 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.”³⁷³

Nor is increased output always beneficial. Economic activity’s proper place should always remain “as the servant, not the master, of society.”³⁷⁴ Consequently, improved social conditions for all citizens must accompany economic development. Government officials must develop better tools to determine whether its (in)actions have the desired effect. The economics professor Simon Kuznets warned of the shortcomings in using his GDP measure to infer a nation’s welfare; over the past year the Stiglitz-Sen commission has examined three key issues: “how to improve standard GDP; how to incorporate new measures of economic, social, and

³⁷¹ Tawney, *supra* note 280, at 180.

³⁷² Gintis et al., *supra* note 72, at 4.

³⁷³ Ariely, *supra* note 58, at 86.

³⁷⁴ Tawney, *supra* note 280, at 183.

environmental sustainability into the data; and how to devise fresh indicators for assessing quality of life.”³⁷⁵ To determine whether competition policy (aligned with other social policies) is achieving its intended aims, more tangible signposts than the catchwords *allocative efficiency* or *consumer welfare* are necessary.

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. 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 misdemeanour, and the love of money is detestable, that those walk most truly in the paths of virtue 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.³⁷⁶

The financial crisis can provide the needed impetus to look beyond the current toils and invest in a better competition policy for future generations.

³⁷⁵ John Thornhill, *A Measure Remodelled*, FIN. TIMES, Jan. 28, 2009, at 9; *see also* Joseph Stiglitz, *Progress, What Progress?*, OECD OBSERVER, Apr. 2009, at 27.

³⁷⁶ Keynes, *supra* note 203, at 7.