

Articles

Relative Preferences

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To secure her daughter a position on her high school cheerleading team, Wanda Webb Holloway solicited a man to kill the mother of her daughter's chief rival, hoping that the mother's death would distract the rival from the competition.¹ In Japan, enough people work themselves to death that the culture has a name for this means of dying: *karoshi*.² Do the forces motivating these divergent behaviors have anything in common? If we merely describe Ms. Holloway as wanting her daughter to cheerlead, and the *karoshi* victims as

1. Holloway, the organist at Channelview Missionary Baptist Church, allegedly considered having both the mother and the rival daughter killed for \$7,500 but later settled on murdering only the mother for \$2,500. Roxanne Roberts, *Rah, Rah, Sis . . . Boom?: In Texas, Cheerleading Is Serious Business. Maybe As Serious As Murder*, WASH. POST, Mar. 24, 1991, at F1.

2. "In Japan, *karoshi* is recognized as a fatal mix of apoplexy, high blood pressure and stress that doctors relate to too many hours on the job. . . . A recent Health Ministry report called *karoshi* the second leading cause of death after cancer among Japanese workers." Ronald E. Yates, *To Some In Japan, Job Holds A Fatal Attraction*, CHI. TRIB., Apr. 22, 1990, at 1. An insurance company polled Japanese workers and found that more than 40% "feared that overwork might kill them" but that "few planned to do anything about it." Jim Impoco, *Dying To Work*, U.S. NEWS & WORLD REP., March 18, 1991, at 24. Although *karoshi* has received much attention, the problem of job strain is hardly limited to Japan. See, e.g., ROBERT KARASEK & TÖRES THEORELL, *HEALTHY WORK* 117-57 (1990) (discussing work stress and heart disease among American workers).

wanting the added goods their extra work earns them, then the answer is “no”—their desires are wholly unrelated, except perhaps that each is unusually intense. But the thesis of this Article is that behaviors such as these *are* related, and reveal an important and often-neglected aspect of human motivation. In both cases, the psychologically richer description is that the actors seek not an absolute end, but *relative position* among peers: Ms. Holloway sought for her daughter elevated status and popularity among her classmates, while the Japanese workers seek elevated rank and prestige among their coworkers. The lesson of these two examples is that for some, social position is an end literally worth killing or dying for.

Whether it is termed “status,” “prestige,” or “distinction,” people sometimes seek—as *an end in itself*—relative position; they measure their income against the prevailing “standard of living” of their society or their peers, suffer indignity at failing to “keep up with the Joneses,” and generally gain or lose satisfaction according to how well they do compared to others. Neoclassical economics, however, has neglected the fact that people desire relative position. The omission of relative preferences from economic theory is part of a broader tendency to assume that consumer preferences are independent of each other, i.e., that individuals are concerned only about their own consumption, and are “indifferen[t] to the welfare of others.”³ Although many social scientists have begun to challenge this concept of selfishness, they have done so primarily by exploring ways in which preferences are *positively* dependent on each other, as when empathy, altruism, or moral commitment cause one person to desire that others be able to satisfy their own desires.⁴ Much less has been said about the extent to which preferences are *negatively* interdependent, and the economic consequences of such preferences. One way that preferences may be negatively interdependent is when a person seeks *as an end* a position that is relatively superior to that held by others.⁵ Although the existence of such relative desires

3. Kenneth E. Boulding, *Economics As a Moral Science*, 59 AM. ECON. REV. 1, 6 (1969). Boulding criticized this particular view of “[s]elfishness, or indifference to the welfare of others,” as being “a knife edge between benevolence on the one side and malevolence on the other.” *Id.*

4. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 43-54 (1989); Jon Elster, *Selfishness and Altruism*, in BEYOND SELF-INTEREST 44 (Jane J. Mansbridge ed., 1990); AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS (1988); Jane J. Mansbridge, *On the Relation of Altruism and Self-Interest*, in BEYOND SELF-INTEREST, *supra* at 133; Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, in SCIENTIFIC MODELS AND MEN 1-25 (Henry Harris ed., 1979). This sort of work is forming the basis for a new interdisciplinary field called “socio-economics.” See David Sears, *SOCIO-ECONOMICS: Challenge to the Neoclassical Economic Paradigm*, 2 PSYCHOL. SCI. 12, 13 (1991) (the Society for the Advancement of Socio-Economics had 600 members in 18 countries in its first year). Founded by Etzioni, the Society is an interdisciplinary group that seeks to combine neoclassical economics with a broader view of human behavior informed by the other social sciences. *Id.* For a more traditional economic account of altruism, see William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

5. I define relative preferences in greater detail *infra* text accompanying notes 14-24.

is evident to the noneconomic social sciences,⁶ to literature,⁷ and to popular culture,⁸ economics and its legal variant, law and economics, typically treat such preferences as a minor matter that may safely be ignored.

Incorporating relative preferences into the normative welfare analysis common to much legal theory⁹ challenges a conventional assumption that greater wealth necessarily means greater social welfare. When individual preferences are independent of each other—when one person's satisfaction is not influenced by the consumption level of others—then we can plausibly maximize social welfare by maximizing total wealth within society: increased wealth will allow society to make someone (absolutely) better off without making anyone else (absolutely) worse off.¹⁰ When individual preferences are interdependent, however, this simple analysis does not always work: *making someone absolutely better off may itself make others worse off if the others prefer to maintain a certain economic position relative to the one whose wealth*

6. See *infra* Part II(A).

7. See, e.g., JANE AUSTEN, *PRIDE AND PREJUDICE* (Frank W. Bradbrook ed., Oxford University Press 1970) (1813); CHARLES DICKENS, *HARD TIMES* (London, Dent 1978) (1854). See generally RENÉ GIRARD, *DECEIT, DESIRE, AND THE NOVEL 1-52* (Yvonne Freccero trans., 1965) (novelists reveal "triangular" nature of desire: subject who desires, object desired, and "mediator" whose desire the subject imitates). Alexander Pope had such desires in mind when he described the prodigal whose consumption was always directed toward creating a certain impression with others:

Not for himself he sees, or hears, or eats;
 Artists must choose his pictures, music, meats:
 He buys for Topham drawings and designs;
 For Pembroke statues, dirty gods, and coins;
 Rare monkish manuscripts for Hearne alone,
 And books for Mead, and butterflies for Sloane.

Moral Essays, Epistle IV, *Of The Use of Riches*, THE COMPLETE POETICAL WORKS OF POPE 171 (Henry W. Boynton, ed., Houghton Mifflin 1903).

8. See, e.g., JANIS JOPLIN, *Mercedes Benz, on PEARL* (Columbia Records) ("Oh Lord, won't you buy me a Mercedes-Benz/My friends all drive Porsches, I must make amends."). More generally, a great deal of advertising is directed at the usefulness of a product in establishing one's position in society. See, e.g., Russell W. Belk, *Materialism and Status Appeals in Japanese and U.S. Print Advertising*, INT'L MARKETING REV., Winter 1985, at 38.

9. I refer to the concepts of efficiency—Pareto optimality and Kaldor-Hicks efficiency—borrowed from welfare economics. See C.E. FERGUSON & S. CHARLES MAURICE, *ECONOMIC ANALYSIS: THEORY AND APPLICATION* 489-90 (3d ed. 1978) (Pareto optimality exists when "there is no change that will benefit some people without making some others worse off"); EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 279-80 (1978) (change is Kaldor-Hicks efficient if resulting "winners" gain enough so that they *could* compensate resulting "losers"). "Law and economics" employs both concepts; the latter is the basis of Richard Posner's concept of "wealth maximization." See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 356-58 (1990); Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85 (1985).

10. I am aware of the substantial criticisms of Kaldor-Hicks efficiency and wealth maximization. See, e.g., JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 67-152 (1988); RONALD DWORKIN, *Is Wealth a Value?* in A MATTER OF PRINCIPLE 237 (1985); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 114-50 (1987); Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307 (1980). Because I believe there are strong constraints on the appropriate use of wealth-maximization, in this Article I generally employ the less controversial welfare test of Pareto-optimality. Nonetheless, I occasionally use the wealth maximization criterion of efficiency. Under certain constraints, I believe the criterion is useful for determining the strength of competing claims. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 302-04 (1986). In addition, this concept of efficiency is so commonly employed in legal scholarship that it is important to note the consequences relative preferences have on such analysis.

is increased. If people or social groups share such relative preferences, either for particular goods, general wealth or status, then one person or group gains position regarding those things only at the expense of others who lose it; the competition is zero sum. The key to understanding the potential waste of investments in satisfying relative preferences is that, unlike spending to satisfy conventional “nonrelative” preferences, the effectiveness of one’s investment in satisfying relative preferences depends entirely on the amount that others invest. Thus, parallel investments by consumers can entirely nullify any positional advantage either hoped to gain by making the investment. When this zero sum competition diverts resources that might have been used to satisfy nonrelative preferences, the investment in relative gain will, under circumstances discussed below, represent a net loss in social welfare.

This analysis opens potentially fruitful areas of legal theory. Accepting that satisfaction of relative preferences counts as a positive social good, competition to satisfy such preferences may nevertheless lead to market failure. If, for example, consumption of certain safety measures or the enjoyment of simple leisure is generally unobservable and contributes less to one’s status or prestige than consumption of more observable goods, then people struggling for status may sacrifice safety or leisure to obtain the other, more observable goods. If others make the same consumption decision, however, the sacrifice does not change one’s relative position or status at all; the sacrifice is not matched by any relative gain. Even where one party ultimately “wins” the competition for position and achieves a relative gain, all of the investment by the losing party, and much of that by the winning party, is wasted. Just as an arms control pact can save adversaries the resources they might waste matching each other in an arms race, regulations prohibiting positional investments may prevent the waste of such resources. Alternatively, economic regulations mandating minimum consumption levels for nonrelative goods might indirectly prevent the “arms race” for relative position from inflicting great harm on participants.¹¹

More generally, if people care greatly about relative position, this motivation will materially influence individual choices of every variety. Economic explanations of a multitude of disparate behaviors—how much people save, what wages they will require, what risks they will take, how they respond to taxation, etc.—will be seriously incomplete unless they account for the relative effects of such decisions. A general theory of relative preferences, one that considers how groups as well as individuals compete for status, may also illuminate phenomena such as poverty and racism that are already thought of by many in relative terms.

Some have lamented what they see as a tendency of legal scholars, when borrowing from other disciplines, to rely on stale if not obsolete theory from

11. See, e.g., ROBERT H. FRANK, CHOOSING THE RIGHT POND (1985), discussed *infra* Section I(C).

those disciplines.¹² If we are to have economic analysis of law, as we certainly do, then we should have a rich understanding of neoclassical economics, including controversies between the margin and the mainstream of that discipline. This Article sets forth such a controversy—one largely unknown to legal scholarship—concerning relative preferences, and seeks to advance the empirical¹³ and theoretical understanding of such preferences. Drawing on an array of social science literature to describe the nature and prevalence of these preferences, the Article explores the positive and normative implications of relative desires, particularly with respect to law and legal theory.

After defining relative preferences more precisely, Part I examines existing analyses of such preferences. A historical review shows that neoclassical economics has repeatedly deferred analysis of relative preferences while perfecting models of consumer behavior based on simpler, absolute preferences. There has been some analysis of envy, but as I show below, envy is merely one example of the larger phenomenon of relative preferences, and the existing discussion of envy has restrained rather than advanced a more general analysis. Part I ends, however, by introducing the recent work of a few economists who have initiated a normative analysis of preferences for relative position and have explained how competition to satisfy such preferences can be socially wasteful.

Part II expands the existing analysis in several ways. Part II(A) provides a multi-disciplinary discussion of the source and nature of relative preferences, reviewing the literature of social psychology, sociology, anthropology, and economics to demonstrate the strength and pervasiveness of such preferences. Part II(B) sketches a general theory of the market failure—termed “competitive consumption”—that results from individual efforts to satisfy incompatible relative preferences, and attempts to isolate the particular factors that lead to this failure. Efforts to satisfy relative preferences do *not* inevitably lead to a market failure, and in certain narrow cases, are even socially desirable. Finally, Part II(C) offers an analysis of the conventional and special transaction costs that impede individuals from reaching Coasean bargains that avoid the wasteful consequences of competitive consumption where it does arise.

Part III applies the analysis of Part II to particular legal problems. After stating general strategies for correcting the wastefulness of competitive consumption, Part III focuses on the illustrative examples of income taxation and discrimination law, demonstrating in each case how the legal scheme may be understood as correcting for the wastefulness of competitive efforts to satisfy

12. Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013, 1013 (1988).

13. Robert Ellickson and Kenneth Dau-Schmidt have persuasively advocated incorporating other social sciences into economics and the field of law and economics. Kenneth G. Dau-Schmidt, *Relaxing Traditional Economic Assumptions and Values: Toward a New Multidisciplinary Discourse on Law*, 42 SYRACUSE L. REV. 181 (1991); Ellickson, *supra* note 4. Such an interdisciplinary approach is especially necessary for an intelligent discussion of relative preferences. See *infra* Section II(A).

relative preferences. Where taxation may reduce the waste of interpersonal competition for position, antidiscrimination laws may address the related problem of intergroup status competition. In each case, the conventional economic claims that these regulations are inefficient are seriously incomplete, as they fail to address the relative nature of the preferences motivating the underlying behavior.

I. EXISTING ANALYSIS OF RELATIVE PREFERENCES

This Part reviews existing economic and jurisprudential analyses of relative preferences. Section A briefly reviews the sporadic attention classical and neoclassical economics have given relative preferences. Section B examines economic and political analyses of envy, finding it to be a failed effort at describing the larger phenomenon of relative wants. Section C introduces the recent work of several economists who have begun investigating relative preferences in earnest.

Initially, however, it is necessary to define more precisely what I mean by “relative” preferences (or wants, desires or tastes), and to isolate the kind of relative preference that is the subject of this Article. To define relative preferences, I must place the category within a larger framework of preferences. First, I shall distinguish between self- and other-regarding preferences, and within the latter category, between absolute and relative preferences. Finally, I shall distinguish between positive and negative relative preferences, the second being the main focus of this Article.

Neoclassical economic analysis commonly employs a concept of self-interest in which people are concerned solely about their own consumption.¹⁴ Such preferences are “self-regarding.” In contrast, “other-regarding” preferences (also termed “interdependent” or “second party” preferences) concern the consumption of others.¹⁵ A person’s desire to drive at high speeds and not to eat broccoli are self-regarding preferences because the preference may be satisfied without any other individual engaging in an act of consumption. Conversely, the preference that others avoid reading *Madame Bovary* or that others eat sufficient food to live are necessarily *not* satisfied unless other people

14. See Boulding, *supra* note 3, at 6.

15. See, e.g., JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 36 (1983) (referring to altruistic and public-minded preferences as “other-regarding”); Amartya Sen, *Foundations of Social Choice Theory: An Epilogue*, in *FOUNDATIONS OF SOCIAL CHOICE THEORY* 213, 233 (Jon Elster & Aanund Hylland, eds., 1986) (contrasting “self-centred” and “other-regarding” preferences). See also Robert A. Pollak, *Interdependent Preferences*, 66 *AM. ECON. REV.* 309, 309 (1976) (“interdependent preferences” are “preferences which depend on other people’s consumption”); Robert Haney Scott, *Avarice, Altruism, And Second Party Preferences*, 86 *Q.J. ECON.* 1 (1972). Note that, regardless of terminology, this category of preferences concerns other people’s consumption, *not* other people’s preferences or their utility. For example, A may have the relative desire to enjoy higher consumptive levels than B even though B has no preference regarding A’s consumption, and regardless of the level of B’s utility.

engage or refrain from engaging in certain consumptive activities. The latter are examples of “other-regarding” preferences.

Within this category, we may distinguish between positive and negative other-regarding preferences. The terms “positive” and “negative” refer to the mathematical nature of the dependency: one’s satisfaction may vary positively or negatively with the consumption of others. For example, for many people, increased consumption by family members adds to one’s own satisfaction—a positive dependency—while increased consumption by one’s bitter enemy decreases one’s satisfaction—a negative dependency. More generally, the altruist derives pleasure from the consumption of others,¹⁶ while the sadist derives pleasure from depriving others of consumption.¹⁷

Finally, we may distinguish between *relative* and *absolute* other-regarding preferences. In one sense, all other-regarding preferences are relative: one’s satisfaction is relative to what others consume. But by a “relative” other-regarding preference, I mean a more complex function in which one derives pleasure or displeasure from the fact of another’s consumption level *in relation to* one’s own, i.e., where the ratio of one’s consumption to the other’s determines the effect on one’s satisfaction. An other-regarding preference is therefore relative when its satisfaction depends on the ratio between one’s own consumption (selfish consumption or “SC”) and the consumption by another or the average of several others (others’ consumption or “OC”). In contrast, an “absolute” other-regarding preference is a function in which one derives pleasure or displeasure directly from the fact of another’s consumption, without regard to how that consumption compares to one’s own.

The above illustrations concerning family members, bitter enemies, altruists, and sadists are examples of positive and negative *absolute* other-regarding preferences. One may gain pleasure from consumption by a family member and feel displeasure at consumption by a hated enemy, regardless of how that consumption compares to one’s own level of consumption. There are also positive and negative *relative* other-regarding preferences. Positive relative preferences¹⁸ are probably rare, although one can imagine, for example, that an egalitarian who enjoys greater than average consumption (i.e., $SC > OC$) may gain satisfaction as the consumption of others increases (a movement toward equality).¹⁹

16. Alternatively the altruist may derive pleasure from certain types of consumption and/or by certain categories of others’ consumption. Any of these variations are examples of positive other-regarding preferences.

17. This locution may seem a strange way to describe the pleasure the sadist gains by inflicting pain on others, but in economic terms, people who desire to be free from pain “consume” the conditions facilitating the absence of pain. Sadistic preferences are therefore negative other-regarding preferences.

18. Because relative preferences can only be “other-regarding” in this taxonomy, I will henceforth use the shorter phrase “relative preferences” to describe “relative other-regarding preferences.”

19. The example assumes the egalitarian wants material equality, i.e., that he prefers that $SC/OC = 1$. When $SC > OC$, the egalitarian receives satisfaction from increases in OC , a positive relative preference. I do not mean to suggest that egalitarianism is best defined in this manner. In general, the egalitarian is

Within this taxonomy,²⁰ this Article addresses *negative* relative preferences—preferences for approaching or surpassing the consumption level of others. These preferences are relative because their satisfaction depends on the ratio of SC to OC; the preferences are negative because, within this ratio, their satisfaction varies inversely with OC. A negative relative preference is therefore a preference for a consumptive position that is favorable in comparison to that of others. “Consumptive position” may refer to the quantity or the quality of particular goods, including intangible goods such as prestige, or it may refer to the sum of all goods, i.e., wealth. The “others” may include an individual, a group, or all of society.

Because there are numerous ways of imagining positions that are relatively favorable to those of others, negative relative preferences include a variety of different wants. For example, people may desire a position ahead of all others, one at least equal to the average, or simply a position ahead of the bottom. And people may define their rank ordinally (caring only about numerical rank) or cardinally (caring not only about rank, but the size of the gap between one’s rank and the rank of others). Desiring a “relatively favorable position” may therefore include the desire (*A*) to have the highest rank, (*B*) to maximize the positive difference between what one has and what others have, (*C*) to avoid the lowest rank, (*D*) to maximize the positive difference between what one has and what the lowest ranking others have, (*E*) to have at least an average rank, or (*F*) to minimize the negative difference between what one has and what average ranking individuals have. The (*A*) and (*B*) desires represent the desire to be ahead of others, (*A*) representing a preference for being at the top in an ordinal ranking, (*B*) in a cardinal ranking.²¹ The (*C*) and (*D*) desires are for positions in an ordinal and cardinal ranking, respectively, from the perspective of one who wants to avoid ranking at the bottom, but is not concerned with being at the top.²² Finally, the (*E*) and (*F*) desires are for positions in an

concerned with equalizing the ratio of consumption of some members of society to the consumption levels of other members. But where this commitment encompasses a concern that others consume at his level (because the egalitarian is himself part of the wealthier group), we have the unusual case of a positive relative preference.

20. The following chart summarizes the taxonomy of other-regarding preferences:

	<i>Absolute</i>	<i>Relative</i>
<i>Positive</i>	e.g., love, altruism	e.g., egalitarianism (under appropriate circumstances)
<i>Negative</i>	e.g., hatred, sadism	e.g., the desire to consume favorably compared to others

21. (*A*) is the desire to rank numerically ahead of others with indifference as to the distances between ranks, while (*B*) is the desire to maximize one’s distances ahead of others. Being ranked first in the group would satisfy the (*A*) desire, but the (*B*) desire could, in theory, be insatiable (or satiable only when one has everything and the others have nothing).

22. At some distance from the bottom, other than being at the top, the desire will be satisfied. Otherwise, desires (*C*) and (*D*) would be the same as (*A*) and (*B*), respectively.

ordinal and cardinal ranking, respectively, when the individual is concerned only with having an “average” amount as compared to others.²³ Each of these cases defines circumstances in which the consumer’s welfare, at least to a point, depends negatively on amounts consumed by others.

This Article addresses only negative relative preferences. As a matter of simpler terminology (and because I believe that most relative preferences are negative), I will henceforth refer to negative relative preferences simply as “relative preferences.” I will also contrast relative preferences with “absolute” preferences. By absolute preferences I henceforth mean to include not only absolute other-regarding preferences, but also the more conventional self-regarding preferences. After all, self-regarding preferences are absolute in the important sense that the pleasure one gains from consumption does not depend in any way on the consumption of others.²⁴

Having defined the subject, we can now consider the existing analysis of such preferences. The intellectual history of relative preferences is one of neglect. Although many classical economists have recognized the existence of such preferences in passing, the dominant tendency has been to defer consideration of relative preferences, and consequently, a further tendency to overlook the normative implications of such preferences. Against this backdrop, however, a few economists, beginning with Adam Smith, have made important contributions.

A. *Economic Analysis of Relative Preferences: An Issue Deferred*

Adam Smith would undoubtedly be surprised by the near absence of discussion of relative wants in modern economics since he viewed them as central to understanding human behavior. In *The Theory of Moral Sentiments*, he asks whether the rich believe that their wealth brings them greater absolute satisfaction in life, whether they “imagine that their stomach is better, or their sleep sounder, in a palace than in a cottage?”²⁵ In Smith’s view, “[t]he contrary has been so often observed, and, indeed, is so very obvious, that there is nobody ignorant of it.”²⁶ If that is so, he asks “what are the advantages which

23. Once one obtains the average, there is no additional relative satisfaction from obtaining more than the average, but additional units may still satisfy absolute preferences.

24. There is no reason why a consumer cannot have, in the defined sense, both a relative and an absolute preference for one object; in fact, such combinations may be more common than either purely relative or purely absolute preferences. Thus, to say that A has a relative preference for X does not exclude A having an absolute preference for X, but means that, independent of any satisfaction A receives from consuming an absolute quantity of X, A will experience satisfaction from having a level of X that is relatively favorable to others and will experience dissatisfaction from a level of X that is relatively unfavorable to others. See *infra* text accompanying notes 260-261, 265.

25. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 112-13, (D.D. Raphael & A.L. Macfie, eds., Clarendon Press 1976) (1759) [hereinafter SMITH, *MORAL SENTIMENTS*].

26. *Id.* at 113.

we propose by that great purpose of human life which we call bettering our condition?"²⁷ Smith explains:

[I]t is chiefly from this regard to the sentiments of mankind, that we pursue riches and avoid poverty To be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation, are all the advantages which we can propose to derive from it The rich man glories in his riches, because he feels that they naturally draw upon him the attention of the world At the thought of this his heart seems to swell and dilate itself within him, and he is fonder of his wealth, upon this account, than for all the other advantages it procures him. The poor man, on the contrary, is ashamed of his poverty. He feels that it either places him out of the sight of mankind, or, that if they take any notice of him, they have, however, scarce any fellow-feeling with the misery and distress which he suffers.²⁸

Smith continues this theme in *The Wealth of Nations*,²⁹ and the same point is subsequently made by major nineteenth-century economists.³⁰

27. *Id.*

28. *Id.* at 112-13. In sum: "It is because mankind are disposed to sympathize more entirely with our joy than with our sorrow, that we make parade of our riches, and conceal our poverty." *Id.* at 112. See generally D.A. REISMAN, ADAM SMITH'S SOCIOLOGICAL ECONOMICS 105-16 (1976) (regarding Smith's views on consumption and social status). But see RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 238 (1981) [hereinafter POSNER, JUSTICE] ("Why is there less curiosity about the lives of the poor, as measured, for example, by the frequency with which poor people are central characters in novels, than about those of the rich? The reason, I conjecture, is that the lives of the poor do not provide as much useful information in patterning our own lives.")

29. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., University of Chicago Press 1976) (1776) [hereinafter SMITH, WEALTH OF NATIONS]. Smith understood the concept of a "necessity" (which he contrasted with a "luxury") to include not only goods required for physical survival, but any good the consumption of which was, by community standards, necessary to avoid public "shame." *Id.* at 405 (Bk. 5, Ch. II, Pt. II). Thus, he recognized that people have a desire to consume at least as much of certain goods as is the community norm. Conversely, for "the greater part of rich people," Smith recognized that "the chief enjoyment of riches consists in the parade of riches, which in their eye is never so complete as when they appear to possess those decisive marks of opulence which nobody can possess but themselves." *Id.* at 192 (Bk. 1, Ch. XI, Pt. II). Stephen Holmes has argued that the key purpose of THE WEALTH OF NATIONS was to "draw the political classes of Great Britain away from envy and unreasoning animosity and toward interest—away from the ideal of relative and toward that of absolute wealth." Stephen Holmes, *The Secret History of Self-Interest*, in BEYOND SELF-INTEREST, *supra* note 4, at 267, 341 n.57 (emphasis added). But see Gary S. Becker, *A Theory of Social Interactions*, 82 J. POL. ECON. 1063 (1974), discussed *infra* at notes 59-65 and accompanying text.

30. John Stuart Mill noted: "[A] great portion of the expenses of the higher and middle classes in most countries, and the greatest in this, is not incurred for the sake of the pleasure afforded by the things on which the money is spent, but from regard to opinion, and an idea that certain expenses are expected from them, as an appendage of station." JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 869 (J. M. Robson ed., 1965) (1848). See also John Stuart Mill, *Posthumous Essay on Social Freedom*, OXFORD & CAMBRIDGE REV. (January 1907) ("Men do not desire to be rich, but to be richer than other men."), quoted in A.C. PIGOU, THE ECONOMICS OF WELFARE 89-90 (1948). Karl Marx saw relative disparity of material wealth as a great engine of social change: "A house may be large or small; as long as the neighboring houses are likewise small, it satisfies all social requirements for a residence. But let there arise next to the little house a palace, and the little house shrinks into a boat." KARL MARX, WAGE-LABOUR AND CAPITAL 33 (International Pub. 1978) (based on lectures given in 1847).

Although Smith was perhaps the first economist to recognize the existence of relative desires, John Rae was apparently the first to draw a critical normative conclusion about efforts to satisfy such preferences. See JOHN RAE, THE NEW PRINCIPLES OF POLITICAL ECONOMY (1834), reprinted in SOCIOLOGICAL THEORY

Notwithstanding an early recognition of relative wants, the neoclassical economics of this century repeatedly deferred analysis of such preferences. Alfred Marshall, the “father of neoclassicism,”³¹ recognized the power and prevalence of the human desire for “distinction.”³² In his seminal theory of consumer demand, however, he offers “an elementary analysis of an almost purely formal kind” that does not distinguish among the types of desires, and consequently does not address the desire for distinction.³³ This treatment is typical.³⁴

Thus, when Thorstein Veblen, the great heterodox economist, savagely criticized classical economics at the turn of this century, he particularly noted its failure to recognize that in affluent societies the “dominant incentive” for owning property was to demonstrate “pecuniary success” and thereby to obtain “invidious distinction.”³⁵ Some 40 years later, James Duesenberry, a neoclassi-

OF CAPITAL (Charles W. Mixter ed., 1905). Rae argued that people have a desire he termed “vanity” for achieving “superiority over others,” for “hav[ing] what others cannot have.” *Id.* at 245-46. Rae also observed that society wastes capital by investing in the production of goods satisfying such desires. Defining “luxuries” as goods that satisfy vanity, Rae argued that the investment in manufacturing luxuries is a waste of capital. “Taking the whole society as a body,” this production does not increase welfare because the enjoyment it creates “is all relative; as much as one is raised by it, another is depressed, the superiority of one man being here equivalent to the inferiority of another.” *Id.* at 273.

31. HARRY LANDRETH, HISTORY OF ECONOMIC THEORY 281 (1976). Marshall created modern demand theory.

32. Marshall specifically discussed the consumption of food, clothing, and housing space as means of creating social distinction, ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 87 (9th ed. 1961) (clothing), 88 (housing), 106 (food), and decried the growing and “unwholesome desire for wealth as a means of display which has been the chief bane of the well-to-do classes in every civilized country.” *Id.* at 136.

33. *Id.* at 90. Marshall states that “[t]he higher study of consumption must come after, and not before, the main body of economic analysis . . .” *Id.* at 90 (raising again the subject of relative wants, but noting, “we are exceeding the proper scope of the present Book”). He never offered a “higher study,” see Becker, *supra* note 29, at 1064 n.1, and this simplification of theory lasts in large measure to the present day. See JAMES S. DUSENBERRY, INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR 14 (1949) (while Marshall and others recognize the interdependence of consumer preferences in passing, their comments on the issue are “mere *obiter dicta*” not affecting the formal analysis).

34. See, e.g., MELVIN W. REDER, STUDIES IN THE THEORY OF WELFARE ECONOMICS (1947). Reder states that a “theory of welfare economics which does not take account of the importance of ‘keeping up with the Joneses’ has a serious deficiency.” *Id.* at 67. Apparently interested in avoiding such a deficiency, Reder begins to discuss several means by which different persons’ preferences may be interdependent, including the desire to “outdo” others in the consumption of a particular good. *Id.* at 65. Reder grasps the key normative implication of such preferences. When individuals are engaged in what Reder terms “competitive consumption,” the “invidious expenditure” of one will create external costs to the other by lowering the other’s relative consumptive position. *Id.* at 65-66. Legislation limiting such “invidious expenditure” might increase welfare. *Id.* But in an almost schizophrenic manner, after briefly noting these implications, Reder concludes that welfare economics should proceed by assuming that relative preferences do not exist. *Id.* at 67 (“Economic Theory can be fruitfully discussed apart from political and sociological considerations,” so that Reder assumes “throughout [the] remainder [of the book], that the satisfaction of one individual does not depend on the consumption of another”).

35. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS 26-34 (Random House 1934) (1899). Echoing Smith, Veblen believed that once society progresses above a subsistence level, ownership of property becomes a necessary requisite for “popular esteem” and, eventually, self-respect. *Id.* at 30-31. See SMITH, *supra* note 25 and accompanying text. Veblen also recognized the basic normative implication of this struggle for “invidious distinction”: because individual desires for relative wealth are insatiable, “no general increase of the community’s wealth can make any approach to satiating this need, the ground of which is the desire of every one to excel everyone else in the accumulation of goods.” *Id.* at 32. “[S]ince the struggle is substantially a race for reputability on the

cal economist interested in explaining consumer saving decisions, made perhaps the most concerted effort until that time to incorporate relative preferences into mainstream consumer theory.³⁶ Duesenberry explicitly challenged the “independence postulate” of consumer theory, the assumption “that the preferences of each individual are independent of the actual purchases of others.”³⁷ But Milton Friedman’s “permanent income” theory of savings,³⁸ an explanation placing no reliance on relative wants, eclipsed Duesenberry’s theory of savings, and his general call for attention to relative wants went unheeded.³⁹ To this day, the standard discussion of consumer preferences assumes their absolute, nonrelative nature.⁴⁰ Until recently,⁴¹ the exceptional efforts of twentieth-

basis of an invidious comparison, no approach to a definitive attainment is possible.” *Id.*

In perhaps the best known aspect of his theory, Veblen said that people seek “invidious distinction” by demonstrating their wealth through the behavior of “conspicuous consumption” and “conspicuous leisure.” “[W]ealth or power must be put in evidence, for esteem is awarded only on evidence.” *Id.* at 36. By “conspicuous leisure,” Veblen meant behavior that demonstrates one’s abstention from work. “Conspicuous consumption” is the consumption of goods that are manifestly expensive for reasons not related to the function they serve. Both behaviors evidence wealth through the actor’s ability to afford waste; the choice between the two is merely “a question of advertising expediency.” *Id.* at 85.

36. See DUESENBERY, *supra* note 33. In addition to Veblen and Duesenberry, A.C. Pigou also noted and discussed the existence of relative preferences. See A.C. PIGOU, A STUDY IN PUBLIC FINANCE 91 (3d ed. 1952); see also PIGOU, *supra* note 30, at 89-90, 191 (“The satisfaction which a man derives from the possession of a given income depends, not only on the absolute amount of the income, but also on the relation subsisting between it and the incomes of other people”). Pigou observed the basic implications of such desires: “Among commodities, the desire for which is partly a desire to possess what other people do not possess, the creation of the 1000th unit adds to aggregate satisfaction less satisfaction than it carries itself, because it makes every unit of the commodity more common.” *Id.* at 226.

37. DUESENBERY, *supra* note 33. Duesenberry argued that Americans seek to increase their standard of living as an end in itself, apart from satisfying particular preferences for higher quality goods, and that the standard of living is defined by what others have. *Id.* at 28. Acquisition of a higher standard of living becomes necessary to the maintenance of an individual’s self-esteem. *Id.* at 28-29. Each individual compares his status with others based in part on his relative standard of consumption, and “inferiority feelings aroused by unfavorable comparisons” drive the individual to seek a higher level of consumption. *Id.* at 30-31. Duesenberry claims to observe two separate functions at work. First, “[o]ur social goal of a high standard of living . . . converts the drive for self-esteem into a drive to get high quality goods.” *Id.* at 31. Second, “the drive for self-esteem [leads to] a desire for high social status,” which also requires “high quality goods.” *Id.* The strength of the inferiority feelings depends “on the ratio of his expenditures to those of others with whom he comes into contact.” *Id.*

Duesenberry uses this insight to explain why the proportion of income consumers save increases as their income increases. He says the decision to save—not to consume—is a function of the consumer’s income *relative* to those with whom one has frequent contact: other things being equal, “the propensity to save of an individual can be regarded as a rising function of his percentile position in the income distribution.” *Id.* at 45. See also *id.* at 37-38. Duesenberry predicts that individuals with high levels of income relative to the group of individuals with whom they have contact will achieve a given high level status with less of their income than someone with only average relative income. Thus, with *relatively* higher income levels, there is less pressure to consume all of one’s income, and more money available for savings.

38. See MILTON FRIEDMAN, A THEORY OF CONSUMPTION FUNCTION (1957).

39. Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AMER. ECON. REV. 101, 109 (1985) [hereinafter Frank, *Nonpositional Goods*] (“many economists felt uncomfortable with what they regarded as a sociological theory of the consumption function [in Duesenberry’s work]”).

40. “The literature on interdependent preferences in demand analysis is relatively sparse. The lead provided by James Duesenberry was never systematically explored.” Pollak, *supra* note 15, at 310. See Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53, 58-59 (1985) (remarking on failure of most economists to incorporate desire for status into their models, and citing exceptions).

41. See *infra* Section I(C). ROGER S. MASON, CONSPICUOUS CONSUMPTION: A STUDY OF EXCEPTIONAL CONSUMER BEHAVIOR viii-ix (1981).

century economists at discussing relative wants—including Nobel laureates Friedman⁴² and George Stigler⁴³—have been almost entirely in the context of adjusting the positive theory of consumer behavior, while ignoring the normative implications of activity satisfying such wants.⁴⁴

Legal theory has also failed to address relative preferences in any systematic way. Those applying economic analysis to legal issues have followed mainstream economists in omitting discussion of preferences for relative position. Even those who seek to limit the use of simple market analysis have overlooked the significance of relative preferences.⁴⁵ The primary exception to this tendency has been the analysis of envy.

B. *A Partial Economic Analysis: The Externality of Envy*

Theorists have noted that the extent of envy in society is critical in determining the effects of economic growth. Envy creates the conventional problem of an externality or third party effect. If A envies B, then an increase in B's wealth (demonstrated through consumptive activity) creates a social cost—A's unhappiness or “envy pain”—which B does not bear. Gary Becker has dis-

42. Although Friedman avoided using relative wants in his savings theory, *see* FRIEDMAN, *supra* note 38, he previously resorted to the desire for relative wealth in an attempt to reconcile (risk-preferring) consumer decisions to gamble with (risk-averse) decisions to buy insurance. *See* Milton Friedman & L.J. Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 279 (1948), discussed *infra*, text accompanying notes 192-195. But they do not discuss the welfare implications of this analysis.

43. George Stigler and Gary Becker have described how consumption of “fashion goods” produces social prestige or distinction, but only as a means of explaining changes in fashion without positing changes in underlying consumer tastes. *See* George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AMER. ECON. REV. 76, 84, 88 (1977).

44. *See, e.g.*, Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183 (1950) (constructing demand curves given various interdependencies of preferences). Others took passing note of relative wants. *See* JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 108 (1936) (listing but not discussing “Ostentation and Extravagance” on list of subjective consumptive motives); John Maynard Keynes, *Economic Possibilities for Our Grandchildren* (1930), in 9 *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES: ESSAYS IN PERSUASION* 321, 326 (1972) (distinguishing “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,” and noting that the “desire for superiority” may be insatiable but drawing no welfare conclusions); *see also* FRANK H. KNIGHT, *FREEDOM AND REFORM* 376-77 (1947) (“The content of the wants for the goods and services for which people strive . . . is predominantly social, conventional, cultural, and esthetic; the urge or animus is very largely emulation and rivalry—to ‘keep up with the Joneses’ or to get ahead of them.”).

45. For example, Cass Sunstein's exhaustive catalogue of justifications for collectively intervening in the market do not include any potential market failure from satisfying relative preferences. *See* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 32-73 (1990) [hereinafter SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*]; Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 CHI. KENT L. REV. 181 (1990); Cass R. Sunstein, *Disrupting Voluntary Transactions*, NOMOS XXXI: MARKETS AND JUSTICE 279 (John W. Chapman & J. Roland Pennock eds., 1989); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). As another example, Deborah Weiss recently explored the reasons why consumers fail to save optimally for retirement. *See* Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275 (1991). Although she surveys neoclassical arguments for and against paternalistic savings policies, she never mentions Duesenberry's relative income theory of savings or his prediction that competition for status diminishes savings.

cussed the effect of envy on the conventional economic assumption that increased social income will increase social welfare. If the desire for "relative income position" is sufficiently intense, a proportional increase of all incomes "would not improve anyone's welfare,"⁴⁶ and might "actually lower welfare!"⁴⁷ Some economists have offered just such a theory to explain apparent dissatisfaction with economic growth.⁴⁸ Guido Calabresi has made a similar point: if envy is prevalent, then the concept of Pareto optimality is of limited use.

Even an efficiency move that makes some A wealthier without making any B poorer—an extraordinary situation—is not a move toward a better society unless one is prepared to make the frequently plausible, but not necessary, assumption that the change also made that A happier and did not make any B less happy, or that A is made happier and that any B made less happy by A's greater wealth deserves to be less happy because envy is "bad."⁴⁹

Others have made similar arguments against Posner's notion of wealth maximization.⁵⁰

46. Becker, *supra* note 29, at 1089-90.

47. *Id.* at 1090. Actually, proportionate growth (increasing everyone's welfare by the same percentage) could decrease welfare only if (a) envy is based on cardinal, rather than merely ordinal, differences in position, and (b) envy is the only, or at least predominant, relative preference. As proof of (a), consider that if people cared only about numerical ranking of economic position, *proportional* growth could not make them worse off, because ordinal rankings would be preserved (while differences between ranks increased). If people cared about the absolute wealth difference between themselves and others, proportional growth would make them worse off by the extent to which those with higher ranks moved even further ahead in an absolute sense. But Becker fails to note that proportional growth would also increase the absolute wealth difference between an individual and those of lower economic rank. Thus, as limitation (b) suggests, proportionate growth could make people worse off only if they cared more about comparisons with those of greater wealth (i.e., are more affected by envy) than with those of lesser wealth. The desire to stay ahead of those who rank lower economically might be called jealousy, and there is no reason, a priori, to think that envy is stronger than jealousy.

48. See, e.g., Trygve Haavelmo, *Some Observations on Welfare and Economic Growth*, in INDUCTION, GROWTH AND TRADE 65 (W.A. Eltis et al. eds., 1970). Haavelmo argued that there could be "collective diseconomies" from growth. He proposes an individual utility function represented by the formula, $u(x, y, x^*)$, where x represents the totality of goods and services that the individual can afford by performing a quantity of work represented by y . The variable x^* denotes the arithmetical average of all the individual x 's in the society. Utility is related positively to x and negatively to y ; with an assumption of "envy," utility is related negatively to x^* so that the higher x is for other members of society compared with the individual's x , the lower that individual's utility. Haavelmo concludes that growth may represent the aggregated effects of individuals attempting to maximize $(x - x^*)$, and such efforts may fail because everyone else's identical efforts continuously raise x^* . If the individual chooses a higher work level y with the expectation of increasing $(x - x^*)$, and the work of others prevent $(x - x^*)$ from rising, then it is possible that higher levels of x do not produce sufficient utility to counter the disutility from higher levels of y .

49. Guido Calabresi, *About Law And Economics: A Letter To Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 556 (1980).

50. See, e.g., Richard Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal*, 83 COLUM. L. REV. 488, 514-15 (1983) (reviewing RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981)). Posner himself has noted the problem. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 437 n.2 (3d ed. 1986) [hereinafter POSNER, *ECONOMIC ANALYSIS*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 344 (1990).

There are several common rejoinders to this problem posed by envy. As Calabresi suggests, some claim that there is insufficient evidence of the significance of envy to reject the use of social income as a measure of social welfare.⁵¹ Second, some argue that diminishing the pain of envy is not a morally appropriate basis for restricting the liberty of others; labelling a desire as "envy" is thus one means of delegitimizing any claims based on that desire.⁵² Third, Robert Nozick argues that efforts to reduce the pain of envy by mandating equality are futile. Positing a psychological "principle of the conservation of envy," he suggests that equalizing some characteristics (such as wealth) will drive people to intensify their comparisons along still unequal (but formerly less salient) dimensions, thus producing the same constant level of envy pain.⁵³

Thus, as matters stand, legal and economic analyses of negative relative preferences have focused on feelings of envy, and the problem envy poses for social welfare analysis has been disregarded as empirically insignificant, morally irrelevant, or practically irresolvable. This impasse results primarily because the problem is framed solely as one of "envy." Properly understood, however, envy is but one class of relative preferences.

The key point is that not every negative feeling in response to the fortune of others can properly be characterized as envy. Rawls, for example, draws a distinction between the negative reaction those in inferior positions feel toward the more fortunate, and the negative reaction those in superior positions feel

51. Posner, for example, seems to believe that there is not much envy in society. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 439 ("Probably the major cost of poverty . . . is the disutility it imposes on affluent altruists."). Becker says he lacks the information necessary to estimate the true significance of envy and hatred. Becker, *supra* note 29, at 1089. The issue of data is addressed *infra* Part II(A), but it is worth noting here the particularly germane evidence of David Morawetz, who asked two groups to explain how they would react to economic change in their community if everyone else became richer while their economic situation remained the same. David Morawetz et al., *Income Distribution And Self-Rated Happiness: Some Empirical Evidence*, 87 *ECON. J.* 511, 520-21 (1977). He summarizes his findings: "[A]fter a hypothetical *Pareto-optimal change* (some persons economically better off, all others unchanged) only 7 and 12% of respondents would feel happier [in the respective groups], while 54 and 24% would feel less happy . . ." *Id.* at 521 n.2. Morawetz also asked people how they would react if everyone else in their community became poorer while their own economic situation remained the same and found that only 47 and 31% of the members of the respective groups would feel less happy, while 9 and 14% would feel happier. *Id.* at 521. Thus, this "hypothetical '*Pareto-pessimal*' change . . . gets a reception which is not noticeably more hostile than that granted to the *Pareto-optimal change*!" *Id.* at 521-22 n.2.

52. Posner, for example, has at times defended wealth maximization as superior to utilitarianism because the former is able to ignore the claims envy makes for strict equality, while the latter is not. See POSNER, *JUSTICE*, *supra* note 28, at 82-83; see also ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 245 (1974) (arguing that psychic pain of envy is an insufficient category of "external" harm to justify restricting liberty of person whose conduct creates envy in others). Rawls also says that envy, with certain exceptions, is not a "moral feeling" but one of "the vices of hating mankind." JOHN RAWLS, *A THEORY OF JUSTICE* 532-33 (1971). But the exceptions are quite significant: "benign envy" exists where one acknowledges the value of what another has, but does not wish that the other lose the thing of value. *Id.* Rawls also distinguishes the vice of envy from "excusable envy" or resentment, which exist where the "circumstances evoking envy are so compelling" that they constitute a "wound" to self-respect such that "no one can reasonably be asked to overcome his rancorous feelings." *Id.* at 534. The sense of shame and poverty discussed below has more in common with benign envy and excusable envy than one of the "hating vices." See *infra* notes 55-57 and accompanying text.

53. NOZICK, *supra* note 52, at 245.

toward the improving circumstances of the less fortunate; only the former may qualify as “envy.”⁵⁴ Thus, we may divide relative preferences by distinguishing between *maintaining* and *obtaining* a relatively favorable position, that is, into (A) “jealous” or “grudging” desires to maintain a relatively superior position, and (B) desires to obtain a favorable position one currently lacks. But even within category (B), theorists persuasively distinguish envying from coveting. Envy requires not only (1) that one desires or “covets” what another possesses, but also (2) that the covetor consequently feels a threat to his self-esteem and acts to preserve himself in a socially inappropriate manner, typically by belittling the other or denying that the other “deserves” the thing possessed.⁵⁵ Simply to wish for what others have is not envy.⁵⁶ Nor is it envy to experience shame and loss of self-esteem for lacking what others have, when one does not contest that the others deserve what they have.⁵⁷

These distinctions illuminate Adam Smith’s statement that it is primarily in “regard to the sentiments of mankind, that [people] pursue riches and avoid poverty.”⁵⁸ In his analysis of envy, Becker incorrectly contrasts the views of Adam Smith and Thorstein Veblen on the subject.⁵⁹ In Becker’s view, Smith dismisses envy, malice, and resentment as “relatively minor determinant[s] of welfare,” while Veblen treats such motives as “the very stuff of life that dominate everything else.”⁶⁰ But Veblen was concerned not so much with “envy” as with jealous preferences to maintain relative position (category (A)), which motivated the conspicuous consumption of the leisure class.⁶¹ And Smith similarly notes that for “the greater part of rich people, the chief enjoyment of riches consists in the parade of riches.”⁶² As for people who wish to

54. The latter reaction is “jealousy” or “grudgingness”: “A person who is better off may wish those less fortunate than he to stay in their place. He is jealous of his superior position and begrudges them the greater advantages that would put them on a level with himself.” RAWLS, *supra* note 52, at 533; *see also* NOZICK, *supra* note 52, at 239-40 (drawing related distinctions).

55. After reviewing diverse theories of envy, Silver and Sabini propose treating envy as a critical reaction to the loss of self-esteem caused by another’s superior accomplishment. John Sabini & Maury Silver, *Envy*, in *THE SOCIAL CONSTRUCTION OF EMOTIONS* 167, 178 (Rom Harre ed., 1986) [hereinafter Sabini & Silver, *Envy*]. Salovey summarizes this position, finding evidence of envy in the combination of two components: “(a) that actor X has greater success than actor Y, and (b) that Y has acted inappropriately, inconsiderately, or disrespectfully toward X in order to bolster Y’s threatened self-esteem.” Peter Salovey, *Social Comparison Processes in Envy and Jealousy*, in *SOCIAL COMPARISON* 261, 269 (Jerry Suls & Thomas A. Wills eds., 1991) (citing Maury Silver & John Sabini, *The Perception of Envy*, 41 *SOC. PSYCHOL.* 105 (1978)).

56. *See* RAWLS, *supra* note 52, at 533 (contrasting this so-called “benign envy” with true envy, or, “envy proper”).

57. One may concede that another deserves greater success yet still find the comparison painful. The shame one feels at the fact that one does not measure up to the contemporary standard of living of one’s society or one’s peers, for example, may be all the more acute because one believes it *is* deserved.

58. SMITH, *MORAL SENTIMENTS*, *supra* note 25, at 112-113.

59. BECKER, *supra* note 29, at 1089-90.

60. *Id.*

61. *See supra* note 35 and accompanying text.

62. SMITH, *WEALTH OF NATIONS*, *supra* note 29, at 192 (Bk. 1, Ch. XI, Pt. II). *See also* MASON, *supra* note 41, at 17 (“Smith and Veblen believed that ostentatious economic display is generated by specific socioeconomic conditions which make the conspicuous display of wealth a necessary activity for those

acquire relative position they currently lack (category (B)), Smith and Veblen are again in agreement: such desires are best characterized not so much by "envy" as by the desire to live up to the "canons of decency"⁶³ and to avoid the public "shame"⁶⁴ of falling too far behind.

Properly understood, neither Smith nor Veblen viewed envy as dominant, yet both viewed what I call relative preferences as a fundamental human motivation. This distinction between the broad category of relative preferences and the subcategory of envy (developed further in Part II(A)) will permit the analysis of this field to move beyond the impasse created by the three "envy rejoinders" described above.⁶⁵ A handful of economists have made the initial steps toward this broader analysis by focusing on the problems generated by the desire for relative income. Their work, however, still remains at the periphery—or perhaps the "cutting edge"—of economics, and has failed so far to penetrate the field of law and economics.

C. *Beyond Envy: Recent Work Concerning Positional Preferences*

In recent decades, several economists have attempted to explain the apparently widespread discontent with economic growth by noting that individual welfare depends in an important way on relative success.⁶⁶ Most notably, Fred Hirsch has offered a two-step explanation of this dissatisfaction based on his concept of a "positional good."⁶⁷ First, certain inherently scarce goods may be purchased only by those who occupy a relatively favored economic position within society;⁶⁸ second, economic growth may be the product of people repeatedly striving for but failing to acquire the relative wealth necessary to obtain such positional goods.

Positional goods are scarce either for physical or social reasons. Goods are physically scarce when there are physical limits on their creation; for example, the supply of land is physically limited. Social scarcity, on the other hand,

seeking higher personal status and prestige within the community.").

63. VEBLLEN, *supra* note 35, at 87. According to Veblen, the decision to engage in any form of conspicuous waste is not, however, typically a conscious one. "[I]t must not be understood that the motive on which the consumer acts in any given case is [conspicuous waste] in its bald unsophisticated form." *Id.* "Ordinarily [the consumer's] motive is a wish to conform to established usage, to avoid unfavorable notice and comment [and] to live up to the accepted canons of decency in the kind, amount, and grade of goods consumed." *Id.* (emphasis added).

64. See SMITH, *MORAL SENTIMENTS*, *supra* note 25, at 51 ("The poor man . . . is ashamed of his poverty").

65. See *supra* text accompanying notes 51-53.

66. See LESTER C. THURLOW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 189-90* (1980)); Richard Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, in *NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ* 89, 112-114, 121 (Paul A. David & Melvin W. Reder eds., 1974); Haavelmo, *supra* note 48, at 74-75; R. Layard, *Human Satisfaction and Public Policy*, 90 *ECON. J.* 737 (1980).

67. FRED HIRSCH, *SOCIAL LIMITS TO GROWTH passim* (1976).

68. *Id.* at 24.

exists when the satisfaction a good creates depends directly or indirectly on the fact that it is scarce.⁶⁹ Satisfaction depends *directly* on scarcity in the case of the snob who consciously desires goods precisely for their scarcity.⁷⁰ But more importantly, satisfaction may depend *incidentally* on scarcity even where one does not consciously seek what others cannot have.⁷¹ For example, A may desire several full-time, live-in servants for the absolute satisfaction their services provide. In a society with individual households, we cannot all have live-in servants—some of us would have to *be* servants—so such services are a positional good.⁷² Hirsch then claims that economic growth continuously raises, and then frustrates, consumer expectations for positional goods. Wants are frustrated either because positional goods remain too expensive for all but the highest economic class, or because a generally increased level of consumption unexpectedly devalues the good.⁷³

Hirsch fails, however, to explain fully why the existence of positional goods causes discontent. The claim of “frustrated expectations” rests on an unarticulated assumption of imperfect information. In a world of perfect information, people would know (a) that they had to increase their relative, not absolute, income to obtain positional goods and (b) whether a given course of action would increase their relative, rather than absolute, income.⁷⁴ They would decide to sacrifice leisure time for the pursuit of more income only when the expected value of doing so (the probability of gaining relative income times the value of the positional good such income would secure) exceeded the value they placed on the incremental unit of leisure. Individuals would then avoid

69. *Id.* at 20. Although in some sense all scarcity is social (because a good cannot be scarce unless there is some demand for it among members of society), Hirsch means to distinguish between the factors limiting supply. He calls the scarcity physical when the supply is physically limited as in the case of scenic oceanside landscape or Old Masters’ paintings. Practically speaking, it is impossible to make “more” of such goods. Such goods are purchased only by the highest bidder, who naturally tends to be among those with the greatest relative wealth; an increase in overall social wealth will increase the amount bid on such goods, but their scarcity will continue to limit availability to the relatively well-off.

70. *Id.* at 20-22.

71. *Id.*

72. Similarly, managerial jobs require the existence of others one manages. “[W]hereas Napoleon might wish to encourage the belief that every soldier carried in his knapsack a marshal’s baton, it was obviously impossible that *every*—as distinct from *any*—soldier could rise to the position of marshal.” HIRSCH, *supra* note 67, at 23. *Id.* at 23 (citing PHILLIP H. WICKSTEED, *THE COMMON SENSE OF POLITICAL ECONOMY* 657 (1910)). Here Hirsch relies on Sir Roy Harrod, who distinguished between “democratic wealth” that economic growth could provide to everyone at the same time, and “oligarchic wealth” that, regardless of growth, is achievable only by the few. *Id.*; see also Roy F. Harrod, *The Possibility of Economic Satiation—Use of Economic Growth for Improving the Quality of Education and Leisure*, in 1 *PROB. OF U.S. ECON. DEV.* 207, 208-09 (Committee for Econ. Dev., 1958). Harrod concludes that economic growth cannot make more generally available goods such as “mansions to live in, private parks and gardens, stables full of horses, [or] yachts,” use of which depends on the consumption of “a considerable amount of personal services . . . attached to them for their upkeep.” *Id.*

73. As an example of this effect, Hirsch points out that growth greatly increased educational levels, but decreased the value of a college degree in obtaining a job. *Id.* at 36-41.

74. To take one of Hirsch’s examples: if the consumer knows that land is auctioned to the highest bidder, and that general economic growth will increase the absolute value of the winning bid, he will not expect to obtain such land unless he increases his relative wealth.

frustration because their "expectations" would be in line with the actual likelihood of future events. Even in the real world of imperfect information, it is not clear why consumers would systematically overestimate their chances of gaining positional goods. Hirsch does not offer a theory predicting such informational distortion.⁷⁵

Economists have subsequently noted, however, that positional goods continue to pose an allocation problem if consumers fear that they must work harder simply to avoid losing their existing level of positional consumption.⁷⁶ Most importantly, economist Robert Frank⁷⁷ has moved the analysis of relative wants beyond a critique of growth, suggesting that particular examples of collective regulation may desirably limit wasteful investment in the pursuit of relative gain. Where Hirsch's analysis suggests that people might sacrifice too much leisure in a competitive race for consumptive power (because of faulty expectations of what their new income will buy), Frank suggests that people might wastefully sacrifice *nonpositional* commodities in the hope of obtaining more positional commodities. Frank's general normative claim is that individuals competing for positional goods inefficiently overinvest in such goods and underinvest in "nonpositional" goods. His methodological contribution to this

75. Indeed, one might expect that his eloquent warning of a "positional treadmill" would help correct any distortion that exists. *But see* Yew-Kwang Ng, *Economic Growth and Social Welfare: The Need for a Complete Study of Happiness*, 31 KYKLOS 575 (1978) (formalizing work of Hirsch). Ng concedes that the fundamental problem is one of unrealistic aspirations—growth raises the expectations of consumers for positional goods that proportional growth will not help them obtain—but says that in this context, claims of perfect foresight are "dubious." *Id.* at 581-82.

76. Contemporaneously with Hirsch, Tibor Scitovsky noted the problem of status-seeking behavior, where status is, in Hirsch's terms, a positional good. TIBOR SCITOVSKY, *THE JOYLESS ECONOMY* (1976). Scitovsky observes that sometimes people seek status by a "ranking on a one-dimensional scale" such as income or wealth. *Id.* at 119. The problem with wealth dependent status, Scitovsky argues, is that it represents "a zero-sum game," in which "one person's gain in status is automatically matched by an equal loss of status suffered by those he now outranks." *Id.* at 119. Because the amount of one's income is not usually public information, part of this status game involves demonstrating income by "appropriate spending behavior," consisting in part of emulating the wealthy. *Id.* Scitovsky's key insight is that "there need be neither an end to such competitive increase in conspicuous consumption *nor any gain to the players engaged in this competitive game taken as a whole.*" *Id.* at 120 (emphasis added). Social wealth, which would include all such expenditures, is thereby decoupled from the achievement of social welfare. Other economists have made recent contributions to a normative analysis of the desire for status. *See, e.g.,* Philip R.P. Coelho, *An Examination into the Causes of Economic Growth: Status as an Economic Good*, 7 RES. LAW & ECON. 89 (1985); Roger D. Congleton, *Efficient Status Seeking: Externalities, and the Evolution of Status Games*, 11 J. ECON. BEHAV. & ORG. 175 (1989); Kai A. Konrad, *Statuspräferenzen: Soziobiologische Ursachen, Statuswettrüsten und seine Besteuerung*, 43 KYKLOS 249 (1990); Layard, *supra* note 66; Ng, *supra* note 75; Norman J. Ireland, *On Limiting the Market for Status Signals* (1992) (unpublished manuscript, on file with author).

77. *See* ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985) [hereinafter FRANK, *THE RIGHT POND*]; Robert H. Frank, *Positional Externalities*, in STRATEGY AND CHOICE 25 (Richard J. Zeckhauser ed., 1991) [hereinafter Frank, *Positional Externalities*]; Robert H. Frank, *Frames of Reference and the Quality of Life*, 79 AM. ECON. REV. 80 (1989) [hereinafter Frank, *Frames of Reference*]; Frank, *Nonpositional Goods*, *supra* note 39; Robert H. Frank, *Interdependent Preferences and the Competitive Wage Structure*, 15 RAND J. ECON. 510 (1984) [hereinafter Frank, *Interdependent Preferences*]; Robert H. Frank, *Are Workers Paid their Marginal Products?* 74 AM. ECON. REV. 549 (1984) [hereinafter Frank, *Marginal Products*]; Robert H. Frank, *Envy and the Optimal Purchase of Unobservable Commodities: The Case of Safety*, in THE VALUE OF LIFE AND SAFETY 145 (Michael W. Jones-Lee ed., 1982) [hereinafter Frank, *Unobservable Commodities*].

analysis is to introduce the model of a prisoner's dilemma⁷⁸ to explain the means by which individuals competing for distinction inefficiently allocate resources.

This analysis is best summarized by the case of workplace health and safety. Frank argues that workers competing for relative income may jointly sacrifice safety for higher nominal income either to gain or avoid losing relative income, only to find that the parallel sacrifices of other workers cancel out the desired relative effects. Under conditions of this "prisoner's dilemma," government regulations mandating minimum safety standards may limit the investment wasted in acquiring or maintaining relative income. Frank proposes the following example. A and B are two workers each facing a choice between a job at a "clean" mine for \$150 a week and a job at a "dusty" mine for \$200 a week. A and B each have a relative preference for greater income than the other. In such circumstances, "the payoff to each from working in a given mine will depend in a clear way on the mine chosen by the other."⁷⁹

Assume that, in the absence of concern about relative position, A and B would each choose to work in the clean mine, valuing its healthier conditions at more than \$50 a week. Given a sufficiently strong concern with relative income, however, each would rank his choices accordingly: (1) work in dirty mine while the other works in clean mine (gaining the most in relative position); (2) both work in clean mine; (3) both work in dirty mine; (4) work in clean mine while the other works in dirty mine (losing the most in relative position). Under these circumstances, each worker will choose to work in the dirty mine to avoid outcome (4) and to have a chance at outcome (1).⁸⁰ Their joint decisions would produce outcome (3), in which the higher absolute income produces no relative advantage for either. Not only do A and B each rank outcome (3) lower than outcome (2), but moving from (2) to (3) means that each has given up the health advantages of the cleaner mine with no compensating gain. Consequently, a collective rule mandating a minimum level of the nonpositional good of long term health, requiring that all mines be "clean," would prevent this misallocation of resources into individual competition for relative position and make both workers better off. Thus, certain occupational health and safety regulations might be Pareto efficient in providing a minimum level of health or safety if individuals' desires for relative wealth otherwise cause them to underinvest in such goods.⁸¹

78. For a general description of the prisoner's dilemma model, see ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7-11 (1984).

79. See Frank, *Nonpositional Goods*, *supra* note 39, at 102.

80. More technically, the decision to work in the dirty mine "dominates" the other decisions. If B works in the clean mine, then A prefers the dirty mine because it secures its highest ranked outcome (1). If B works in the dirty mine, then A prefers the same because it avoids its lowest ranked outcome (4). B's choices are the same.

81. Frank draws an analogy between the mining example and one he borrows from Thomas Schelling concerning hockey helmets. See THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 213-14

The analyses of Hirsch and Frank move well beyond the simple consideration of envy and answer the three rejoinders discussed above. Most clearly, the prisoner's dilemma analysis renders irrelevant Nozick's "principle of conservation of envy." In the above example, Frank's justification for requiring safe mines is not that people will feel less envious, but that the regulation prevents workers from needlessly sacrificing health and safety by attempting to gain a positional advantage. Workers will still want relative income and feel dissatisfaction from failing to get it—this relative preference is "conserved" in Nozick's terms—but they will not invest as much to reach whatever relative position they obtain. For the same reason, Frank's analysis provides a conventional economic basis for regulation: not to diminish morally dubious feelings of envy, nor even to reduce morally sound feelings of resentment or shame, but to facilitate greater satisfaction of absolute preferences. In addition, if the "envy problem" is recast as a more general desire for relative position, i.e., if we imagine that people seek to *preserve* as well as *acquire* relative position, then collective regulation need not merely restrict successful persons to benefit those who envy them, but may restrict all individuals from harming each other by investing in maintenance or acquisition of relative position.⁸² Third and finally, Frank does not ask us to take the existence of such desires on faith; he

(1978). Schelling notes that in some hockey leagues, some of the same players who chose not to wear a protective helmet supported adoption of a league rule requiring everyone to wear such helmets. *Id.* at 213, 223-24. Frank's explanation for such apparently inconsistent preferences is that individual hockey players face a choice conforming to the model of a prisoner's dilemma. Wearing a helmet may significantly decrease the risk of certain injuries, but may slightly decrease a player's vision or hearing (or the ability to project a fierce, intimidating image). Thus, in deciding whether to wear a helmet, a player weighs the increment of safety against a possible loss of competitive edge. Of course, where everyone (or an equal number on each team) chooses not to wear a helmet, neither side gains a competitive advantage nor suffers a competitive loss, but each side loses potential safety. The investment each team makes—forgone safety—is thus wasted, yet under certain circumstances, we expect the players to make exactly that decision.

Similar analysis explains rules prohibiting athletes from using performance-enhancing drugs, such as steroids. See generally Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93, 105-07 (1990). These drugs have adverse health consequences. *Id.* An athlete may decide, however, that the health costs are justified for competitive reasons: either to gain or to avoid losing an edge on other athletes. Yet as more and more athletes begin to use steroids, the competitive effects of the drug are eliminated; with widespread use, it is as if no one used the drug, but many suffer from the adverse health effects. Collective prohibition, if effective, would prevent anyone from losing a competitive edge relative to others, yet would also protect everyone from harms to health.

82. Of course, it is still possible to argue that preferences for maintaining a relatively favorable position are also immoral. Jon Elster, for example, says that the desire for positional goods is "arguably" an "unethical" preference. ELSTER *supra* note 15, at 22. "The widespread desire for positional goods can lead to less welfare for everybody, so that such preferences fail to pass the Kantian generalization test." *Id.* at 22-23. Elster's point seems to apply with equal force, however, to all negative relative preferences. As I show below, even the desire to avoid being ranked at the bottom of some scale, if people invest enough in an effort to avoid the lowest rank, may lead to "less welfare for everybody." So, presumably, even this somewhat tame and understandable relative preference may fail the Kantian generalization test. Although it may be useful to pursue moral distinctions between different types of other-regarding preferences, this Article instead focuses on the consequences of relative preferences. This consequentialist approach may ultimately illuminate moral differences in different types of relative preferences.

offers some evidence supporting the view that the desire for relative position is both strong and pervasive.⁸³

Frank's work is genuinely pathbreaking. To date, however, its value has been lost to economic analysis of law.⁸⁴ Perhaps a partial (but only partial) explanation for this omission is that Frank's analysis leaves some important questions unanswered. To understand and accept his argument, we must obtain a fully satisfactory answer to this question: why would people care about relative wages or relative quantities of some goods but not about their relative consumption of other goods such as safety? In other words, if people care about *relative* income, why not include the value of safety as part of one's income? Without fully distinguishing between them, Frank suggests two possible answers that I term the "positional goods theory" and the "frame of reference" or "status" theory. Each theory requires further elaboration.

First, people may want disposable income in order to purchase positional goods. For example, Frank suggests that people may be inclined to seek types of wealth that they can transfer to their children, so as to provide their children with *relative* advantages over other children.⁸⁵ Disposable income can be used to purchase, for example, superior educational opportunities for one's children, but nondisposable income—like safety—cannot. So miners A and B may wish to purchase the "positional good" of a "superior" education, and each realizes that he needs a relatively superior wage in order to do so.⁸⁶

This version of Frank's theory is similar to Hirsch's theory of positional goods. Relative wealth is still desired merely as a means of satisfying absolute

83. His data consists of biological studies of animals and humans showing that changes in status cause physiological reactions, and economic surveys showing that self-rated happiness is more closely associated with relative than absolute income. This evidence is subject to serious reservations. See *infra* notes 114-116 and accompanying text.

84. Susan Rose-Ackerman's textual reference to Frank's work, the most extensive discussion of his prisoner's dilemma model in legal literature, is a brief and cursory paragraph. Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 357-58 (1988). See also John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1012 n.98 (1991).

85. Frank offers an evolutionary basis for such a desire:

A more general implication of [the evolutionary] view is that an element of almost overriding importance in the structure of human motivation will be a taste for seeing to it that one's children are launched in life as successfully as possible. Now, how successful one's children will be in life depends much less on their skills and endowments in any absolute sense than on how these compare with the skills and endowments of others. . . . Suppose we take as a working hypothesis that a parent's utility function is programmed with an instruction something like, 'Feel bad whenever your children are less well provided for than are the children of your peers.'

Frank, *Nonpositional Goods*, *supra* note 39, at 102. See also FRANK, *THE RIGHT POND*, *supra* note 77, at 130 ("If our preferences were forged in the crucible of natural selection, then being able to provide extra [relative] advantages for our children should indeed taste sweeter than the contemplation of an extended old age.").

86. The relative desire for having more disposable income is merely "*instrumental*" to securing financial security for one's child. Frank, *Nonpositional Goods*, *supra* note 39, at 103. Parents merely need recognize that "[s]uccess in the labor market . . . depends much less on the quality of instruction one receives, per se, than on how one's training compares with the training received by others," to conclude that they need to acquire a relatively high disposable income for that purpose. *Id.* at 102.

ends.⁸⁷ Frank's refinement is to show, first, that the costs of investment in positional goods may be a sacrifice of—not just leisure—but any number of nonpositional goods, such as health or safety. Second, Frank's explanation does not need a theory of information distortion; a prisoner's dilemma produces an inefficient result even if the participants have perfect information.⁸⁸ But the positional goods theory is limited to whatever number of goods have the positional qualities that create such a dilemma.⁸⁹ As long as we focus on absolute preferences for positional goods, the resulting prisoner's dilemma is limited by the enumeration of such goods.

Frank's work, however, provides a more general explanation of why the desire for relative income may not include a desire for relative safety, one that approaches recognition of relative preferences. This "frame of reference" or "status" theory is premised on the distinction between "observable" and "unobservable" goods. Frank calls goods "observable" when they are typically consumed in public view (e.g., automobiles, clothing, backyard swimming pools), while unobservable goods are those typically consumed out of public view (e.g., savings, insurance, certain kinds of safety).⁹⁰ Given real world costs of gathering or disseminating information, this simple distinction means that people are more aware of the social level of consumption of some goods than others. Frank then suggests two reasons why people might sacrifice unobservable goods in order to afford more observable goods. First, Frank posits that consumers judge how well off they are in relation to psychological standards of comparison or "frames of reference," including how much of a com-

87. For example, Frank argues that "blue laws" limiting store hours may prevent owners competing for loyal customers from inefficiently extending store hours to an maximum of twenty-four per day. Frank, *Positional Externalities*, *supra* note 77, at 26-27. Such competitive behavior clearly depends only on the selfish desire to maximize profits, not relative preferences.

88. Miners A and B choose to work in the dusty mine even knowing that they would both be better off if each worked in the clean mine. Frank reveals this dilemma with the insight that some goods, like childhood education, are "positional" throughout the entire consumptive spectrum. For such goods, even when a consumer determines that he cannot achieve a positional gain, he may still invest in the good to avoid moving backward and losing ground to other individuals who seek to improve their position. *Id.* at 106. Further, if people care not only about their ordinal ranking but their cardinal position within the distribution, even a consumer who knows he cannot lose his existing rank will sacrifice nonpositional goods simply to widen (or maintain) the gap to the next lowest rank (and to narrow or maintain the gap to the next highest rank). *Id.* at 106 n.6.

89. The prisoner's dilemma will appear in markets in which most consumers worry, not just about achieving the top prize, but about falling behind their current level of consumption no matter where they currently rank. The education one secures for one's children has this characteristic, because most consumers worry about keeping their current "position" in this market (providing education) even if they recognize it is futile to strive for the top position. But many of the goods Hirsch considered as "positional" do not present this problem because so few consumers have any position to lose. For example, a small fraction of the population currently consumes original artworks of long-dead masters; the problem of consumers sacrificing greater leisure to avoid falling further behind in such consumption is quite small.

Frank also argues, however, that in markets in which the revenues are highly concentrated among the top performers, participants will systematically overinvest in competing for that prize. See Robert J. Frank & Philip H. Cook, *Winner-Take-All Markets* (1990) (unpublished manuscript, on file with author).

90. Frank, *Unobservable Commodities*, *supra* note 77, at 146.

modity others are consuming.⁹¹ Frank notes: "One can't envy what one can't see,"⁹² and we might add, one cannot take pride in having more of something than others unless one knows how much the others have. Thus people are more likely to feel that they lack commodities that others are visibly consuming than those whose consumption is unobservable. The feeling that one has "enough" safety may not change as others unobservably consume more safety, but the feeling that one has an adequate level of an observable good declines as others consume more. In the above example, the result is that A and B sacrifice safety to raise themselves up to or above an observable standard of comparison for those things A and B purchase with the additional wage.

Similarly, the difference between observable and unobservable goods matters to one's social status. In a different context—a challenge to the marginal productivity theory of wages—Frank suggests that people desire "status" among their peers, and that total income is a major determinant of that status.⁹³ For purposes of Frank's alternative theory of wages, he assumes that workers in a firm are aware of their coworkers' total compensation package.⁹⁴ But to whatever extent this assumption is true for coworkers, most people do not directly know the income of their "peers" outside their workplace, but instead must rely on inferences from observable behavior. Thus, Frank's distinction between observable and unobservable goods suggests a second reason for people to consume competitively the former to the detriment of the latter: if one's social status is based not on one's income but on what others *perceive* one's income to be, then observable goods will be better at "demonstrating" purchasing power than are unobservable goods.⁹⁵ People will value the consumption of goods that favorably signal their income over unobservable goods that do not.⁹⁶

In this explanation, the critical distinction between observable and unobservable goods, although plausible, requires further explanation. If people compete for status by demonstrating their wealth, we might expect that individuals would work to eliminate the distinction by "advertising" their unobservable

91. Frank, *Frames of Reference*, *supra* note 77, at 80-81.

92. Frank, *Unobservable Commodities*, *supra* note 77, at 146.

93. See *infra* notes 190-191 and accompanying text.

94. See Frank, *Marginal Products*, *supra* note 77.

95. Frank, *Nonpositional Goods*, *supra* note 39, at 101. Even within the category of observable goods, Frank notes that "interpersonal comparisons with respect to certain *types* of consumption will be more important than will others." *Id.* He does not explain why this is so.

96. The status explanation overcomes an objection to the frame of reference explanation. Being in the business of mining coal, miners A and B may each know (1) the health and safety consequences of working in a clean or dusty mine and (2) which mines are clean and which are dusty. If A and B are using each other's consumption as a frame of reference, each may also know (3) where the other works. Under these circumstances, workplace health and safety is as observable between these two miners as any other consumption, and there would be no reason to expect them to sacrifice health and safety for more observable goods. On the other hand, the rest of the (nonmining) world may evaluate the social standing of A and B at least partly on the basis of observable consumption, not being aware of the above mining information. To compete for this status, A and B may sacrifice health and safety measures for more commonly observable goods.

consumption. Advertising unobservable consumption such as safety, or even announcing one's income or wealth directly, would permit one to obtain the maximum status possible from one's income without sacrificing any otherwise unobservable consumption. Absent some explanation of why such advertising fails, the prisoner's dilemma caused by the pursuit of relative income appears less significant. Even if such advertising has some positive cost, the magnitude of the dilemma would appear to be limited to the cost of an announcement that eliminates the observable/unobservable good distinction in a particular context.

Frank's work raises this question and several more. Does the social science evidence support the existence of relative wants, and particularly, the distinction between observable and unobservable goods? If position is important, do individuals care about their position relative to other individuals, as Frank asserts, or are they concerned with the position of their social groups compared to other groups, or both? Turning to the theoretical issues, what are the specific conditions that create a prisoner's dilemma, in which any investment in position is wasteful? Certainly the mere existence of the desire for status, or other relative preferences, does not inevitably lead to a collective action problem. And there are competitions for position that the prisoner's dilemma does not describe, as when one party, by investing more heavily than others, is made better off by the superior position he achieves. Is there any inefficiency in such cases when one party in a positional race actually "wins"? Finally, if consumption has external costs (by lowering the relative position of others), why wouldn't individuals privately bargain toward a solution of this problem as predicted by the Coase Theorem? The next Part takes the work of Hirsch and Frank as a starting point, and, organized around these questions, develops a general theory of a market failure caused by individual attempts to satisfy relative preferences. Part III then applies the theory to criticize some conventional economic analyses of law that ignore relative preferences.

II. A SOCIOECONOMIC THEORY OF RELATIVE PREFERENCES AND COMPETITIVE CONSUMPTION

This Part presents a theory of a market failure that I term "competitive consumption."⁹⁷ Competitive consumption results, under circumstances described below, when individuals compete to satisfy their relative preferences

97. See REDER, *supra* note 34, at 65-66 (introducing term "competitive consumption"). See also W.E. WEYL, *THE NEW DEMOCRACY, AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES* 246 (1912) (discussing "a frantic competitive consumption" that "increase[s] the general social friction and produce[s] an acute social irritation"), *quoted in* MASON, *supra* note 41, at 77-78; GRANT McCracken, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 15 (1988) (tracing the rise in consumerism to Elizabeth I's use of expenditure as an instrument of government, causing the Noblemen to become "slaves of competitive consumption").

(e.g., “when A tries to outdo B . . . in the lavishness of his home”).⁹⁸ Competitive consumption is a market failure because the resources individuals invest in attempting to satisfy certain relative preferences could produce greater satisfaction if invested in satisfying other preferences. The analysis is organized around three evidentiary and theoretical weaknesses in the existing work on relative preferences.

First, Frank’s review of the data concerning relative wants—and that of the other economists recently addressing relative wants—is insufficiently rich. To convince those skeptical of the importance of relative preferences to human behavior, it is necessary to consider a range of social science data broader than that which Frank and others present, especially since, for reasons explained below,⁹⁹ their data turns out to be less persuasive than it first appears. Thus, I call my theory “socioeconomic” because it is rooted in an interdisciplinary description of relative preferences, drawing—in Section A below—on social psychology, sociology, and anthropology. Besides establishing relative preferences as fundamental to human motivation, this data further illuminates the genuine distinction between observable and unobservable goods.

Second, Section B draws on this social science literature to explain the market failure of competitive consumption. I introduce the concept of “inherent” preference conflict, argue that resources invested in satisfying inherently conflicting preferences are wasted, and show that the conditions of such conflict are often present for relative preferences. The analysis is broader than Frank’s prisoner’s dilemma model both because it applies to desires for less than the top position and because it applies to cases where one party “wins” the positional competition. The broader theoretical framework permits application of the concept of preference conflict to phenomena more varied than competition for relative income, such as that of race discrimination.¹⁰⁰

Finally, Section C considers the Coase Theorem.¹⁰¹ Even though people have strong preferences for relative position, if it is in their mutual interest to limit investments in acquiring or preserving position, they will have an incentive to reach private agreements to limit these unproductive investments. Section C considers how transaction costs may prevent private solutions to the problems posed by relative preferences and when those costs will likely be present. Some of the costs are conventional obstacles to Coasean bargaining, but relative preferences pose some special transaction costs as well.

98. REDER, *supra* note 34, at 65.

99. See *infra* notes 114–116 and accompanying text.

100. See *infra*, Part III(D).

101. The “Coase Theorem” derives from Ronald Coase’s analysis of externalities in *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). See *infra* note 241.

A. *The Source, Nature and Scope of Relative Preferences: Evidence from Psychology, Sociology, Anthropology, and Economics*

Economic analysis typically makes assumptions that are conceded to be unrealistic. Some simplification of reality is necessary to permit any theory building; as long as the matter ignored is not significant, the theory may suffice. It is essential, therefore, to demonstrate the significance of relative preferences as an empirical matter in order to justify their inclusion in consumer theory. While striking out to enlarge the neoclassical economic model of human behavior, Frank and the other economists addressing these preferences have failed to make the best case for the intensity and pervasiveness of relative preferences.

Economists addressing relative wants have relied primarily on two types of evidence. First, Frank and Coelho offer biological evidence to support an evolutionary basis for relative preferences.¹⁰² Frank reviews biological studies of human and nonhuman primates in which changes in social status are associated with physiological changes.¹⁰³ Coelho reviews studies of the social structure of various animals, showing that status differentiation is common.¹⁰⁴ This evidence is suggestive but incomplete. Physiological changes are certainly significant; they provide strong confirmation of a sociological or psychological claim that people desire status. But by themselves, the biological studies leave unanswered the question whether physiological changes associated with status in turn "cause" behavior,¹⁰⁵ or whether human culture is sufficiently like animal culture to use the latter to make useful predictions about the former.¹⁰⁶ Some additional, more direct, evidence, remains essential.

Frank also points to some direct evidence:¹⁰⁷ Richard Easterlin's compari-

102. For Frank's explanation of a sociobiological origin of positional preferences, see *supra* note 85. For Coelho's theory, see *supra* note 76, at 91-93. See also KONRAD, *supra* note 76, at 251-56. Konrad asks as many questions as he answers, but suggests (1) that as a matter of biological perpetuation, individuals will tend to favor mating with individuals with "especially well-suited genetic qualities," (2) that because they lack direct knowledge of the suitability of another's genes, individuals use observable characteristics correlated with genetic suitability, and (3) that status is such a characteristic to the extent a culture awards status for characteristics (like strength, skill, knowledge) that aid in survival. *Id.*

103. FRANK, *THE RIGHT POND*, *supra* note 77, at 21-26. For example, in studies of vervet monkeys and humans, changes in a subject's group status cause changes in the blood concentration of the neurotransmitter serotonin. *Id.* at 22-23.

104. Coelho, *supra*, note 76, at 92-93 & nn.8-13. Coelho states that "[t]here is not one species of social animal that reproduces sexually that does not have hierarchies, social rankings, and dominance," and particularly notes that "[s]ocial primates live in groups (tribes), have social distinctions, and are competitive for status within their tribe." *Id.* at 92.

105. Existing research suggests that serotonin levels create some tendencies of behavior, but as Frank admits, our understanding of how serotonin affects behavior is "still very much in its infancy." FRANK, *THE RIGHT POND*, *supra* note 77, at 25.

106. MASON, *supra* note 41, at 17-20, criticizes theories that ignore the importance of cultural environment to conspicuous consumption, i.e., theories that "the basic drive is unlearned and would be significant under any social conditions." *Id.* at 19. As his historic analysis of the United States and England shows, conspicuous consumption has taken different forms and existed in varying intensities over time.

107. FRANK, *THE RIGHT POND*, *supra* note 77, at 26-30. Frank also argues that various economic

son of income and self-reported happiness, which found happiness more closely associated with relative than absolute income.¹⁰⁸ Virtually every economist addressing the issue of relative desires has relied heavily, if not exclusively, on this one apparently dispositive source.¹⁰⁹ In 1974, Easterlin reviewed income data and happiness surveys collected in nineteen countries over approximately 25 years.¹¹⁰ *Within* each nation, he found that those in the highest income group were happier on average than those in the lowest group; in other words, income was positively related to happiness. But *among* the nineteen nations, he found little relationship between income and happiness; the average citizen of a wealthy country was not significantly happier than the average citizen of a poor country.¹¹¹ Easterlin explained the conflict between the within-country and among-country comparisons by a theory of relative income: people care more about their *relative* than absolute income,¹¹² but only care about income “relative” to those around them (within their nation). Thus those who rank above their nation’s average consumption level are, on average, happier than those who do not, but the above average wealth of one country does not mean its inhabitants are, on average, happier than the inhabitants of countries of below average wealth.¹¹³

phenomena (like wages and savings) are best explained by a theory that incorporates a desire for relative income. *Id.* at 58-98, 143-61. Because alternate theories may still account for the data, however, the persuasiveness of the relative income theory of wages or savings depends in part on direct evidence of relative preferences.

108. Easterlin, *supra* note 66.

109. Hirsch calls Easterlin’s data “[p]erhaps the most striking indication of the significance of relative income” HIRSCH, *supra* note 67, at 111. Coelho states that “the evidence . . . overwhelmingly support[s] the proposition” that “humans have interdependent utility functions,” Coelho *supra* note 76, at 96, but the only social science evidence he actually cites is Easterlin. *Id.* at 111 n.22. See also Ng, *supra* note 75, at 584 (relying on Easterlin); Layard, *supra* note 66, at 737, nn.1-2 (1980) (stating that “rich countries appear to be no happier than poorer ones,” citing Easterlin); FRANK, THE RIGHT POND, *supra* note 77, at 26-31 (Tables 2.1 and 2.2, Figure 2.6); Frank, *Interdependent Preferences*, *supra* note 77, at 511 n.3. This data has achieved such notoriety that it has been called the “Easterlin paradox.” Moses Abramovitz, *Economic Growth and Its Discontents*, in *ECONOMICS AND HUMAN WELFARE* 3, 7 (Michael Boskin ed. 1979).

110. Easterlin, *supra* note 66, at 89-90.

111. Rather than finding that wealthier nations had happier inhabitants, many of the nations, including the poorest four, clustered around the mean happiness level. In addition to the international comparisons, Easterlin conducted a time series study within the United States. He found no significant relationship between income and happiness; as American income rose from 1946 to 1970, self-reported happiness fluctuated up and down, but with only a small upward trend. See also Otis D. Duncan, *Does Money Buy Satisfaction?* 2 SOC. INDICATORS RES. 267 (1975) (surveys of Detroit area housewives showed no significant difference in satisfaction with standard of living between 1955 and 1971, despite fact that median income in constant (1971) dollars rose by factor of 1.42 during same period); ANGUS CAMPBELL, THE SENSE OF WELL-BEING IN AMERICA: RECENT PATTERNS AND TRENDS 27-38 (1981) (time series study suggests that there was downward drift in happiness in United States from 1957 to 1978, while there was much economic growth).

112. Following Duesenberry, he postulates that the utility people derive from their consumption expenditure “is a function, not of the absolute level of [their] expenditure, but of the ratio of [their] current expenditure to that of other people.” Easterlin, *supra* note 66, at 112.

113. The relative income thesis also explains the time series data *supra* note 111: average happiness remains constant as income rises because the consumption standard against which people measure their income is also rising. Because relative income is the concern, it is possible that those in the current lowest income group feel less happiness than the middle class of prior decades even though their absolute income

Easterlin seems to provide startling and definitive proof of the power of relative wants. But the evidence is a little too startling; recent data contradicts Easterlin's findings. Surveys from a larger number of countries reveal a distinctly positive relationship between happiness and wealth *among* countries.¹¹⁴ Ruut Veenhoven has also shown that Easterlin's own data actually prove a positive correlation between happiness and national wealth.¹¹⁵ Veenhoven concludes that absolute income strongly influences happiness, although there are diminishing returns from income as absolute needs are satisfied.¹¹⁶ Aside from apparent empirical invalidity, the reliance on Easterlin's study focuses too much on the desire for relative income or wealth. If we wish to establish a broader theory of relative preferences, one that may include the desire for things other than relative income, then we should consider the general psychological and sociological sources of such preferences.

Questioning the Easterlin results does not mean that people do not have relative wants. But rejection of Easterlin does require a renewed inquiry into the existence and significance of relative preferences. To some extent the Easterlin data made the proof appear too easy and forestalled a broader review of the social science literature.

is higher. Easterlin, *supra* note 66, at 112.

114. See George Gallup, *Human Needs and Satisfaction: A Global Survey*, 40 PUB. OP. Q. 459, 460, 463 (1976) (sample included 60 nations containing two-thirds of world population; finding "[t]he nations with the highest per capita income almost invariably top every test of psychological well-being and satisfaction in major aspects of life."); Ruut Veenhoven, *Is Happiness Relative?*, 24 SOC. INDICATORS RES. 1, 12 (1991) (more recent and comprehensive data show "correlation between GNP per capita and average happiness is +0.84! ($p < 0.01$)"); Ed Diener et al., *The Relationship Between Income and Subjective Well-Being: Relative or Absolute?* 17-22 (1991) (unpublished manuscript, on file with author) (survey of 18,032 college students in 39 countries showed that "average life satisfaction" and "global happiness" both "correlated significantly across countries with GNP per person"). See also Morris Silver, *Money and Happiness?: Towards 'Eudaimonology'*, 33 KYKLOS 157 (1980).

115. Veenhoven, *supra* note 114, at 10-12. Veenhoven argues that Easterlin's chart showing the absence of a relationship between wealth and happiness *among* countries "is simply misleading. Easterlin played the classic trick of scales: the scale of national wealth is 2.5 times longer than the happiness scale and logarithmic. If both variables are plotted on equal scales . . . we . . . see a clear positive relationship." *Id.* at 10.

116. Veenhoven argues that since income is used to satisfy basic needs, we should expect the effect of income on happiness to diminish as those needs are satisfied. *Id.* at 26-27. Veenhoven uses the concept of diminishing returns to explain Easterlin's time series study of the United States, and similar data described *supra* note 111. The fact that growth between 1945 and 1970 did not significantly affect happiness does not prove that absolute income is irrelevant, according to Veenhoven, only that absolute income has little effect on happiness once affluence is achieved. Because "[t]he USA was already quite affluent at the end of World War II . . . it is . . . quite comprehensible that further increase did not add much to happiness." Veenhoven, *supra* note 114, at 19. Time series data from several other countries over roughly the same period—countries beginning at a level lower than the United States—shows a general rise in happiness. *Id.*

Of course, if the marginal effect of absolute income on happiness declines toward zero, any remaining effect of income on happiness must be due to the pleasures of relative income. Veenhoven claims, however, that *within* countries, the relationship between income and happiness is much weaker in affluent countries than poor ones. *Id.* at 12. In some of the affluent countries, there is *no* remaining relationship between income and happiness, but within the wealthiest he surveyed—the United States—there remains a significant correlation between income and happiness. *Id.* Thus, despite the force of his general criticism of Easterlin, there is still some evidence of the desire for relative income.

1. *The Process of Social Comparison and the Theory of Relative Deprivation*

The definition I have given to negative relative preferences¹¹⁷ bears substantial relation to social science research on the human drive toward social comparison. From its beginnings, social psychology has emphasized the importance of social context to the development of an individual's self-concept,¹¹⁸ and, in particular, the fact that people compare themselves with other people. Various theories compete for the best explanation of why people compare themselves with one another, and for the best predictor of which "others" will be chosen for comparison, what aspects will be compared, and the cognitive and emotional effect such comparisons will have. Existing constructs—the psychological theory of social comparison and the sociological theory of relative deprivation—reveal that comparison with others is a prevalent phenomenon, and that people's emotional state, their short-term moods and long-term happiness, often depend on their ranking in comparison with others.¹¹⁹

Within social psychology, the body of work most relevant to relative preferences is "social comparison theory." Leon Festinger introduced social comparison theory in 1954 to explain the particular relationship between social groups and individual self-assessment.¹²⁰ Festinger hypothesized that individu-

117. See *supra* text accompanying notes 14-24.

118. In the nineteenth century, William James noted the effect of comparisons to others on self-esteem. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (Dover, 1950) (1890). Early in this century, Charles Horton Cooley introduced the concept of the "looking-glass self": people are "ashamed to be seen evasive in the presence of a straightforward man, cowardly in the presence of a brave one, gross in the eyes of a refined one, and so on. We always imagine, and in imagining share the judgments of the other mind." CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (1902) *quoted in* George Goethals, *Social Comparison Theory: Psychology from the Lost and Found*, 12 *PERSONALITY & SOC. PSYCHOL. BULL.* 261, 273 (1986).

119. Social comparison and relative deprivation theories have emerged from a group of theories that share much in common for the purposes of this Article. For a survey and synthesis of other theories of social psychology and sociology that are similar to social comparison and relative deprivation theories, see Thomas F. Pettigrew, *Social Evaluation Theory: Convergences and Applications*, in *NEBRASKA SYMPOSIUM ON MOTIVATION* 241 (D. Levine ed., 1967). Pettigrew traces the origins of comparison theory to some of the earliest social psychological thinking. *Id.* He finds within the work of various psychologists, including Leon Festinger, *A Theory of Social Comparison Processes*, 7 *HUMAN RELATIONS* 117 (1954), and sociologists, including SAMUEL A. STOUFFER, *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE* (1949), a core of agreement he called "social evaluation theory." Pettigrew, *supra*, at 242 (these theories "are variations on the same theoretical theme of social evaluation"). According to Pettigrew, the basic tenets of social evaluation theory are (1) "that human beings learn about themselves by comparing themselves to others"; and (2) that "the process of social evaluation leads to positive, neutral, or negative self-ratings which are relative to the standards set by the individuals employed for comparison." *Id.* at 243 (emphasis omitted). As the remainder of this Section reveals, modern work on social evaluation occurs primarily within the fields of social comparison and relative deprivation theories.

120. See Festinger, *supra* note 119. See also Leon Festinger, *Motivation Leading to Social Behavior*, in 2 *NEBRASKA SYMPOSIUM ON MOTIVATION* 191, 217 (Marshall R. Jones ed., 1954) (shorter summary). Festinger is probably best known for his later work introducing the concept of cognitive dissonance. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). For a history of social comparison theory, see Ladd Wheeler, *A Brief History of Social Comparison Theory*, in *SOCIAL COMPARISON*, *supra* note 55, at 3 and Goethals, *supra* note 118. The major compilations of social comparison work are *Studies in Social Comparison*, in *J. EXPERIMENTAL SOC. PSYCHOL.* (Bibb Latané ed., supp. 1966); *SOCIAL COMPARISON*

als seek to evaluate their own opinions and abilities, that sometimes there is no absolute metric available for such self-evaluation, and that people will then attempt to compare their opinions and abilities with others (called "comparison others"). One of the key insights by Festinger, confirmed by much subsequent research, is that people do not generally compare themselves with the rest of the world but with some much more discrete group, typically with others they see as being "similar" to themselves, either in general or for the characteristic being compared.¹²¹

As initially formulated, Festinger's social comparison theory easily fits within a standard economic explanation of consumer behavior. To maximize welfare, consumers require accurate information concerning their own opinions and abilities. For example, to make intelligent decisions about what kind and how much education or training one should purchase (investment in human capital), or what job one should pursue, it is important to know one's aptitude for various tasks. When there is no absolute scale for measuring one's abilities or traits (and perhaps even when there is), it is rational to seek a relative ranking by comparing oneself with others. If everyone you know is funnier than you are, you may want to think about being a law professor (but not a comedy writer).

One of the major changes in social comparison theory, however, has been the recognition of a second function of comparisons. In addition to self-evaluation, the motive for social comparison may be "self-enhancement," i.e., to improve one's self-esteem.¹²² As Jerome Singer put it, people evaluate not only an opinion or ability but "their opinions of themselves. . . . When a person asks 'How much X do I have [compared to others]?' he is also asking 'What sort of person am I for possessing that much X?'"¹²³ A favorable interperson-

PROCESSES: THEORETICAL AND EMPIRICAL PERSPECTIVES (Jerry M. Suls & Richard L. Miller eds., 1977) [hereinafter SOCIAL COMPARISON PROCESSES], and SOCIAL COMPARISON, *supra* note 55.

121. See Jerry M. Suls, *Notes on the Occasion of Social Comparison Theory's Thirtieth Birthday*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 289, 291 (1986) (concluding that subsequent studies support Festinger's similarity hypothesis). For example, one study of 35,000 graduates of American colleges and universities found that high grades are more strongly associated with selection of a "high-level" career than is quality of school. In other words, even though quality of school varies significantly, a student's relative standing among the other students at his or her particular school is the key predictor of choice of career. James A. Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 AM. J. SOC. 17 (1966).

122. See Jerry M. Suls, *Social Comparison Theory and Research: An Overview from 1954*, in SOCIAL COMPARISON PROCESSES, *supra* note 120, at 1 ("It is now widely accepted that one's self-concept [defined as including one's sense of self-worth] is vitally affected by social comparison. That is, one's self-concept is based in part on how one compares to other individuals with regard to traits, opinions, and abilities."). Goethals, *supra* note 118, at 268, credits William James and Erik Erikson with first making this general point about self-esteem and comparison, although the first study within social comparison theory directly to assess the effect of comparisons on self-esteem was Stan Morse and Kenneth J. Gergen, *Social Comparison, Self-Consistency, and the Concept of Self*, 16 J. PERSONALITY & SOC. PSYCHOL. 148 (1970).

123. Jerome E. Singer, *Social Comparison—Progress and Issues*, J. EXPERIMENTAL SOC. PSYCHOL. 103, 105 (Supp. 1 1966)

al or intergroup comparison may enhance self-esteem;¹²⁴ an unfavorable one may reduce it.¹²⁵ People may seek others with whom favorable comparisons may be made (“downward comparison”), so as to improve their self-esteem.¹²⁶ Of course, the “similarity hypothesis” continues to place a limit on the people with whom one makes comparisons; self-esteem depends upon comparisons with similar others.¹²⁷

Because of the emotional risks of comparison—the possibility that one will discover that one ranks lower along some scale than previously believed—people have mechanisms for coping with unfavorable comparisons. One of these coping mechanisms illuminates the difference between self-evaluation and self-enhancement: people tend to interpret information about themselves in a “distorted, but reassuring” manner.¹²⁸ They are more sensitive to information that supports their positive self-image than to information that contradicts it.¹²⁹ Unlike a rigid economic rationality, this bias undermines the “self-evaluation” function; individuals tend to evaluate themselves charitably, not impartially.¹³⁰ But this informational bias is rational in that it minimizes the loss

124. See Thomas A. Wills, *Downward Comparison Principles in Social Psychology*, 90 PSYCHOL. BULL. 245 (1981) [hereinafter Wills, *Downward Comparison Principles*]; Thomas A. Wills, *Similarity and Self-Esteem in Downward Comparison*, in SOCIAL COMPARISON, *supra* note 55, at 51-56 [hereinafter Wills, *Similarity and Self-Esteem*] (citing supporting studies). Wills posits that downward comparison does not produce a linear increase in subjective well-being because extreme differentials may produce countervailing forces such as empathetic concern or concern for one's future similarity to the lower ranking person. *Id.* at 58-60; see also Philip Brickman & Ronnie Janoff Bulman, *Pleasure and Pain in Social Comparison*, in SOCIAL COMPARISON PROCESSES, *supra* note 120, at 168-69 (citing studies regarding fear of success). Self-enhancement may also be caused by intergroup comparisons, i.e., by making favorable comparisons about the group to which one belongs (the “in-group”) against groups to which one does not belong (“out-groups”). See Riia Luhtanen & Jennifer Crocker, *Self-Esteem and Intergroup Comparisons: Toward a Theory of Collective Self-Esteem*, in SOCIAL COMPARISON, *supra* note 55, at 211 (citing supporting studies).

125. “[C]onceiving of a standard for evaluating abilities and opinions without reference to social norms seems an impossible task. For this reason, a person's self-esteem is greatly affected by how he or she differs from others on valued attributes The superior person, by serving to underscore an individual's outcome dissatisfaction, lays bare this individual's low self-esteem as well and, by causing self-evaluative standards to rise, compromises self-esteem even further.” Richard Smith et al., *The Roles of Outcome Satisfaction And Comparison Alternatives in Envy*, 29 BRIT. J. SOC. PSYCHOL. 247, 254 (1990). See also Brickman & Bulman, *supra* note 124, at 152-53, 158. Those in higher status positions often tend to disparage those in lower status positions. *Id.* at 158, 166-67 (citing supporting studies).

126. Wills, *Downward Comparison Principles*, *supra* note 124. Similarly, people can sometimes improve their self-esteem by comparing themselves with someone slightly higher in rank for an ability or trait (“upward comparison”), if they can thereby assure themselves that they are very nearly as good as a very high ranking individual.

127. Social comparison theory is therefore consistent with the common sense observation that a modestly serious amateur bowler does not suffer in self-esteem because she compares poorly to a professional; nor does a middle class worker gain self-esteem from favorable comparison to a homeless person. The latter case, however, may produce guilt rather than esteem. See *supra* notes 121 & 124.

128. Goethals, *supra* note 118, at 274. See also George Goethals, *Fabricating and Ignoring Social Reality: Self-Serving Estimates of Consensus*, in 4 RELATIVE DEPRIVATION AND SOCIAL COMPARISON: THE ONTARIO SYMPOSIUM (James W. Olson et al. eds., 1986) [hereinafter ONTARIO SYMPOSIUM]; Gary Marks, *Thinking One's Abilities Are Unique and One's Opinions Are Common*, 10 PERSONALITY & SOC. PSYCHOL. BULL. 203 (1984).

129. This includes judging competitors or rivals more harshly than the objective facts warrant. See, e.g., Marks, *supra* note 128.

130. John Arrowood refers to this fact as a “tension . . . between wanting to find out (self-evaluation) and wanting to find out particular things (social reality and self-validation).” A.J. Arrowood, *Comments on*

people suffer in their inevitable encounters with people who surpass them in some manner important to self-esteem.¹³¹

In addition to social comparison theory, the process of "upward comparison" forms an integral part of what sociologists and social psychologists call "relative deprivation."¹³² Relative deprivation theory further illuminates the types of comparisons people seek and the behavior such comparisons motivate. Although people are in a sense "deprived" whenever they lack something that they desire, they do not always experience feelings of resentment, anger, or unfairness as a result.¹³³ Psychologists hypothesize that a central component of people's angry feelings over deprivation is a comparison between themselves and others who have the desired thing.¹³⁴

Social theorists first introduced the concept of "relative" deprivation to explain some paradoxical findings in an extensive and well-known study of American soldiers during World War II. Notably, the study revealed that while airmen had absolutely greater prospects for promotion than military policemen, the former were substantially less satisfied than the latter with their chances for promotion.¹³⁵ Sociologists theorized that members of each military group made comparisons primarily with members of their own group and, therefore, that unpromoted airmen, who had more promoted peers, felt the most relative deprivation.¹³⁶ Although comparison with others is not always necessary to

"*Social Comparison Theory: Psychology from the Lost and Found*," 12 PERSONALITY & SOC. PSYCHOL. BULL. 279, 281 (1986). Brickman & Bulman, *supra* note 124, at 178-81, describe this conflict as a "contest between adaptive and hedonic forces" and outline a model for predicting the net outcome of these forces.

131. Social comparison theorists have attempted to measure how much one's happiness, satisfaction, or subjective well-being depends on how one fares in the process of social comparison. Such measurements are extremely difficult because social comparison has both direct and indirect effects on well-being. Angus Campbell, for example, claims to have found that individual well-being depends largely on the gap between one's aspirations and one's achievements, and to some lesser degree on direct comparisons with "typical Americans." See ANGUS CAMPBELL ET AL., *THE QUALITY OF AMERICAN LIFE: PERCEPTIONS, EVALUATIONS, AND SATISFACTIONS* 171-72 (1976). Campbell states, however, that comparison with others is an important determinant of one's aspiration level. *Id.* Similarly, adaptation-level theorists posit that subjective well-being depends on how far one achieves above the level to which one has adapted as a result of past experiences, but such experiences include the experiences of others one learns about through a process of social comparison. See Phillip Brickman & Donald T. Campbell, *Hedonic Relativism and Planning the Good Society*, in *ADAPTATION-LEVEL THEORY* 287, 294 (M.H. Appley ed., 1971). Nonetheless, evidence suggests that social comparison significantly affects subjective well-being. See Richard H. Smith et al., *Intrapersonal and Social Comparison Determinants of Happiness: A Range-Frequency Analysis*, 56 J. PERSONALITY & SOC. PSYCHOL. 317, 319 (1989) (citing studies). *But see* Diener, et al., *supra* note 114, at 16.

132. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 270-71 (1992). See generally ONTARIO SYMPOSIUM, *supra* note 128; W. G. RUNCIMAN, *RELATIVE DEPRIVATION AND SOCIAL JUSTICE* 196 (1966); *SOCIAL COMPARISON, SOCIAL JUSTICE, AND RELATIVE DEPRIVATION: THEORETICAL, EMPIRICAL, AND POLICY PERSPECTIVES* (John C. Masters & William P. Smith eds., 1987).

133. James M. Olson & Michael Ross, *Perceived Qualifications, Resource Abundance, and Resentment about Deprivation*, 20 J. EXPERIMENTAL SOC. PSYCHOL. 425, 426 (1984).

134. See, e.g., Faye Crosby, *A Model of Egoistical Relative Deprivation*, 83 PSYCHOL. REV. 85, 90 (1976) (maintaining that first precondition of relative deprivation is that "the person who lacks X must see that someone else . . . possesses X").

135. STOUFFER, *supra* note 119, at 250-58.

136. Robert K. Merton & Alice S. Rossi, *Contributions to the Theory of Reference Group Behavior*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 225 (Robert K. Merton ed., 1957); Robert K. Merton & Alice S. Kitt, *Contributions to the Theory of Reference Group Behavior*, in *CONTINUITIES IN SOCIAL RESEARCH:*

produce feelings of relative deprivation,¹³⁷ numerous studies since *The American Soldier* have demonstrated the importance of comparison with others to feelings of relative deprivation and behaviors motivated by such feelings.¹³⁸ The theory of relative deprivation is useful in predicting and explaining social protest, at least when people feel that their group is deprived as compared to other groups.¹³⁹ Other work has extended the concept to "relative gratification," the notion that people feel especially gratified when they have more relative to others.¹⁴⁰

Furthermore, the concept of "poverty" may best be explained as an acute form of relative deprivation.¹⁴¹ The feeling of income inadequacy known as

STUDIES IN THE SCOPE AND METHOD OF "THE AMERICAN SOLDIER" 40 (Robert K. Merton & Paul F. Lazarsfeld eds., 1950).

137. There are several possible bases for comparison: "persons may feel deprived of some desirable thing *relative* to their own past, another person, persons, group, ideal, or some other social category." Ian Walker & Thomas F. Pettigrew, *Relative Deprivation Theory: An Overview and Conceptual Critique*, 23 BRIT. J. SOC. PSYCHOL. 301, 302 (1984). Several studies have shown how people may use their own past as a basis for comparison. See Thomas S. Cook et al., *The Construct Validity of Relative Deprivation, in SOCIAL COMPARISON PROCESSES*, *supra* note 120, at 323 (presenting studies of self-comparison, Table 5). Of course, some form of relative comparison is a necessary component of relative deprivation theory.

138. See Cook, *supra* note 137, at 320-23 (presenting studies involving comparison with others, Table 4). After reviewing this literature, Pettigrew concludes that "[f]rom small group research and voting surveys to international studies, relative deprivation (RD) ideas receive considerable empirical support." Pettigrew, *supra* note 119, at 272. See also Morawetz, *supra* note 51, at 521-22 n.2.

One of the major theoretical disputes, begun by Runciman, *supra* note 132, is whether relative deprivation (RD) is based primarily upon interpersonal or intergroup comparisons. "Egoistic RD refers to a type of personal discontent that occurs when an individual compares his or her own situation to that of others (ingroup or outgroup members), whereas fraternal RD is a more social discontent that occurs when an individual compares the situation of his or her group as a whole to that of an outgroup." Lise Dubé & Serge Guimond, *Relative Deprivation and Social Protest: The Personal-Group Issue*, in ONTARIO SYMPOSIUM, *supra* note 128, at 201, 204. Compare Crosby, *supra* note 134 (the egoistic model emphasizing interpersonal comparisons) with Walker & Pettigrew, *supra* note 137 (emphasizing fraternalistic model of inter-group comparisons).

139.

The research reviewed . . . indicates that fraternalistic RD is useful for predicting white racism and support of black political candidates in the United States, militancy among black Americans and their approval of violence to gain their rights, attitudes of Québec nationalism among Francophone Canadians in Montreal, subjective satisfactions among members of Toronto's Chinese community, and outgroup attitudes among Chinese in Toronto and Muslims in India, respectively.

Kenneth L. Dion, *Responses to Perceived Discrimination and Relative Deprivation*, in ONTARIO SYMPOSIUM, *supra* note 128, at 159, 174. Although rejecting a link between social protest and personal dissatisfaction from "egoistic" relative deprivation, Dubé and Guimond also report studies linking "fraternal" relative deprivation and social protest. Dubé & Guimond, *supra* note 138, at 201. For the distinction between egoistic and fraternal relative deprivation, see *supra* note 138.

140. See, e.g., Morawetz, *supra* note 51, at 521-22, n.2 (finding that some people express happiness at thought of others' incomes decreasing while their own remains constant). Although there are effects that may offset "relative gratification," such as guilt or empathy, see *supra* note 124, Pettigrew perceptively argues that "[g]enerally in a competitive society such as that of the United States the intrinsic satisfaction of the differentiating reward and the feeling of competitive success more than compensate for the interpersonal loss." Pettigrew, *supra* note 119, at 265. See Michael C. Kearl, *An Inquiry Into the Positive Personal and Social Effects of Old Age Stereotypes Among the Elderly*, 14 INT'L J. AGING & HUM. DEV. 277 (1981-82) (finding evidence that elderly benefit from feelings of "relative advantage" by comparing themselves to unduly pessimistic stereotypes of older Americans).

141. See Peter Townsend, *The Development of Research on Poverty*, SOCIAL SECURITY RESEARCH: THE DEFINITION AND MEASUREMENT OF POVERTY 15, 18 (1979) (A conception of poverty should be "founded on 'relative deprivation' . . . the absence or inadequacy of those diets, amenities, standards,

poverty is difficult to define at an absolute level of income. Both official and unofficial meanings of poverty have historically been relative, so that the poverty level in various societies rises as the average income rises.¹⁴² Attempts to define poverty without reference to contemporary social standards, i.e., definitions pegged to some absolute, nonhistorical amount of material wealth, tend to condemn either too many or too few to poverty according to common understanding.¹⁴³ Several theorists have convincingly argued that given this sort of data, poverty cannot be understood except as inherently relative to social standards of wealth.¹⁴⁴

Finally, there are psychological studies of what is called the "minimal intergroup situation." Social psychologists seeking to understand the effect of group membership on individual behavior have set out to create a "base-line intergroup situation" in which individuals would have no reason to favor their own group nor to discriminate against the other group.¹⁴⁵ But to their surprise, the psychologists were unable to construct intergroup situations without bias: "[I]n one study after another, the 'minimal' [group] situations threw up findings of intergroup discrimination which kept on producing very high levels of

services and activities which are common or customary in a society.").

142. For example, Lee Rainwater reviewed 18 Gallup Poll surveys taken in the United States between 1946 and 1969. This review revealed that the response to the question, "How much income a week do you think the average family of four needs for health and comfort in this community?," rose 50% in constant (1971) dollars over the twenty-five year period. LEE RAINWATER, *WHAT MONEY BUYS: INEQUALITY AND THE SOCIAL MEANINGS OF INCOME* 52 (1974). Additionally, many countries have continually raised the poverty line as the general wealth increases. See Easterlin, *supra* note 66, at 113 (citing studies).

143. See Easterlin, *supra* note 66, at 115-16 ("[T]he great majority of American families live on a scale that compares well with the way *wealthy* families lived 200 years ago." (emphasis added) (quoting AMERICAN ECONOMIC GROWTH: AN ECONOMIST'S HISTORY OF THE UNITED STATES (Lance E. Davis et al., eds., 1972)). If we adopt a subsistence level of poverty, the United States and other Western nations will have virtually eliminated poverty, notwithstanding public understanding to the contrary. However, if we seek an absolute standard higher than subsistence, the implication may be that many people in non-Western countries (or in Western countries in the past) who are (or were) considered "middle class" are, in fact, poor.

144. Scitovsky claims that some minimum amount of wealth is necessary for an individual to "gain and assert his membership in the society around him." SCITOVSKY, *supra* note 76, at 115-16. This level of wealth is the minimum "status," the absence of which defines poverty in any given society. Amartya Sen proposes a similar view in *Poor, Relatively Speaking*, 35 OXFORD ECON. PAPERS 153 (1983). Sen rejects a definition of poverty that is solely a question of inequality (having less than others), and instead defines poverty as "absolute deprivation in terms of a person's capabilities." *Id.* at 153. But because such capabilities should include the ability to avoid shame resulting, for example, from the failure to meet social conventions, *id.* at 159-61, 168 (citing ADAM SMITH, *THE WEALTH OF NATIONS*, *supra* note 29), poverty is "relative deprivation in terms of commodities, incomes and resources." *Id.* at 153.

145. HENRI TAJFEL, *DIFFERENTIATION BETWEEN SOCIAL GROUPS* 10 (1978). Tajfel and Turner describe the initial experimental paradigm:

[T]he subjects . . . are randomly classified as members of two nonoverlapping groups—ostensibly on the basis of some trivial performance criterion. They then make "decisions," awarding amounts of money to pairs of *other* subjects (excluding self) in specially designed booklets. The recipients are anonymous, except for their individual code numbers and their group membership (for example, member number 51 of the X group and member number 33 of the Y group). The subjects, who know their own group membership, award the amounts individually and anonymously.

Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7, 13-14 (Stephen Worchel & William G. Austin eds., 1986) (emphasis added).

statistical significance.”¹⁴⁶ In Part III(C), I argue that these findings suggest an inherent tendency of groups to compete against one another for status, and present a model of discrimination as a group-based status competition. For present purposes, however, it is the *nature* of the group discrimination that is relevant. When subjects in the minimal intergroup study were asked to award other subjects points or money, they not only favored members of their group, but appeared to follow a strategy of maximizing the *relative difference* between the groups, even when that strategy failed to maximize profit within their own group.¹⁴⁷

In sum, research on social comparison processes and relative deprivation suggests both the source and prevalence of relative preferences. Social comparison theory teaches that people commonly compare their abilities and traits with those of others and that they feel measurably better off by favorable comparisons (to those of lower rank), and measurably worse off by unfavorable comparisons (to those of higher rank). In economic terms, we can reasonably say that people have preferences—as ends in themselves—for favorable comparisons with others. Similarly, relative deprivation theory tells us that people are made to feel worse off by having less of something than those with whom they most frequently compare themselves. These feelings of deprivation are significant enough to explain certain behavior, especially when people feel the group to which they belong is deprived in comparison to other groups.¹⁴⁸ Studies of the minimal intergroup situation also demonstrate that individuals readily compete on behalf of groups to which they belong by seeking to maximize differences over other groups. Again translating into economic terms, we can say that people have relative preferences for having as much or more than other individuals, and for belonging to groups that have as much or more than other groups. To understand fully the role that market goods play in satisfying these preferences, we should consider what other social scientists have said about the symbolic significance of such goods.

146. *Id.* at 10-11, 75-86. See also Louise Lemyre & Philip M. Smith, *Intergroup Discrimination and Self-Esteem in the Minimal Group Paradigm*, 49 J. PERSONALITY & SOC. PSYCHOL. 660, 660 (1985) (“More than 20 experiments in which researchers used variants of the minimal group experimental procedure (MGP) support the hypothesis that under certain conditions, merely being categorized into an experimental group is sufficient to induce favoritism to the in-group and discrimination against an out-group.”). For an additional discussion of the minimal intergroup situation, including methodological detail, see *infra* notes 362-367 and accompanying text.

147. TAJFEL, *supra* note 145, at 80 (“[W]hen *relative* differentiation in favour of the ingroup conflicted with the absolute amounts of awards that could be distributed either to members of the ingroup (the [maximum ingroup profit] strategy) or to all subjects (the [maximum joint profits] strategy), it was the achievement of this relative differentiation which tended to guide the choices.”); see also Lemyre & Smith, *supra* note 146, at 660 (“Reliably, [individuals] discriminate competitively in favor of their own group, striving not only for their own group’s gain, but also for advantage relative to the other group even when this entails the sacrifice of absolute gain for one’s own group.”).

148. Although envy is only one possible result of social comparison and relative deprivation, its pervasiveness is additional evidence of the importance of these psychological processes. For the significance of envy to human culture, see HELMUT SCHOECK, *ENVY: A THEORY OF SOCIAL BEHAVIOUR I* (Michael Glenny & Betty Ross eds., 1969) (“Envy is a drive which lies at the core of man’s life as a social being.”).

2. *Goods as Symbols of Status*

The pervasiveness of status symbols provides additional support for the importance of positional desires: if people did not strongly desire status, they would not invest in symbols of status. Additionally, an understanding of the manner in which status symbols are utilized will illuminate more clearly the distinction between observable and unobservable goods.

Status may be understood as the respect one commands from others as a consequence of where others place one in a social hierarchy;¹⁴⁹ those who fare well in social comparisons deemed important by society are awarded this respect. If the existence of an individual's favorable comparisons were always conspicuous, then there would be no need for symbols of status. A person's comparative qualities will not, however, be readily observable to all of society all of the time. The history of status therefore must be understood in light of the following problem: those who enjoy high status have an interest in symbolizing their status, while those who lack status seek to appropriate such symbols and construct a "fraudulent" status for themselves.¹⁵⁰ As significant social science literature suggests, consumers commonly use goods in this manner, to symbolize their status, whether truthfully or fraudulently.

Anthropologists study human culture in part by studying the material objects of culture. Material objects reveal much more than the level of technology a culture has obtained. Objects serve various symbolic functions, and their study reveals the social norms, relationships, and patterns within a culture.¹⁵¹

149. "Status is . . . a form of power . . . consist[ing] of the respect, consideration, and envy of others. A person with status sets the standards and norms by which others will act, and in this way embodies the goals of a culture." MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 29 (1981). "Status symbols, therefore, express a very general aspect of their owners—their power to control others. They are in some ways a summary of all the salient characteristics of the self, a global measure of the owner's standing in the community." *Id.* at 31. Status is the quintessential positional good: not everyone can have the power described above. See Sabini & Silver, *Envy*, *supra* note 55, at 167, 172 ("It is not only, as social comparison theory holds . . . that a person evaluates his assessment of his own status by comparing his assessment with that of others, but also that his status, as evaluated by himself or others, is inherently comparative.").

150. GRANT MCCrackEN, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 33 (1988) ("[A] symbol of status is not always a very good test of status" because it may be used in a "fraudulent" manner. (quoting Erving Goffman, *Symbols of Class Status*, 2 *BRIT. J. SOC.* 294 (1951))).

151. "Consumer goods have a significance that goes beyond their utilitarian character and commercial value. This significance consists largely in their ability to carry and communicate cultural meaning. . . . In the last decade a diverse body of scholars has made the cultural significance of consumer goods the focus of renewed academic study." MCCrackEN, *supra* note 150, at 71; see also *id.* at 75, 83 n.8 (citing empirical investigations for specific goods including housing, art, clothing, ornaments, technology, food, and automobiles); MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS* 59 (1979) ("It is standard ethnographic practice to assume that all material possessions carry social meanings and to concentrate a main part of cultural analysis upon their use as communicators."). See generally CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 149; *MATERIAL CULTURE STUDIES IN AMERICA* (Thomas J. Schlereth ed., 1982); MARSHALL SAHLINS, *CULTURE AND PRACTICAL REASON* (1976); Russell W. Belk, *Possessions and the Extended Self*, 15 *J. CONSUMER RES.* 139 (1988). Legal theory has generally ignored the symbolic meaning of goods. For an exceptional work examining the relationship between product liability law and the symbolic content of goods, see Anita Bernstein, *Why Products Liability?* (1992) (unpublished manuscript,

A major function of material objects or "goods" is to symbolize individual social rank or status.¹⁵² Ethnographic studies find that goods are routinely used to represent social rank.¹⁵³ An array of social science literature has revealed "how individuals and communities use inanimate objects to claim, to legitimate, and to compete for status meaning."¹⁵⁴

Exactly what role do goods play in status competition? Veblen gave one answer: the "conspicuous consumption" of goods demonstrates one's pecuniary

on file with author).

152. Material objects serve many symbolic functions other than representing status, and some anthropologists have criticized theorists for ignoring the other subtle and varied ways in which goods are imbued with cultural or personal meaning. See MCCRACKEN, *supra* note 150, at 89 ("It is only recently that the field of person-object relations . . . has begun to recognize that the cultural meaning carried by consumer goods is enormously more various and complex than the Veblenian attention to status was capable of recognizing."); DOUGLAS & ISHERWOOD, *supra* note 151, at 207 n.6. But if some have focused on the "status meaning" of goods to the exclusion of other meanings, it is only because symbolizing status is one unmistakable function of goods. See MCCRACKEN, *supra* note 150, at 10 ("status meaning" is "perhaps the most obvious[] of the kinds of meaning contained in goods.").

153. See, e.g., E.R. LEACH, *POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE* 142-43 (1964) ("Wealth objects [of the Kachin tribesmen] other than ordinary perishable foodstuffs have value primarily as items of display. The best way [for a Kachin tribesman] to acquire notoriety as the owner (ruler) of an object is publicly to give possession of it to someone else . . . In sum, the possessor of wealth objects gains merit and prestige mainly through the publicity he achieves in getting rid of them."); H.K. Schneider, *Economic Development and Economic Change: The Case of East African Cattle*, 15 *CURRENT ANTHROPOLOGY* 259, 261 (1974) (concluding that "man is a maximizer not of goods but of status," and that "[u]tility in its purest form is social, not material"); Joachim Voss, *The Politics of Pork and the Rituals of Rice: Redistributive Feasting and Commodity Circulation in Northern Luzon, the Philippines*, in *BEYOND THE NEW ECONOMIC ANTHROPOLOGY* 121, 128-29 (John Clammer ed., 1987) (the pig "carries the heaviest symbolic load in Igorot society"; protocol of meat circulation at ritual feasts requires that pig parts be distributed according to status). See also MASON, *supra* note 41, at 49-53 nn. 5 & 8 (potlatch ceremony of various cultures involving hoarding of property for status rituals, sometimes including intentional destruction of property); *id.* at 57 (Roman gladiator exhibitions originally introduced as part of funeral games; over 90 year period, status competition led to escalation of number of gladiator pairs from initial three to peak of 74 when checked by sumptuary legislation).

154. MCCRACKEN, *supra* note 150, at 31.

The field of material culture has established a detailed understanding of the symbolic properties that adhere to objects of human manufacture. . . . [W]e are now in possession of a thorough record of how material culture makes culture material. One of the special interests of this literature is the ability of material culture to carry status messages.

Id. See also CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 149, at 29 ("The most extensive studies of objects as expressions of the self have been done in connection with the status-giving role of things."). Goods may symbolize status by their rarity, expensiveness, age, or simple association with people who have high status. *Id.* at 30-31. See also Floyd W. Rudmin, *Ownership as Interpersonal Dominance: A History and Three Studies of the Social Psychology of Property* 49-56 (1988) (unpublished Ph.D. dissertation, Queen's University (Ontario)) (reviewing studies of property as status symbol in social economics, popular literature, science of symbols, and anthropological study of territorial markers). Furthermore, after studying inferences that children, teenagers, and adults made from the house and automobile consumption decisions of others, it was found that "[t]he ability to recognize the social implications of consumption choices is . . . significant by second grade, and almost fully developed by sixth grade." Russell W. Belk et al., *Developmental Recognition of Consumption Symbolism*, 9 *J. CONSUMER RES.* 4, 13 (1982). See also MASON, *supra* note 41; VANCE PACKARD, *THE STATUS SEEKERS* (1959); Marcus Felson, *Invidious Distinctions among Cars, Clothes and Suburbs*, 42 *PUB. OP. Q.* 49 (1978) (finding public perceived local status hierarchies for cars, clothing stores, and suburbs, although not as clearly as national hierarchies for occupational prestige); William H. Form & Gregory P. Stone, *Urbanism, Anonymity, and Status Symbolism*, 62 *AM. J. SOC.* 504 (1957) (finding that many urban residents report using, among other things, displays of possessions to determine the social status of strangers they observed); Erving Goffman, *Symbols of Class Status*, 2 *BRIT. J. SOC.* 294 (1951).

success and gains the consumer a "relative distinction."¹⁵⁵ Conspicuous consumption is the activity of displaying one's wealth by overtly consuming expensive goods; the strategy is to make one's overt consumption particularly expensive and one's expensive consumption particularly overt. Consistent with the teachings of social comparison, conspicuous consumption is predominantly "horizontal," in the sense of seeking status gains within one's group, rather than "vertical," in seeking to move to a higher socioeconomic group.¹⁵⁶

This short description of the symbolic function of goods and their role in status competition is, however, inadequate. Conspicuous consumption would be uncommon and perhaps rare if we only mean it to include those occasions when people overtly compete for top status by purchasing more expensive goods than others. Surely, one might argue, this crude form of materialism is as likely to bring ridicule as the social respect we call status.¹⁵⁷ But a more sophisticated understanding of the use of goods as symbols of status will reveal how commonplace this form of competition is. Two points are critical: (1) people compete for symbols not only to convey or exaggerate their wealth, but to display their sense of "fashion" and good taste, and (2) social norms against overt status competition exist, but rather than eliminating the competition, they drive it into less obvious forms.

First, competition in consumption is not merely about who has the most expensive or greatest number of goods. Expensiveness *does* occupy an important role: wealth is an important criterion of status,¹⁵⁸ and goods symbolize one's income or wealth. The more expensive and abundant the goods one observes, the higher the income or wealth one supposes the owner to have. But there is a second feature of goods that serves as a basis for competition: fashion. The aristocratic class of England took up fashion as a means of symbolizing their status, once the consumer/industrial revolution began to undermine earlier status tests.¹⁵⁹ When present consumption replaced family

155. See *supra* note 35.

156. MASON, *supra* note 41, at 110; see also *id.* at 59, 136-37.

157. Various theorists have criticized Veblen as offering too crude a description of status competition. See, e.g., ELSTER, *supra* note 15. Others have noted that Veblen's analysis is to some extent tied to the unusual time in which he wrote, when more obvious forms of status competition were accepted than are accepted today. See, e.g., MASON, *supra* note 41, at ix. I have attempted to present a theory of the status value of goods consistent with these critics' observations, without pausing to consider the extent to which their reading of Veblen is fair.

158. See CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 149, at 160; DUESENBERY, *supra* note 33, at 30 ("income is one of the principal status criteria"). Duesenberry believed that income was a particularly important determinant of status in the United States because of (1) the relative absence of status based on birth and (2) the relative absence of barriers to association between people of different status. *Id.*

159. According to McCracken, status in medieval and early modern England was based on family honor, and entry of one's family to "gentle standing" required several generations of respectable living. MCCRACKEN, *supra* note 150, at 37-38 ("five generation" rule). Consequently, status depended not so much on having a certain quality or quantity of family goods, as on the *age* of such goods; and the physical proof of age was the "patina" that age creates. *Id.* at 38-39. "Patina . . . consists in the small signs of age that accumulate on the surface of objects. . . . As these objects are minutely dented, chipped, oxidized, and worn away, they begin to take on 'patina.'" *Id.* at 32. Although the requirement of patina defined status in a manner resistant to the perpetual attempts at "counterfeit status," the new consumer society of the eighteenth

respectability as the basis for status, the higher classes responded by a continuous search for new styles of consumption, and fashion—based on novelty—came to replace product age or “patina” as the test for status.¹⁶⁰ To the extent that “fashion” is based on sheer novelty—on the need constantly to replace “outdated” goods—having fashionable goods again merely demonstrates wealth, by demonstrating the ability to afford replacing still functional goods. But, in addition, to be “in” fashion demonstrates that one possesses a specialized form of “insider” knowledge. Fashion may thus be a symbol of educational or occupational status—other determinants of overall social status besides wealth¹⁶¹—or it may simply symbolize that one has acquired the right “tastes.”¹⁶² In either case, fashion goods¹⁶³ are necessarily observable goods; the desire to symbolize anything with a good requires that one invest in goods that are observed by others. Because some goods are particularly effective at symbolizing success (by being more public or more expensive than average), we should expect that people will invest in them more heavily than goods with fewer symbolic capabilities.

Second, a person seeking status is limited by the fact that others may not respect naked attempts to gain status.¹⁶⁴ The crude description of conspicuous consumption fails to capture this limitation: although the consumption need be conspicuous, the status-seeking motivation must not be. Jon Elster’s concept of “attitudes that are essentially by-products” explains this curious phenome-

century replaced patina with consumption as the test for status. “Wealthy subordinate social groups” then had it within their power to emulate those of high status and create a counterfeit status. *Id.* at 40. McCracken and others have attempted to illuminate the complex historical roots of the shift to consumerism that both made possible and was made possible by the industrial revolution. *See, e.g.,* NEIL MCKENDRICK ET AL., *THE BIRTH OF A CONSUMER SOCIETY: THE COMMERCIALIZATION OF EIGHTEENTH-CENTURY ENGLAND* (1982); CHANDRA MUKERJI, *FROM GRAVEN IMAGES: PATTERNS OF MODERN MATERIALISM* (1983). McCracken traces the rise in consumerism to Elizabeth I’s use of “expenditure as an instrument of government” in the sixteenth century and the attendant “social competition” among Elizabethan nobility. MCCRACKEN, *supra* note 150, at 10-16.

160. *Id.* at 10-28. The role of patina is explained *supra* note 159. *See also* MCKENDRICK, *supra* note 159, at 11 (“In imitation of the rich the middle ranks spent more frenziedly than ever before, and in imitation of them the rest of society joined in as best they might . . . Spurred on by social emulation and class competition, men and women surrendered eagerly to the pursuit of novelty, the hypnotic effects of fashion.”); CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 149, at 32 (“Whereas in the past one could achieve status through strength, wisdom, honor, or holiness, and each of these required different forms of psychic energy investment irreducible to the other, in modern times wealth has become the measure of a person’s standing on a uniform scale.”).

161. Mason argues that this form of conspicuous consumption—to demonstrate occupation and education—becomes more important in affluent societies in which raw wealth loses its previously dominant influence over status. MASON, *supra* note 41, at 108.

162. Mason argues that in affluent societies, “price (or cost) can no longer be the sole criterion on which decisions must be based and the consumer needs additional knowledge of the probable audience reaction to his purchase in so far as it reveals his taste and *the social quality of his preferences.*” *Id.* at 109 (emphasis added).

163. George Stigler and Gary Becker call “fashion goods” those goods that produce the “commodity” of “social distinction”; goods such as certain jewelry, “large automobiles, expensive furs, fashionable clothing, elaborate parties, a respected occupation, etc.” *See supra* note 43, at 84.

164. Status has this fragile quality: it may become disjoined from any objective power base, and thus subject to collapse. *See* CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 149, at 30-31.

non.¹⁶⁵ In his study on the limitations of rationality, Elster argues that there are some mental states that “can only come about as the by-product of actions undertaken for other ends. They can never, that is, be brought about intelligently or intentionally, because the very attempt to do so precludes the state one is trying to bring about.”¹⁶⁶ As one example, Elster argues that in most cases “nothing is so unimpressive as behaviour designed to impress.”¹⁶⁷ Likewise, there are societal and group norms against wanting something merely to have *more* than others, in order to symbolize a superior status.¹⁶⁸ To admit that one is consciously manipulating the symbols of status in an effort to obtain status is normally to condemn one’s efforts to futility.¹⁶⁹ Nonetheless, the manipulation of status symbols, when skillfully and covertly done, will enhance status.¹⁷⁰

Consequently, a consumer may value a good as a status symbol, even when not conscious of engaging in status competition. As primary examples, consider individuals whose relative preference takes the form of (i) wanting to acquire or maintain social status (at least) equal to the average member of society, or (ii) wanting to avoid the social status of the lowest ranking members of society. Such individuals will want to acquire goods for the sake of their symbolic value, but may not express their desire—even to themselves—in terms of status.

165. ELSTER, *supra* note 15, at 71-77.

166. *Id.* at 43.

167. *Id.* at 66. The attempts of the *nouveaux riches* “to impress are notoriously unsuccessful because they try too hard.” *Id.* at 68-69. Instead, as Paul Veyne describes, one impresses with an apparent attitude of indifference to the impression one makes:

There is something paradoxical about expressive rationality and the way it is adapted to its end: it will not produce its effect if it is too rational. A person who delights in himself and his own greatness has little thought for the impression he makes on others and will not calculate it precisely. And this the others know: they know that an authentic expression is one that disregards the onlookers and does not measure its effects. The self-important who indulge in excessive calculation do not see the spectators smiling behind their back. The spectator does not believe in a calculated expression, since real greatness delights in itself only. Only the expression that does not seek to produce an impression succeeds in making one.

Id. at 67 (quoting PAUL VEYNE, *LE PAIN ET LE CIRQUE* 679 (1976)).

168. Seeking to have more or better goods than others as an end in itself leaves one open to the social judgment that one is shallow, vain, and petty (even while social status is accorded to those not overtly seeking status, on the basis of relative, observable wealth). In addition to possible social disapproval, people may belong or wish to belong to a particular group which may genuinely oppose or limit conspicuous consumption as a means of gaining prestige. *Cf.* MASON, *supra* note 41, at 25, 69-70 (familial, occupational, political, educational, economic, and religious groups may have differing views on propriety of expenditures).

169. *See* MASON, *supra* note 41, at 42.

170. Notwithstanding the fact that social norms drive status-seeking behavior “underground,” more subtle wealth display remains an effective means of gaining status. *See* MASON, *supra* note 41, at 113. Indeed, McCracken argues that the very advantage of goods as symbols is their ability to state indirectly what social norms prevent stating directly:

The inconspicuousness of material culture . . . makes [it] an unusually cunning and oblique device for the representation of fundamental cultural truths [T]he inconspicuousness of the messages . . . permit them to carry meaning that could not be put more explicitly without the danger of controversy, protest, or refusal. Particularly when the message is a political one and encodes status difference, material culture can speak sotto voce.

MCCRACKEN, *supra* note 150, at 68-69.

Instead, people may consciously perceive themselves as merely desiring the absolute commodities of “decent” clothes, a “good” car, or a “nice” house, though their definition of “decent,” “good,” and “nice,” upon analysis, turns out to be (at least partly) relative to what others have.¹⁷¹ These ostensibly absolute desires provide a plausible way for people to explain their acquisition of status symbols—to others and themselves—other than as a naked effort to grab status. Veblen and Duesenberry emphasize how the consumption level increases, not as a result of everyone trying to gain the highest rank, but merely as people try to maintain a socially acceptable standard of living.¹⁷² From social comparison theory, however, we should expect the “others” to which a person compares his own consumption to be some group of peers, not the whole society. Thus, even the affluent, who are well-placed within society at large, may feel themselves needing better quality goods to keep up to the minimum standard of living of their peers, rather than as a conspicuous device for maximizing status.

The covert nature of status competition also explains more fully the distinction between observable and unobservable goods. Previously I asked why people cannot make all consumption observable by “advertising” otherwise unobservable consumption. One reason is the simple cost of such advertising, especially given the need to distinguish one’s genuine claim of consumption from those who would “fraudulently” seek status by fabricating or exaggerating their otherwise unobservable consumption.¹⁷³ But the broader answer is that

171. There is nothing in this description of rationalization and self-deception that is inconsistent with the concept of economic rationality. In predicting that an individual will act to maximize satisfaction of his preferences, consumer theory does not require that people *consciously* maximize, or that they even be able to verbalize in rational terms reasons for their behavior. GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 7 (1976). See also MILTON FRIEDMAN, *The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS* (1953). Positive economics is thus content to say that people act *as if* they were maximizing satisfaction of their preferences, and, as long as the empirical evidence supports such a description, is indifferent to the contrary things people may think they are doing. In this regard, Becker says that economics “is consistent with the emphasis on the subconscious in modern psychology.” BECKER, *supra*, at 7. My point is simply that people sometimes act “as if” they were concerned about the relative quality and quantity of their goods even when not consciously concerned with relative consumption.

172.

The habit of looking for the marks of superfluous expensiveness in goods, and of requiring that all goods should afford some utility of the indirect or invidious sort, leads to a change in the standards by which the utility of goods is gauged. The honorific element and the element of brute efficiency are not held apart in the consumer’s appreciation of commodities, and the two together go to make up the unanalyzed serviceability of the goods.

VEBLEN, *supra* note 35, at 156-7. See also *supra* note 63; DUESENBERY, *supra* note 33.

173. For some goods, the mere act of consumption advertises that one owns such goods. For other goods, one must bear a cost to publicize one’s consumption. For example, without any additional costs, one advertises the clothes one owns by wearing them. (And in case some people might fail to appreciate the quality and expensiveness of one’s clothes, fashionable attire will often bear a designer’s logo.) On the other hand, to publicize one’s life or health insurance plan, or the quantity of one’s savings, requires some additional effort. This added effort constitutes the initial element of advertising costs, but there is a second. Simply posting a notice of one’s savings, or announcing that one enjoys more workplace safety than others, will fail to persuade others because such claims are easily falsified. Making the claim credible requires additional costs, as, for example, the cost of hiring independent auditors to “certify” the size of one’s bank account, or the safety level of one’s workplace.

the advertising tactic would, in most cases, be condemned as a naked effort to acquire status. Breaching social norms is a real cost of explicitly advertising one's consumption. Even though a credible declaration of one's income, for example, would make it unnecessary to engage in the subtleties of symbolizing that income with strategic consumption, it is quite uncommon for people publicly to announce their income. Even relatively private announcements are widely considered vulgar. By consuming goods naturally consumed in public, an individual may communicate this same information indirectly and without social disapproval. But goods not naturally consumed in public view are unsuited for symbolizing status either because others are not routinely aware of how much one is consuming or because social disapproval of efforts to make others aware condemns such efforts to failure.¹⁷⁴

3. *Economic Evidence of Relative Preferences*

Although neoclassical economists have generally sought to explain behavior without resorting to relative preferences, there are a few areas in which the data has essentially compelled recognition of such wants. Not surprisingly, Frank offers relative income theories to explain employee wage data,¹⁷⁵ and joins other economists in reviving Duesenberry's relative income explanation of consumer savings.¹⁷⁶ Milton Friedman also uses positional wants to reconcile simultaneous consumer decisions to gamble and buy insurance,¹⁷⁷ and George Stigler and Gary Becker posit a desire for status to rationalize wildly fluctuating markets for "fashion goods."¹⁷⁸ Although relative wants are employed in the latter two cases in an *ad hoc* manner, the ability of relative preferences to explain such varied phenomena establishes just how pervasive these preferences are.¹⁷⁹ Conversely, recognizing relative preferences will enhance positive theories describing these phenomena.

174. Given the covert nature of status competition, we should also expect that people will not readily admit their conspicuous consumption to others or to themselves, a fact that I argue below represents a special transaction cost that impedes Coasean bargaining to reduce the waste of competitive consumption. See *infra* text accompanying notes 245-252.

175. See FRANK, *THE RIGHT POND*, *supra* note 77, at 35-79; Frank, *Marginal Products*, *supra* note 77.

176. Duesenberry's savings theory is discussed *supra* note 37. See FRANK, *THE RIGHT POND*, *supra* note 77, at 146-49; Frank, *Nonpositional Goods*, *supra* note 39, at 109-11; George Kosicki, *Income Redistribution and Aggregate Consumption: Implications of the Relative Income Model*, 34 AM. ECONOMIST 40 (1990); George Kosicki, *A Note About Savings as a 'Nonpositional Good'*, 14 E. ECON. J. 271 (1988); George Kosicki, *A Test of the Relative Income Hypothesis*, 54 S. ECON. J. 422 (1987) [hereinafter Kosicki, *A Test of the Relative Income Hypothesis*]; George Kosicki, *The Relative Income Hypothesis: A Review of the Cross-Section Evidence*, 26 Q.J. BUS. & ECON. 65 (1987).

177. Friedman & Savage, *supra* note 42.

178. Stigler & Becker, *supra* note 43.

179. In each of these cases, the data supports the existence of relative wants only to the extent that a relative wants theory is intrinsically plausible. The prior sections demonstrated the intrinsic plausibility of a pervasive and powerful desire for relative position.

Frank and Kosicki have revived Duesenberry's relative income theory of consumer savings to account for certain data that prevailing savings theories cannot explain.¹⁸⁰ Savings data has always shown that those enjoying a high income save a higher proportion of their income than those enjoying a lower income.¹⁸¹ Paradoxically, however, as national wealth has increased, the proportion of income saved has remained the same. The standard theories—the permanent income¹⁸² and life cycle theories¹⁸³—explain this data by appealing to the same basic idea: that consumers seek to save the same proportion of their *lifetime* income regardless of the size of that income. Thus, over time, consumer savings is unrelated to income. But income fluctuates over a lifetime; to smooth out the variations, people save proportionately more in what for them will be a high income year, and less in what for them will be a low income year.¹⁸⁴ So while it appears that the level of savings is positively related to income when examining any one year, the standard theories hold that absent “life cycle differences and transitory earnings” (i.e., if everyone earned their lifetime income in equal yearly portions), “high-income persons [would save] the same fractions of their incomes as [do] low-income persons.”¹⁸⁵

But an empirical problem continues to challenge the standard theories: although they explain *some* of the variation in savings rates, various studies attempting to control for transitory fluctuations in income still find that savings is positively associated with lifetime or “permanent” income.¹⁸⁶ Frank and Kosicki point out that Duesenberry's theory explains the discrepancy: the desire for relative position pressures consumers to consume (at least) up to the prevailing standard of living. Because the pressure to spend up to the average is greater for those with below average incomes than for those with above-average incomes, the former save less than the latter. The relative wage theory also accounts for the apparent paradox that savings do not rise as social wealth rises: because the explanatory variable is *relative* income, saving is not associated with aggregate wealth.¹⁸⁷

180. See FRANK, *THE RIGHT POND*, *supra* note 77, at 146-49; Frank, *Nonpositional Goods*, *supra* note 39, at 109-11; Kosicki, *A Test of the Relative Income Hypothesis*, *supra* note 176.

181. FRANK, *THE RIGHT POND*, *supra* note 77, at 146.

182. See FRIEDMAN, *supra* note 38.

183. See Franco Modigliani & Richard Brumberg, *Utility Analysis and the Consumption Function*, in *POST-KEYNESIAN ECONOMICS* (Kenneth K. Kurihara ed., 1954).

184. In other words, if a consumer believes that he is enjoying what for him is an unusually high income—one that will not be repeated often in future years—he will save more than in an average year. Conversely, if he believes the year is below his average, he will save less. The theory predicts that if income were guaranteed to be the same every year, a consumer would save the same amount each year, and that the proportion would be the same regardless of the size of the total.

185. FRANK, *THE RIGHT POND*, *supra* note 77, at 147.

186. Frank reviews this evidence and Kosicki adds his own. See FRANK, *THE RIGHT POND*, *supra* note 77, at 146-59; Kosicki, *A Test of the Relative Income Hypothesis*, *supra* note 176.

187. Choosing a theory of savings is significant, among other reasons, for judging the consequences or fairness of competing tax policies. The merits of taxing savings depend on why people save. See, e.g., Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145, 1175-79 (1992); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 967-81 (1992); Mark

In addition, Frank offers a theory of relative wages that explains wage data inconsistent with standard theory. The accepted neoclassical theory of wages predicts that, in equilibrium, workers are paid an amount equal to their marginal productivity, meaning the amount of revenue that their work adds to the total revenue of the firm.¹⁸⁸ The problem with this theory is that considerable evidence shows that wage differentials are consistently smaller than marginal productivity differentials, so that the most productive workers are often paid less than their marginal productivity, while the least productive workers are paid more. Frank contributes his own data to this discourse, also finding that wages are too compressed to be explained merely by marginal productivity theory.¹⁸⁹ Frank then explains this observed wage compression as a consequence of workers' preferences for *relative* income—for earning more than, or at least as much as, their coworkers. He theorizes that the preference for relatively high income means that those at the high income end of a firm are willing to accept less than their marginal product because they are also receiving implicit compensation in the form of high status.¹⁹⁰ Conversely, he argues that those at the low income end of a firm insist on more than their marginal product because they are suffering from low status.¹⁹¹

Kelman, *Time Preference and Tax Equity*, 35 STAN. L. REV. 649, 675-79 (1983). See also Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 108 (1990) (effect of taxing inheritance on savings depends on choice between competing savings theories).

188. FRANK, THE RIGHT POND, *supra* note 77, at 36-37.

189. *Id.* at 68-79; Frank, *Marginal Products*, *supra* note 77. Frank's data is directed at disproving a particular defense of marginal productivity theory: the claim that any inconsistencies between marginal productivity theory and wage data are explained by measurement difficulties. Some economists argue that wages merely appear to be compressed because it is difficult for economists to measure accurately a worker's marginal productivity. These economists still insist that but for measurement errors, marginal productivity theory does a good job of explaining the data. Frank therefore studied groups of workers whose marginal productivity is reasonably clear—automobile and real estate sales personnel whose marginal productivity can be measured by sales revenue and scientific academics whose marginal productivity can be measured by government grants. Making conservative estimates of marginal productivity, Frank found that in each case the most productive workers were paid significantly less than their marginal productivity and the least productive workers were paid significantly more. FRANK, THE RIGHT POND, *supra* note 77, at 68-79. Frank's evidence refutes the claim that the data contradicting marginal productivity theory can be dismissed as measurement error.

190. Frank also argues that the proliferation of job titles is better understood if we think of workers competing for on-the-job status. FRANK, THE RIGHT POND, *supra* note 77, at 91-94; cf. Jerald Greenberg & Suzyn Ornstein, *High Status Job Title as Compensation for Underpayment: A Test of Equity Theory*, 68 J. APPLIED PSYCHOL. 285 (1983).

191. FRANK, THE RIGHT POND, *supra* note 77, at 41-57. If employers were not willing to pay relatively less productive workers more than their marginal productivity, Frank predicts that such workers would either join firms where coworkers have marginal productivity equal to their own (and thus everyone earns the same wage) or work alone (thus not having to worry about how their income compared to their coworkers). This analysis plausibly assumes that workers are much more concerned about how their pay compares to that of their coworkers than about how it compares to that of the rest of the world.

Choosing a theory of wages is significant, among other reasons, for judging the consequences or fairness of competing employment policies. The desirability of comparable worth or collective bargaining, for example, depends in part on the accuracy of the marginal productivity theory of wages. See, e.g., Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1362-64 (1988) (deviation between in-firm marginal productivity and external market marginal productivity creates opportunity for strategic behavior by employers and workers); Paul Weiler, *The Wages of Sex: The*

Friedman and Savage have used positional wants to reconcile two apparently inconsistent consumer decisions, the decision to buy insurance and to gamble.¹⁹² If people were neutral to risk—if they assessed risk at its “expected value” of probability times outcome—they would neither buy insurance nor gamble.¹⁹³ Insurance is explained by the concept of “risk aversion”; risk-averse consumers will pay others more than the expected value of a risk of loss to induce them to bear the risk. Gambling is the reverse phenomenon: risk-preferring consumers pay more than the expected value of a risk of gain to bear the risk. Why does *the same* consumer sometimes do both? Friedman and Savage sought to answer this question by hypothesizing that utility was positively related to income, but with sometimes rising and sometimes falling marginal returns depending on whether the increased income allowed one to move to a higher economic class. In their words: “[I]ncreases in income that raise the *relative position* of the consumer unit in its own class but do not shift the unit out of its class yield diminishing marginal utility, while increases that shift it into a new class, that give it *a new social and economic status*, yield increasing marginal utility.”¹⁹⁴ Their analysis is not completely correct; people seem to receive substantial relative gains from doing better than their existing peers or class, not merely from moving to the next class. But the basic approach seems sound. There are some absolute income gains that carry more relative benefits than others: while some increases or decreases will hardly change observable consumption, others of the same absolute magnitude will have a larger outward effect.¹⁹⁵ Therefore, people appear to prefer risk when they can take unobservable losses for a chance at observable gains, but to avoid risk when they can forgo unobservable gains to hedge against observable losses. In the former case they would gamble; in the latter, insure. Today, the overlap of these two behaviors—gambling and insuring—is even greater than in 1948

Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1758-63 (1986) (arguing that marginal productivity constrains the wage level but leaves room for sex discrimination); Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 364-71 (1984) (advocating a “relational model” emphasizing relative wages in place of “price theory” of wages based on marginal productivity).

192. Friedman & Savage, *supra* note 42.

193. This statement assumes that the only value in gambling is the possible reward from winning. In circumstances in which gambling is pleasurable independent of the outcome, there is no need to use risk preferences to explain gambling and no apparent inconsistency with buying insurance. Similarly, some forms of gambling will persist because they symbolize wealth and confer status on participants. Lotteries exemplify the type of gambling apparently motivated only by the desire to win.

194. Friedman & Savage, *supra* note 42, at 289-99 (emphasis added). Friedman and Savage claim that because “[m]en will and do take great risks to distinguish themselves,” they may be willing to risk falling to the low end of their existing economic class for a chance of rising to the next class, but unwilling to risk a slight fall within their class for a chance of simply rising to the top of their class. *Id.* at 299. Friedman and Savage do not discuss the normative implications: since a “high” or “low” economic class is entirely relative, if a significant number of people move up to a higher class, the class position of those whose absolute wealth remains the same will tend to fall.

195. One might imagine, for example, that housing is a major component of observable spending. At a given point on the income curve, a small positive increment income will not be sufficient to improve one’s housing level, even though at other points on the curve the same increment will be sufficient. The marginal utility of money is declining in the former case, increasing in the latter.

when Friedman and Savage wrote, which suggests that the desire for relative position is not only strong, but has been gaining in importance over the past several decades.¹⁹⁶

Finally, fashion constantly changes. Yet economists advocate a consumer theory with stable preferences. Since they believe there is no acceptable theory capable of explaining preference change, they wish to construct a model of consumer behavior that minimizes the importance of such change.¹⁹⁷ Stigler and Becker find it unsatisfactory to explain change in fashion, such as annual changes in clothing styles, by asserting that consumer tastes are constantly changing. Instead, they explain the fashion data by positing a single preference for social status, which consumers satisfy by purchasing a combination of "status" or "fashion" goods.¹⁹⁸ Consumers purchase fashion goods to "produce" the commodity of "social distinction" or prestige.¹⁹⁹ Given the amount of resources devoted each year to "fashion" goods, or fashion components of ordinary goods, this explanation of the data also suggests that the desire for social distinction is powerful.²⁰⁰

In sum, the social science evidence suggests that people generally share a strong desire for social distinction, and in particular that people desire relatively high income and the goods associated with high income or status. While this point is itself important for understanding and describing various behavior, it also has important normative consequences.

B. A Socioeconomic Theory of Market Failure: Identifying When Satisfaction of Relative Preferences Leads to Social Waste

Frequently, individuals acting to satisfy their relative preferences will fail to reach a Pareto-optimal outcome. At other times, however, competition for relative gain is not merely harmless, but a constructive social force. An appropriate theory should distinguish cases in which relative preferences will lead to wasteful competitive consumption from those in which they will not. In general, efforts to satisfy relative preferences will lead to an inefficient allocation of resources into a zero sum competition when the following conditions

196. A refined understanding of risk taking is obviously important for, among other things, tort and insurance law.

197. Stigler & Becker, *supra* note 43. For an attempt to model the explosive oscillation of the demand for status goods, see Philip Coelho & J. McClure, *Toward An Economic Theory of Fashion* (1992) (unpublished manuscript, on file with author).

198. Stigler & Becker, *supra* note 43, at 87-88.

199. *Id.* at 88. Stigler and Becker here rely on Becker's "new theory" of consumer behavior that makes a distinction between "goods" and "commodities." See BECKER *supra* note 171 at 131-49; see also *infra* text accompanying notes 352-354.

200. Understanding the status function of goods should be relevant for determining the appropriate definition and protection of property interests. For example, Gene Grossman and Carl Shapiro discuss the effect of differing trademark law enforcement policies against foreign counterfeiting of goods desired in large measure for symbolizing status. Gene Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79 (1988).

are present: (1) the relative preferences inherently conflict because satisfying one person's preference necessarily means that another's will go unsatisfied; (2) investments in satisfying inherently conflicting relative preferences divert resources from satisfying absolute preferences (or at least other preferences not in inherent conflict); and (3) positive transaction costs block private agreements that might prevent this wasted investment in zero sum competition. Competition to satisfy relative preferences is benign unless all of these elements coexist. In a few limited cases, such competition is socially desirable.

Subsection One therefore describes the necessary and sufficient conditions under which relative preferences *inherently* conflict. In particular, the Subsection introduces types of positional incompatibility other than simple competition for the top position, and explains the conditions of preference conflict in light of the previous discussion of social psychology. Subsection Two then describes how competition for relative position, under the conditions of inherent preference conflict, may inefficiently drain resources from the satisfaction of nonconflicting preferences. Subsection Three considers an exception to this analysis, public goods, where relative preferences may actually help overcome market failure. All of these predictions depend, in part, on the presence or absence of transaction costs, a matter considered in Section C.

1. *The Presence of Inherent Preference Conflict*

First, we must identify the conditions of conflict in which satisfaction of relative preferences is a zero sum process. At one level, all preferences "conflict." Economics begins with the idea that unlimited wants make resources scarce; the discipline is reasonably defined as the study of the "allocation of scarce means to satisfy competing ends."²⁰¹ Nonetheless, there is a special sense in which relative preferences may be in conflict. *Even with infinite resources*, shared preferences for high-ranking positions may not all be satisfied. Although unlimited resources would eliminate the conflict between absolute preferences, the conflict between two individuals' preferences "to have the most X" (or "to avoid having the least X") would remain. This Article refers to preference conflict as "inherent" if no amount of resources could resolve the conflict. The satisfaction of relative preferences is a zero sum activity where there is inherent preference conflict.

The process of comparison does not always create inherent preference conflict. Comparing oneself with others involves several distinct variables: (i) the individual or group of individuals with which one will make the comparison ("comparison others" or "referent group"); (ii) the characteristic which one is

201. BECKER, *supra* note 171, at 3 (citing similar definitions in other works). The scarcity of resources means that trade-offs exist between individuals as to whose preferences will be satisfied, and also that each individual makes trade-offs as to which of his preferences he will expend resources to satisfy.

interested in comparing (a "scale"); (iii) the type of position one seeks (ordinal or cardinal; top, average, or avoidance of bottom); and (iv) a judgment about how one ranks in that characteristic relative to the others (a relative "score"). People may have inherently conflicting preferences when (a) they make a comparison among one another, and (b) the comparison involves the same characteristic. But even when two parties have relative preferences that are in this sense "reciprocal," those preferences will not inherently conflict unless (c) they seek incompatible positions with regard to that characteristic and (d) they will know whether they fail to gain the position they seek. All four elements require some additional explanation.

The *first* factor in inherent preference conflict is the person or group an individual uses as a basis for comparison. If people invariably compared themselves to those who rank below them and avoided comparisons to those who rank above them, then perhaps everyone could gain self-esteem from ranking higher than certain others.²⁰² This strategy, however, has practical limitations. One motive for comparison is to gain information. To gain information, one must at least take the risk of unfavorable comparisons. It is not informative to compare oneself only to those who one already knows rank lower. In addition, given how pervasive social comparison is, it would be difficult for one to choose only those people who rank lower in important ways to be one's friends, neighbors, and coworkers, and impossible for *everyone* to do so.²⁰³ Because individual status is, in part, derived from the status of the groups to which one belongs, it may even be counterproductive to associate only with lower ranking individuals. Finally, there are some circumstances in which comparisons are involuntary, in which the media or unexpected contacts with others provide highly salient information about the traits or abilities of others.²⁰⁴

Second, relative preferences do not inherently conflict (and their satisfaction is not zero sum) unless they are directed toward the same characteristic.²⁰⁵ People differ about which characteristics are relevant for judging themselves in comparison to others, and research suggests that people usually weigh most

202. If people care about a trait or ability but fear that comparison would be unfavorable, they may preserve their self-esteem by avoiding comparison altogether. Festinger hypothesized that the segmentation of society may serve to protect people from many unwanted unfavorable comparisons. See Festinger, *supra* note 119.

203. See DUESENBERY, *supra* note 33, at 30 ("[S]ince social status rankings in our society form a continuous series rather than a set of clearly defined group rankings, every individual must associate with some people of higher or lower status than his own.").

204. Festinger pondered the effects of television as a new source of involuntary comparisons. Festinger, *supra* note 119. Interestingly, at least one study found that television in the United States was associated with increased burglaries, but not with crimes of violence. Thomas Ashby Wills, *Discussion Remarks on Social Comparison Theory*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 282, 285-86 (1986) (citing K.M. Hennigan et al., *Impact of the Introduction of Television on Crime in the United States: Empirical Findings and Theoretical Implications*, 42 J. PERSONALITY & SOC. PSYCHOL. 461 (1982)).

205. This is what Scitovsky means when he says that people sometimes seek status by a "ranking on a one-dimensional scale" such as income or wealth. See *supra* note 76, at 119.

heavily those characteristics in which they excel.²⁰⁶ When people compare different characteristics, their relative desires need not conflict. Two people who each rank higher than the other in one aspect and lower in another can each compare themselves to the other on the scale of their strength, and each benefit from the comparison.²⁰⁷ For some reason, however, perhaps due to socialization of norms for self-worth, large parts of society do share certain scales as important bases for comparison, such as standards of physical attractiveness²⁰⁸ and wealth. Indeed, the concept of social status or rank would have no real meaning if this were not the case.

Third, even when relative preferences are reciprocal, they will not conflict unless the preferences are for incompatible types of positions. There would not be inherent conflict, for example, between the preferences of consumers A and B (who compare themselves with each other for the same characteristic), if A desired the first rank, B merely desired to obtain (at least) the average rank, and at least one other consumer (C) existed, who had no positional desire at all. A and B may each simultaneously obtain the position they desire; their investments in gaining their desired ranks may produce gains to themselves without imposing losses on C or on each other. On the other hand, since only one person can occupy the highest rank, if two or more wish to be first, the preferences are in inherent conflict.²⁰⁹

The *fourth*, and final, requirement for inherent preference conflict is that consumers know when they fail to gain the position they seek. Even when people have incompatible, reciprocal relative preferences, there is often room for differing views as to how one ranks relative to others. To rank oneself relative to others, it is necessary to make a judgment *both* as to one's own rank and that of those to whom one is compared.²¹⁰ Many of the characteristics

206. People tend to care about only a small set of all possible bases for comparison, often including those traits or abilities in which they already believe they excel. People can thus be emotionally indifferent to many comparisons in which they rank poorly. See, e.g., Abraham Tesser, *Emotion in Social Comparison and Reflection Processes*, in SOCIAL COMPARISON, *supra* note 55, at 115-45; Salovey, *supra* note 55, at 274-75. This process is part of a general effort to view oneself as unique. See George Goethals et al., *The Uniqueness Bias: Studies of Constructive Social Comparison*, in SOCIAL COMPARISON, *supra* note 55, at 149-76. See also NOZICK *supra* note 52, at 245 (noting that if the set of all possible bases for comparisons shrinks, it becomes increasingly difficult for an individual "to use as a basis for self-esteem a nonuniform weighting strategy that gives greater weight to a dimension he scores highly in").

207. Not only would such adaptation avoid the "zero sum" nature of certain comparisons, but the common ability to satisfy one's relative preferences would increase social welfare over what it would be in the complete absence of such preferences.

208. Despite the truism that "beauty is in the eye of the beholder," there are many widely-held criteria for attractiveness, or perhaps more accurately, for unattractiveness. Some examples of commonly applied criteria for unattractiveness in America are being "fat" and having wrinkles (or "bags" under one's eyes). For men, baldness and shortness are widely considered unattractive. While none of these standards is universal, their pervasiveness is evidenced by the American obsession with dieting, the lengths to which men go to avoid the appearance of being bald, and the rising use of cosmetic surgery.

209. To generalize: whenever more than n persons wish to occupy the top n ranks, the preferences are for incompatible positions.

210. Nozick says that ranking one's ability involves two separate judgments: first, a "factual profile" representing some absolute "score" one has for a particular characteristic; second, an "evaluative profile"

people deem important are highly subjective (e.g., sense of humor, creativity, resourcefulness), and evaluation of many others may require knowledge of private facts about which one is often ignorant (e.g., income, sincerity, self-enlightenment).²¹¹ Individuals often differ in their judgments about the extent to which characteristics are present in themselves or others.²¹² Therefore, more than half of the people who care about a particular characteristic can believe they rank in the top half regarding that characteristic.²¹³ Relative preferences thus will not inherently conflict unless the desired rankings are reasonably “observable” (i.e. people have adequate information to make a judgment of rank) and reasonably “objective” (i.e. that people reach similar judgments about rank when given shared facts). Because there are some scales, however, for which reasonably objective information exists, and because people’s ability to disregard unwelcome information is limited, there will be some occasions where each person’s placement on the scale is manifest to everyone in the comparison group (e.g., hair loss, published class ranks, certain occupational proficiencies, wealth).²¹⁴

Of the four elements of inherent preference conflict, the third—that the positions desired are incompatible—is sufficiently complex to warrant further comment. Although the simplest case of incompatibility exists when two or more consumers seek the highest ordinal rank on the same scale, there are several other ways in which the desired positions may be incompatible. First are other cases of ordinal incompatibility. Suppose initially that everyone in an economy wishes to be (at least) of average ordinal rank. This preference might be expressed as the desire to have at least an equal number of people below one on the scale as are above one. The possibility of complete equality may render these positional preferences compatible. In a three-person economy, for example, a three-way tie might satisfy the desires to be average. Suppose, however, that while B and C wish to have the average rank, A desires the top rank. A will not be satisfied with equality, while B and C will not be satisfied if A acquires a top rank.²¹⁵ *One person* desiring the top rank can create an

representing one’s belief as to where his factual profile places him in relation to the factual profile of others. Nozick’s example is the ability to shoot jump-shots; the factual profile might be one’s ability “to score ___ jump shots out of 100 tries from 20 feet out.” NOZICK, *supra* note 52, at 242. It seems unlikely that all characteristics can be measured in any objective way.

211. *Id.* at 244 n.*.

212. See Goethals, *supra* note 118, at 273-74. See also ELSTER, *supra* note 15 at 148-57 (advancing concept of “wishful thinking” and “interest induced beliefs”).

213. More precisely, more than N% of any group can honestly believe they rank in the top N% of that group for a given characteristic. Thus, when Garrison Keillor says that, in Lake Wobegone, “all the children are above average,” he speaks to the ability of all the parents to believe that their children are in the top 50%.

214. Even where information directly relevant to some scale is difficult to acquire (such as income), people may use more public information (such as house size, model of automobile, clothes, vacations) as a proxy for measuring another person’s rank.

215. If A achieves the top rank, there are two possibilities for B and C. If B and C are tied, neither occupies the average rank (in the sense specified of having an equal number of slots above and below oneself). If B and C are not tied, one occupies the third and lowest rank.

inherent conflict in an economy where the others wish to be of average rank. The same result occurs if we relax C's positional preference even more: even if C only desires to avoid the lowest rank, there is an inherent conflict if B wants the average rank and A desires the top rank.²¹⁶ Finally, suppose C is completely indifferent to position, but that there are *two* A's seeking the top positions. Although the A's desires are obviously incompatible with each other, they are also incompatible with B's positional wants. For if the A's each rank higher than B, B fails to achieve the average position he seeks.²¹⁷

A second interesting case of incompatibility exists when the position desired is defined cardinally rather than ordinally. Under some circumstances, adding the fact that the positional preferences are cardinal will create conflict where ordinal preferences would not. In a three-person economy, imagine that A desires not merely to occupy the highest rank but also to maximize the difference between himself and the average ordinal rank (which, in a three-person economy, is the second rank). In such case, if B desires to have (at least) the average rank on a cardinal scale (not merely the second rank, but to occupy the position halfway between the first and third ranks), there is an inherent conflict even if C has no positional desire. Although A and B aim at different points, their desires inherently conflict because they each define their goal in relation to the point the other seeks. Similarly, if B and C merely desire to avoid falling behind the cardinal average more than a certain amount—e.g., they each wish to stay within 50% of the cardinal mean—their desires will inherently conflict with A's desire, assuming A still wishes to increase his cardinal rank when either B or C has fallen to 50% of the cardinal mean. A more realistic example of cardinal incompatibility may be illustrated by the following: B and C wish to have (at least) the average on a cardinal scale, while A wishes to occupy a position that exceeds all others by some minimum amount (but not, as in the prior case, by an infinite amount). As A moves ahead of the mean, the mean rises, causing B and C to invest in gaining ground; as B and C approach A's position, A invests in creating the gap he seeks.²¹⁸ These permutations demonstrate how minimal the conditions are for incompatibility.

This analysis also reveals an interesting example of compatibility—one existing when certain ordinally-defined positional desires exist together with

216. The only difference from the prior example is that if B and C are tied, C would be positionally satisfied by having avoided the lowest rank. However, with A in the top position, B would still not be satisfied until he moves ahead of C, at which point C will occupy the lowest rank and be positionally unsatisfied.

217. Assume that $x\%$ of the population wishes to obtain the top rank, $y\%$ wishes to obtain the average rank, and $z\%$ is indifferent to rank. Whenever $x > z$, there cannot be as many positionally-indifferent z 's below the y 's as there are x 's above them. Consequently, whenever $x > z$, either some of the y 's are of below-average rank or some of the x 's do not occupy the highest rank.

218. Even if B and C only seek to be within a range of the cardinal mean, the same upward spiral will occur if the gap A seeks is large enough to lower B and C's positions too far below the mean.

the cardinal desire not to fall too far behind some standard. Imagine, for example, that A desires the first ordinal rank, B desires the average ordinal rank, and C desires to avoid falling behind the average rank more than some proportionate amount (e.g., to have at least 75% of what the average ranking person has). Arguably, it is the failure to satisfy a preference of this latter sort—the desire not to fall too far behind a norm—that constitutes “poverty.”²¹⁹ Under these circumstances, although each consumer in the economy has a relative preference, there is no inherent conflict; satisfying all three preferences simultaneously is possible. If this is the correct description of poverty, then poverty could be eliminated not only by complete equality, but by C’s narrowing the gap between himself and the mean to the desired position. Poverty might result, however, if A’s and B’s positional preferences were incompatible and the competition between them raised the mean too far above C’s reach.

To summarize, people have inherently conflicting preferences when (a) they make a comparison among one another, (b) the comparison involves the same characteristic, (c) they desire incompatible positions with respect to one another regarding that characteristic, and (d) their respective positions will be observable and objective. These circumstances produce a zero sum situation: satisfaction of one person’s preference *necessarily* means the dissatisfaction of another’s.

Richard Posner poses a hypothetical that suggests a paradigmatic example of inherent preference conflict. It concerns competition for physical height by consumption of a human growth hormone.²²⁰ Because “tallness” is relative, to prefer to be tall means to prefer to be taller than the average of some reference group. The preference for being tall, or at least for not being short, is widely shared in American society.²²¹ We can say, therefore, that these preferences for height are reciprocal. Because one’s height is easily observed and reasonably objective, the preference for height creates an inherent preference conflict. Satisfying one person’s desire to be taller means that those who remain the same absolute height become relatively shorter and suffer a welfare loss. The total welfare available from stature may thus be fixed; any “investments” in gaining height, e.g., shoe lifts or human growth hormones, will not

219. See *supra* note 144.

220. POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 11-12 (discussing “pituitary extract”). See also Easterlin, *supra* note 66. This hypothetical is not fanciful: technology is making growth hormone sufficiently available to raise real distributional issues. See Barry Werth, *How Short is Too Short?*, N.Y. TIMES MAG., June 16, 1991 at 14; Melvin Grumbach, *Growth Hormone Therapy and the Short End of the Stick*, 319 NEW ENG. J. MED. 238 (1988).

221. See Saul D. Feldman, *The Presentation of Shortness in Everyday Life—Height and Heightism in American Society: Toward a Sociology of Stature*, in LIFE STYLES: DIVERSITY IN AMERICAN SOCIETY (Saul D. Feldman ed., 1975), at 437-42; Wayne E. Hensley & Robin Cooper, *Height and Occupational Success: A Review and Critique*, 60 PSYCHOL. REP. 843 (1987); A. Schumacher, *On the Significance of Stature in Human Society*, 11 J. HUM. EVOLUTION 697 (1982).

increase total welfare created from "consumption" of height, but only redistribute who gains and who loses.²²²

As suggested above, there is one way in which preferences for height may not conflict. Imagine that a certain group of people, the C's, wish only to avoid falling too far behind the mean height, and are indifferent to relative height as long as they are within, say, ten percent of the mean. Assume that the remaining people wish only to achieve certain ordinal ranks: the A's wish only to be within the tallest twenty-five percent of the population, and the B's wish only to avoid being within the shortest forty percent of the population. Under these circumstances, it would be possible for the C's who are more than ten percent shorter than the mean to invest in gaining height without affecting the extent to which the A's or B's satisfy their positional preferences. For many distributions, it is possible for everyone in the bottom forty percent to be within ten percent of the mean; thus it is possible for the C's to satisfy fully their positional preferences without decreasing the satisfaction of such preferences by the A's or B's. When higher ranking people care about rank but not distribution, and when lower ranking people care more about distribution than rank, preferences do not necessarily conflict.

The existence of inherent preference conflict does not necessarily imply a misallocation of resources. Misallocation occurs only when people use resources to compete in a zero sum sector that might have been used in a "positive sum" sector where welfare can rise with investment. I now turn to an examination of this wasteful tradeoff.

2. *The Social Waste of Satisfying Inherently Conflicting Preferences: Diverting Resources to a Zero Sum Competition*

People waste resources when they invest those resources in satisfying relative preferences that inherently conflict instead of satisfying (a) absolute preferences or (b) relative preferences that do not conflict because one of the conditions of inherent conflict is absent. The minimum concept of Pareto-

222. This assertion ignores many complications. First, although many people would like to be tall, it is likely that the pleasure one gains from height is usually not a simple, conscious realization that one is taller than others. Second, in a utility analysis, we would weigh a large gain by the pituitary consumer against a large number of small losses by everyone else. The person who adds to his height has very little effect on average height; he almost certainly gains more satisfaction than the loss he imposes on any one person made relatively "shorter." On the other hand, to add a few inches in height may be to become taller than a very large pool of people, and all of those who come in contact with the now-tall child may suffer some loss (plus those of equally tall or taller height lose some utility from tallness). Third, the comparisons most important to utility are probably not, as suggested above, to average national height, but to average height among much smaller groups (neighbors, coworkers, relatives, etc.). Fourth, instead of desiring to be taller than the average of some group, people may (also) enjoy occasions in which they are the tallest within a social group. In such cases, it is easier to see how increasing the frequency in which one is the tallest in a group necessarily decreases the frequency of that enjoyment for others. Finally, people do not indefinitely desire greater relative height; at some ages and at extreme levels height becomes socially awkward. These complications, however, do not alter the point of the example made above.

superiority condemns transactions undertaken to satisfy inherently conflicting preferences, because making someone better off by satisfying such preferences *necessarily* means that others are made worse off. Satisfying someone's absolute preferences (or relative preferences that do not conflict), on the other hand, does not require the nonsatisfaction of others' preferences. Thus, the Pareto criterion recommends using resources to satisfy nonconflicting preferences. As long as resources might contribute to satisfying such preferences, it is socially wasteful for individuals to direct those resources toward satisfying their conflicting preferences.

The Pareto criterion, however, is always subject to the attack that it is too restrictive. Perhaps we should employ the Kaldor-Hicks concept of social wealth maximization instead. Under the Kaldor-Hicks test, investment in satisfying conflicting preferences is efficient if those who gain from doing so gain *more* than what others lose. In employing this test, we should consider three possible cases of competitive consumption: (i) where one party alone invests to obtain relative position, (ii) where both parties invest an identical amount to obtain relative position, and (iii) where both parties invest to obtain relative position but one party "wins" the competition by making a greater investment than the other.

First, suppose one party alone invests to obtain relative position. If A invests in position and B does not, perhaps it is because A cares about position more than B. Certainly if there were no transaction costs we would expect B to pay A to forgo such positional investment if the change harmed B more than it benefited A. The power of this wealth maximization argument depends entirely on whether transaction costs exist. For reasons stated in Part II(C), transaction costs will frequently block private agreements to control positional investment. Consequently, we cannot infer from B's failure to "bribe" A not to make investments in position that the positional gain to A exceeds the positional loss to B. If we do not know what would happen absent transaction costs, we simply cannot say that A's positional investment is either efficient or inefficient.

Second, consider the case in which A and B invest an identical amount to obtain relative position. Whenever one party suffers from the external costs of transactions to which she is not a party, that party may respond by investing in "defensive measures," such as when a person purchases ear plugs to avoid the externality of noise. The unique characteristic of inherently conflicting preferences, however, is that any such "defensive measures" will not only minimize the harm to B, but will deprive A of the benefit of his prior investment. To the extent B's investment is effective at all, it nullifies A's investment. A may respond by increasing his investment, but in each round of positional competition, B may match A's investment, effectively wasting all the resources invested. If, after any number of rounds, B exactly matches A's investment, we have Frank's prisoner's dilemma model: A's and B's parallel

investment in position is totally wasted. Neither achieves any lasting positional change yet each has sacrificed the resources invested in striving for superiority. Both parties would have been better off if neither had invested in position.

Third, if after the various rounds of competition, A “wins” the positional competition, then A may be better off for having made the positional investments. Nonetheless, resources are wasted: the same relative outcome could be achieved with fewer total resources. Had A and B been able to agree, they could have achieved the same ultimate relative position (ordinal or cardinal) by A’s investing *alone*. In other words, if A invested a total of x and B a total of y , A could have achieved the same relative rank by investing only the difference $(x - y)$. The difference between the amount actually invested $(x + y)$ and the “minimally necessary investment” given the outcome $(x - y)$ represents the waste of competitive consumption.²²³

To illustrate this resource misallocation, it is helpful to return to Posner’s growth hormone hypothetical.²²⁴ Posner asks which family would have greater “value” for a pituitary extract that would increase the height of their child: (1) a wealthy family whose child will otherwise be of average height but who will be “tall” with the growth hormone, or (2) a poor family whose child suffers from a growth deficiency that will retard his growth far below average unless he receives the hormone. The wealth-maximizing answer is that the family that is “willing to pay” the greatest amount for the pituitary extract—quite possibly the wealthy family—“values” it the most.²²⁵ Posner offers the example to show the theoretical difference between social wealth and utility, the wealthy family’s consumption maximizing the former but not the latter. Posner’s point, however, is that such divergences are “rare,” and that wealth maximization is good as a general rule for maximizing utility.²²⁶

Posner’s discussion misses the most interesting aspect of the example: the wealthy family’s use of growth hormone to make its average height child “tall” not only fails to *maximize* utility, *but may even reduce utility*. The wealthy family’s consumption of the extract may not only produce less utility than would the poor family’s consumption, it may be worse than having no consumption of the hormone at all. Because the preferences for height inherently conflict, the use of human growth hormone fails the Pareto criterion: making one person better off by being taller necessarily makes others worse off. Even under the Kaldor-Hicks criterion, if there are transaction costs, we cannot be sure whether it is efficient for only one consumer to use the growth hormone.

223. The total waste, $(x + y)$ minus $(x - y)$, is equal to $2y$. In other words, all of what B invested (y) and an equivalent amount of A’s investment is wasted. Only the amount that ultimately placed A ahead of B is not wasted.

224. POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 11-12 (discussing “pituitary extract”).

225. *Id.*

226. *Id.*

We can say, however, that if the poor family responds to the rich family's investment by also investing in the hormone, there is genuine social waste.

One possibility is that the freedom to consume growth hormone will produce a prisoner's dilemma. Suppose that we have a two-family economy in which each set of parents, hoping to make its child "tall," or to prevent him or her from being "short," ranks its preferences as follows: (1) that its child consume the extract, while the other child does not; (2) that neither child consume the extract; (3) that both children consume the extract; and (4) that the other child consumes the extract while its child does not. Under these circumstances, each family may choose to purchase the extract to avoid outcome (4) and to have a chance at outcome (1).²²⁷ Their joint decisions would produce outcome (3), in which the added height for both children is equal and produces no advantage for either.²²⁸ The result of such a dilemma is an "arms race" of competitive consumption of growth hormone in which parallel spending decisions eliminate the utility of the object purchased. This wealth creates no welfare, but reduces welfare if, in the absence of human growth hormone, the parents would have spent *some* of the money saved in satisfying their nonconflicting preferences.²²⁹ The nonproductive investment in growth hormone represents a loss of the welfare these alternative items would have generated. Even if there is a "winner" in this competition, such that one family gains greater height (within the limits desired) than the other, there is still waste if both families consume the hormone. If the "losing" family had not consumed the hormone, the winning family could have consumed only the minimally necessary amount to achieve its positional edge. The resources represented by the winning family's additional consumption, and all of the losing family's consumption, are wasted.

We can also use Posner's hypothetical to explain under what circumstances it would be affirmatively desirable for one of the families to purchase the growth hormone. Recall the height preferences postulated at the end of the last section: A's desire to be in the top twenty-five percent rank, B's desire to be in the top sixty percent rank, and C's desire to be within ten percent of the

227. More technically, the decision to consume the hormone "dominates" the other decisions. If family B abstains from hormone consumption, then family A prefers consumption because it secures its highest ranked outcome (1). If family B consumes the hormone, then family A prefers consumption because it avoids its lowest ranked outcome (4). Family B's choices are the same.

228. There may be some activities where absolute height is an advantage. For example, assuming that there are lower marginal costs to picking those apples in the part of the tree that can be reached without a ladder (less risk of injury, less capital maintenance), then there may be some gain from having taller apple pickers. But such examples are exceptional.

229. For example, suppose the family's next highest use for the money invested in growth hormone would have been for encyclopedias or for greater leisure for the breadwinners. One can imagine leisure and encyclopedias as having elements of a positional good if one family is striving to have more leisure or to give its child more education than others. I assume for purposes of this example, however, that this is not the case, that the families value the goods for their absolute value only, regardless of the amount consumed by others. All that is necessary for the point above, however, is that these alternative goods create more absolute utility than the growth hormone (which creates virtually none).

mean height. Suppose that the wealthy family in Posner's hypothetical, whose child would otherwise be of average height, has the preference represented by the A's, and the poorer family, whose child has a growth deficiency such as dwarfism, is one of the C's. In this case, consumption by the poor family could satisfy its positional preference without causing any harm to anyone else. The wealthy family's consumption, however, could satisfy its positional preference only by displacing another A who would otherwise be in the top twenty-five percent, and by raising the mean so that a larger number of C's may be more than ten percent below the mean.

3. *Relative Preferences and Optimal Effort: The Exceptional Case When Inherently Conflicting Preferences Are Socially Beneficial*

Some might object to the above analysis of competitive consumption by raising the connection between consumption and production. In a market economy, people must produce in order to consume. Even if people in a group would be better off limiting their competitive consumption, perhaps their efforts to satisfy their relative preferences cause them to produce more goods or services to satisfy *other* people's absolute preferences. Perhaps it is desirable to have relative preferences that elicit greater productive effort.

Although relative preferences will undoubtedly elicit greater effort, one should not conclude that greater effort is always desirable. Under standard microeconomic accounts, absent market failure, absolute preferences are sufficient to elicit the optimal tradeoff between leisure and work. In economic terms, the cost of an hour of work is the value the worker places on using that hour for leisure. The benefit of an hour of work is equal to what others are willing to pay for that hour of labor. It is efficient for individuals to work those hours, *but only those hours*, where the marginal benefits of work exceed the marginal costs.²³⁰ A competitive market—where customers or employers bid for labor—will generally produce that result.

Assume, for example, that A is a self-employed plumber working for ten hours a day who values his marginal (fourteenth) hour of leisure at twenty-five dollars. That sum reflects the strength of his preference for the activities he engages in during leisure. It would be an inefficient use of resources for him to work the eleventh hour for a wage less than twenty-five dollars per hour. At that point, if the highest wage offered is only twenty dollars per hour, then his working would contribute less toward satisfying the preferences of others (as measured by their willingness to pay) than his leisure would contribute

230. Typically, the marginal costs of labor increase over the range of hours in a day (e.g., the worker values the first hour of leisure per day more than the twenty-fourth) while the marginal benefits of labor decline (e.g., a firm values the first hour of labor per day more than the twenty-fourth). Thus, typically, there will be one optimal amount of time each worker should work, a point graphically illustrated by the point at which the rising marginal cost curve for labor intersects the falling marginal benefit curve.

toward satisfying his own preferences (similarly measured).²³¹ In a competitive market, absent a market failure, customers or employers will offer to pay A up to the value they place on his labor, and A will work the optimal level without concern for relative position. Any additional effort caused by A's having a relative preference (e.g., for having more income than a neighbor, B) would be excessive, unless the additional effort actually satisfies A's relative preference. But, under the circumstances specified above, if B has an inherently conflicting relative preference, A's and/or B's additional effort will be wasted.

This analysis, however, points to one important circumstance where relative preferences may be not only harmless but desirable: when an existing market failure holds effort below the optimal level. For example, a competitive market (in which consumers act to satisfy only absolute preferences) is commonly thought to elicit less than optimal production of "public goods" or quasi-public goods.²³² Public goods have two defining characteristics: (1) inexhaustibility, meaning that consumption by one individual does not preclude consumption by other individuals; and (2) nonexcludability, meaning that once produced, it is not feasible to exclude nonpaying individuals from consuming the good.²³³ Journalists and scholars, for example, "produce" information and ideas that may be jointly consumed by many under circumstances where it is not be feasible to exclude use by nonpayers.²³⁴ For commodities with these public good characteristics, consumers will hope to "free ride" on the paid consumption of others, gaining the benefit of the public good at no cost. Because all consumers have the same incentive, a competitive market will usually underproduce such goods.²³⁵ The general problem of free riding may also cause the market to underproduce goods with disproportionately large external benefits. For exam-

231. The same analysis would work if we measured "effort" not by the number of hours worked but by A's "intensity" of work during a given hour or by his investment in training as a plumber.

232. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 46-48 (1988); FERGUSON & MAURICE, *supra* note 9, at 494-95; Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *COL. L. REV.* 1600, 1610-11 (1982).

233. See COOTER & ULEN, *supra* note 232, at 46; Gordon, *supra* note 232, at 1611 & n.65. Under more relaxed conditions—when inexhaustibility or nonexcludability is imperfect—a commodity may be a quasi-public good.

234. Cf. Gordon, *supra* note 232, at 1611 (explaining why "[b]ooks and inventions exhibit certain public goods characteristics"). Copyright law gives scholars and journalists some powers of exclusion regarding their "expression," but these powers are limited and do not include protection of "ideas, processes, systems, discoveries, or similar products of mental effort." Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *STAN. L. REV.* 1343, 1370-73 (1989) (explaining limitations on exclusion right under copyright law). Consequently, this kind of work may retain some important public good characteristics. Suppose, for example, that a legal scholar constructs a new "test" that dramatically clarifies the law and improves the ability of judges to decide cases. Such a test is certainly not "exhausted" if one judge uses it to decide a case; nor can the scholar feasibly advocate the merits of the test and yet exclude people from using it. Similarly, suppose a journalist who uncovers new, highly probative facts about a candidate for political office. Transaction costs may prevent the journalist from selling that information to voters on a case-by-case basis, but once published, there may be no practical way to exclude nonpaying consumers from using the information in deciding how to vote.

235. See COOTER & ULEN, *supra* note 232, at 46; FERGUSON & MAURICE, *supra* note 9, at 494; Gordon, *supra* note 232, at 1611. The underproduction of public goods represents a market failure which may justify governmental regulation either subsidizing or directly supplying such goods.

ple, if altruists desire that the poor receive a certain level of financial support, each would benefit from another's charitable contributions.²³⁶ Consequently, each may seek to free ride on the contributions of others, resulting in less than optimal levels of charity.²³⁷

Relative preferences offer some hope of correcting these market failures. First, efforts to satisfy relative preferences will elicit greater consumption of certain goods. If there were a relative preference for commodities otherwise underproduced, competitive efforts to satisfy the preference would raise demand for, and encourage production of, such goods. For example, for the reasons given above, free riding may cause less than the optimal level of contributions to charitable organizations. But a relative preference to give more to any particular charity than others give—to receive the status of being a “major donor”—would tend to correct this market failure.²³⁸ Up to some point, it is socially desirable for consumers to have relative preferences for otherwise underproduced goods.

Relative preferences might correct market failure in a second way. To satisfy their relative preferences, workers must produce more so that they can afford to consume more. Although this increase generally means that workers are producing private goods beyond the optimal level, competitive consumption also induces workers employed in the production of quasi-public goods to produce more. In theory, competitive consumption might drive such workers to produce an optimal amount of such goods. The costs, however, would certainly exceed the benefits. Making the conventional assumption that public or quasi-public goods are a small fraction of all goods, inducing greater effort by all workers to correct for underproduction would create a larger market failure of overproduction of private goods.

Nonetheless, there are two particular cases where relative preferences might encourage the increased production of quasi-public goods at an acceptable cost. First, suppose that *only* those people in the business of producing quasi-public goods have relative preferences. Competitive consumption would drive these people to increase their effort toward a socially optimal level of production,

236. For example, a soup kitchen that feeds the homeless may create benefits such as decreased crime and decreased pandering, as well as the altruistic pleasure of knowing others have enough to eat. These benefits are not limited to those who contribute to the soup kitchen.

237. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 440. To illustrate the market failure, suppose that ten people place a value of one dollar per day on having one more person fed at a soup kitchen and that it costs five dollars per day to feed one more person. Although the total benefits—ten dollars—exceed the cost, it is quite possible that the ten people will fail to contribute the needed five dollars because each will consider the possibility that others will contribute enough and that he will accrue the benefits without contributing anything.

238. To elaborate on the example *supra* note 237, if one person seeks to “consume” (i.e., give) more charity than others, he might be willing to contribute the entire five dollars per day. Amihai Glazer and Kai Konrad argue that conspicuous charity has certain advantages over conspicuous consumption in signaling one's income, and find evidence that people use charitable giving for that purpose. Amihai Glazer & Kai A. Konrad, *A Signalling Explanation for Private Charity* (1992) (unpublished manuscript, on file with author).

while private good production (carried out by workers without relative preferences) remained unaffected. But this approach would fail if it depended on people satisfying their relative preferences by the money wages they receive in quasi-public good production. Since it is the nature of such goods that producers cannot generate as much return on their effort as they could by producing private goods, there is a tendency for such people to exit the market for producing quasi-public goods.²³⁹ This tendency would be countered in part, however, if merely being a producer in a quasi-public good market earned one relatively high status within the larger community. Thus, awarding social respect to those in such occupations, and depriving private good occupations of similar status, may encourage the production of quasi-public goods without raising the likelihood of wasteful competitive consumption.

Second, suppose that people producing quasi-public goods have a relative preference for their *production*. This possibility requires that we relax the neoclassical assumption that work is entirely a cost (a sacrifice of leisure), and imagine that sometimes people also gain utility directly from working (as opposed to the wages they earn from work).²⁴⁰ If people have preferences for work, such as the desire to accomplish tasks or to develop proficiencies, then it is plausible that they also have *relative* preferences for work, such as the desire, as an end in itself, to be more productive than others. Again, according to neoclassical theory, relative preferences for work generally would not be necessary to elicit optimal effort. But for public goods, such a desire would correct the natural tendency to underproduce such goods. Therefore, it would be socially desirable if people in quasi-public good occupations had the desire, as an end in itself, to be more productive than others.

To illustrate these two points, consider again the fields of journalism and academia. If these fields produce information that has the characteristics of a public good, then it may be socially desirable (a) that the occupations of journalist and scholar be accorded high social status and (b) that journalists and scholars strive for status within their occupations. In American society, these occupations are not particularly high in status, but it is interesting that some of the most prestigious "prizes" are the Pulitzer Prizes for journalism and the Nobel Prizes for certain academic disciplines. Perhaps the status these prizes bestow is a cultural means of partially solving the public good market failure.

239. Those with relative preferences would not remain concentrated in public good production for another reason. People tend to compare themselves with similar others, such as the group of people sharing one's occupation. If the remaining industries lacked positionally-motivated producers, it would be easier to "get ahead" in those industries than in those in which everyone seeks to satisfy relative preferences.

240. The standard assumption that work does not itself produce pleasure has been questioned and criticized. See, e.g., ROBERT E. LANE, *THE MARKET EXPERIENCE* (1991); Margaret Jane Radin, *Justice And The Market Domain*, in *NOMOS XXXI: MARKETS AND JUSTICE* 165, 176-77 (John W. Chapman & J. Roland Pennock eds., 1989).

C. *When Transaction Costs Prevent Bargaining Solutions*

When the conditions of inherent preference conflict exist, the above analysis suggests that individuals will wastefully divert resources from satisfying nonconflicting preferences into the zero sum activity of competitive consumption. All three cases of wasteful competitive consumption depend, however, on the failure of the parties to agree privately to controls on their competitive investments. In Coasean terms,²⁴¹ satisfaction of relative preferences under circumstances of inherent conflict creates negative externalities—the nonsatisfaction of another individual's relative preferences. The Coase Theorem suggests that, in the absence of transaction costs, the parties will bargain to the efficient control of such externalities. In other words, individuals will voluntarily seek agreements restricting competitive consumption if such agreements will save resources that are more efficiently employed in satisfying nonconflicting preferences.

In this context, "efficient allocation" is a function of two factors: maximizing welfare by satisfying the strongest relative preferences (some persons having stronger relative preferences than others) and minimizing resources expended to satisfy relative preferences. In the growth hormone example, the efficient outcome might be that neither individual, A or B, consumes the growth hormone;²⁴² but because each wishes to avoid being made relatively shorter by the other's consumption of growth hormone, each will consume the growth hormone if acting independently. In the absence of transaction costs, the Coase Theorem says that A and B will reach an agreement whereby each promises to forgo consumption of the hormone. Similarly, under certain circumstances, the most efficient outcome might be for A to consume the growth hormone but for B to refrain. Acting independently, however, B also may consume the hormone, canceling the effects of A's consumption, and wasting the investment of both. If A benefits more from gaining in relative height than the cost to B from losing relative height, though, the Theorem predicts that A will pay B to refrain from hormone consumption while A partakes of it himself, if the net gain is larger than that produced by any other consumption pattern.

241. See Coase, *supra* note 101. Briefly stated, the Coase Theorem says that "in a world without transaction costs, parties will bargain to the optimal allocation of rights, no matter where the rights were initially assigned." James Lindgren, "Of Man River . . . He Keeps on Rollin' Along": A Reply to Donohue's Diverting the Coasean River, 78 GEO. L.J. 577, 579 (1990). In even simpler terms, "when it is to the benefit of people to reach an agreement, they will seek to reach it." George J. Stigler, *Two Notes on the Coase Theorem*, 99 YALE L.J. 631, 631 (1989).

242. The mutual consumption of growth hormone will cause A and B to forgo consumption of an absolute good (e.g., safety or insurance), without making either any taller in a relative sense.

1. *Conventional Transaction Costs*

In most cases, however, high transaction costs will prevent individuals from reaching agreements about limiting expenditures to satisfy their relative preferences. Such agreements will generally require that an individual bargain with every individual who is affected by his consumption of a positional good. These transaction costs will be prohibitively high when there are more than just a few consumers. The groups to which individuals generally compare themselves—friends, neighbors, coworkers—are usually large enough to make bargaining impractical.

In addition to the high costs of negotiating with all relevant parties, the normal problems of strategic behavior are likely to prevent an efficient outcome. Noncontracting parties can “free ride” on the agreement of others to forgo consumption of a positional good (such as growth hormone) or to consume a minimum amount of a nonpositional good (such as safety). Such parties, as a result, receive greater benefit from consuming positional goods. This is the effect that creates the prisoner’s dilemma of the sort discussed above.²⁴³ Also, as more parties express their willingness to participate in an agreement (restricting positional consumption or requiring nonpositional consumption), the few remaining parties will perceive that their cooperation is growing in importance, and they will threaten to “hold out” in an effort to extract more than a proportionate share of contractual benefit. The possibility of both strategies often will block any agreement.²⁴⁴

2. *Special Transaction Costs*

Besides these standard transaction costs, the context of competitive consumption presents some special impediments to Coasean bargaining. First, paying a Coasean “bribe” may undermine rather than preserve or enhance one’s social status. Offering to pay others to forgo consumption is just the kind of overt manipulation of status symbols that is more likely to produce derision than status.²⁴⁵ Explicitly offering to pay people to assume a lower status is especially self-defeating because it concedes that the “briber” is otherwise status-deficient. Even if such payments do produce status, acknowledging that one seeks such an end will violate social norms against feelings of jealousy and envy. Although it is appropriate to want “nice” clothes, a “good” car, and a

243. The unrestricted families now will gain even more from hormone consumption, since the contract will tend to depress the average community height. Any party who contractually restricts his or her own consumption of goods serving purely relative ends risks relative losses if other consumers are not so restricted. Consequently, a consumer will tend to refuse to enter such agreements unless all consumers are included.

244. See generally Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991).

245. See *supra* notes 164-170 and accompanying text.

“decent” income, many consider it inappropriate to want more or better clothes, cars, and income than others, or to feel badly for possessing less. Thus, the shame people feel in admitting they care about these things will also impede Coasean bargaining in this context.²⁴⁶

For example, if Jones seeks to own one of the “nicest” cars on his block, he can theoretically pay his neighbors not to buy a better car. But such bargaining requires Jones to reveal the shameful fact that he feels worse when others are doing relatively better, or better when others are doing worse. And vis-à-vis the neighbors with whom he makes the bargain, the Coasean contract will hardly protect his status given that the reason that his car compares favorably to others is that he is paying the other owners not to improve their own. Rather than enhance status, the existence of the contract is a form of subordination to his neighbors: Jones’ self-esteem is so fragile that he will pay others to pretend they are less financially successful than they really are. Thus the shame and “self-defeating” subordination of openly seeking and paying for status constitute the first set of special transaction costs to bargaining in this context.

Of course, in some cases, there may be ways of bargaining to the efficient outcome without either side actually admitting to having a relative preference. To return to Frank’s coal workers example,²⁴⁷ the workers may be unwilling to admit that each would refuse to work in the “dirty” mine except for the prospect of losing position relative to the other. This “shame” cost might prevent a straightforward agreement to work in the clean mine. But there are alternatives: for example, the workers might agree to form a union and jointly demand the right to work in clean mines. They might give as the reason for their demand, not the avoidance of resource misallocation caused by their competitive consumption, but the right of working people to humane conditions or the need to stop management from exploiting workers.²⁴⁸ This alternative, or others, may avoid shame costs, but require other transaction costs. If the costs of alternative arrangements are also sufficiently high, they will prevent the parties from bargaining to the efficient outcome.

Another special impediment to Coasean bargaining in this context is that people may not possess sufficient information about the relative nature of their own preferences to carry out the necessary bargaining. The social norms against relative desires may suppress the necessary self-knowledge. Normally, conscious awareness is irrelevant to the economic theory of consumer behavior. In predicting that individuals will act to maximize satisfaction of their prefer-

246. Cf. Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 675 (1988) (discussing “anxiety” as transaction cost). Although neglected for a time, psychology has again begun to emphasize the importance of shame. See, e.g., MICHAEL LEWIS, *SHAME, THE EXPOSED SELF* (1992); THE MANY FACES OF SHAME (Donald L. Nathanson ed., 1987); LEON WURMSER, *THE MASK OF SHAME* (1981).

247. See *supra* text accompanying notes 79-81.

248. Cf. FRANK, *THE RIGHT POND*, *supra* note 77, at 150-58. I am not suggesting that this is the primary explanation for unionization.

ences,²⁴⁹ consumer theory does not require that people *consciously* maximize, or that they be able to verbalize what they are doing in maximizing terms.²⁵⁰ People need not even be conscious of what their preferences are; their observable behavior may be explained best as an attempt to satisfy a desire whether or not they are aware of such a desire. Positive economics is thus content to say that people act *as if* they were maximizing satisfaction of their preferences, and is indifferent to what people may think they are doing.

Nonetheless, the Coase Theorem presents a special case. Here, economic analysis predicts that people engaged in conflicting activities will *bargain* to reach the optimal level of each activity. Can such bargaining occur without at least one party being conscious of the fact? More significantly, can such bargaining occur without at least one party being conscious of conflict between the two activities? There may be circumstances in which “subconscious bargaining” does exist, where two parties consciously engage in some activity other than bargaining that produces the effect of a Coasean bargain.²⁵¹ But there are other circumstances in which it is exceedingly unlikely that parties will bargain unless they are conscious of what they are doing and why.

For example, suppose that A lives in a neighborhood where everyone parks on the street and that she has a preference for having the “best” automobile on her block.²⁵² Assume also that B shares this relative preference, that B “competes” with A by investing in progressively more expensive cars, and that such investment is inefficiently diverting resources from satisfying nonconflicting preferences. The Coase Theorem predicts that A and B will solve this problem by agreeing to restrict their car consumption. But if A and B are not conscious of the relative nature of their preferences—if they each consciously perceive themselves wanting only a “nice” car, not one better than the other—can we expect them to bargain with each other to restrict the quality of automobile they consume? A might “compete” with B for best car on the block even though she has never met B. It seems highly unlikely that A could contact B for the first time and arrange a limit on automobile consumption, without being conscious of the facts that she had a relative preference for automobiles, that an agreement restricting competitive automobile consumption was desirable,

249. This also applies to any decision unit seeking to maximize any object (such as firm maximizing profits or politician maximizing votes).

250. See BECKER, *supra* note 171, at 7; FRIEDMAN, *supra* note 171, at 15. Of course, people sometimes do consciously maximize; it is simply not necessary to economic theory that they do.

251. When people have a pre-existing relationship of some sort, it is possible that they will act “as if” they were bargaining over conflicting activities, while not being conscious of the conflict or the bargain. Imagine two people sharing an apartment: A, who likes to go to sleep early, and B, who likes to play music loudly late at night. Consciously or subconsciously, it is possible that A might “punish” B for each incident of late night music by refusing to do chores or by acting coldly toward B for a period of time. Again, consciously or subconsciously, B might respond in kind, or B might play the music at a lower volume, turn it off earlier in the evening, or purchase and use headphones. Even with both parties behaving subconsciously, the ultimate result might be a Coasean bargain in which the parties reach the efficient outcome.

252. Neoclassical economics would infer such a preference if its existence best explained certain of A’s observable behavior; whether she was conscious of this preference is irrelevant.

and that she was in fact bargaining with B over that issue. We may generalize this point by saying that where there is no previous contractual relationship between the parties (and especially where there is no previous relationship of any kind between the parties), it is unlikely that they will contact each other and negotiate a contract without conscious awareness that their activities conflict and that they are bargaining over the best way to resolve that conflict.

Yet in the context of relative preferences, the necessary self-awareness will sometimes be lacking. Avoiding conscious awareness of one's relative preferences may be a common means of avoiding the feelings of shame such preferences tend to create (even if others do not know about them). Wanting more expensive goods, or a higher income, than one's neighbors, coworkers, and friends may make one feel petty, vain, and shallow. Thus, a final special impediment to Coasean bargaining in this context is that people may be insufficiently conscious of their relative preferences to permit them to bargain.

3. *Examples of Successful and Unsuccessful Coasean Bargaining*

There will be cases in which parties overcome these impediments to Coasean bargaining. An excellent example is suggested by Frank's theory of wages. As noted above,²⁵³ Frank explains the deviation of wages from marginal productivity by reference to workers' desire for having higher wages than their coworkers in the firm. According to Frank, this desire leads firms to pay their more productive workers less than their marginal productivity, and their less productive workers more than their marginal productivity, thus compressing the pay scale from the scale that marginal productivity theory suggests.²⁵⁴

If Frank's theory is correct, individuals have somehow bargained to a solution of the problem of competitive consumption and (consciously or unconsciously) avoided the resource misallocation their relative preferences might otherwise create. Absent Coasean bargaining, if firms set wages at marginal productivity, some workers would make wasteful investments in preserving their position vis-à-vis their coworkers. Rather than work in a firm with people making relatively higher wages (because of their higher marginal productivity), workers would seek to preserve their status in one of two ways: (1) by each working for himself or herself and avoiding all coworkers or (2)

253. See *supra* text accompanying notes 188-191.

254. Workers accept wages that are relatively high within the firm, but are below their marginal productivities, because they are better off trading that wage increment for increased status. Other workers accept wages that are relatively low within the firm, but above their marginal productivity, because they are better off trading that status for the wage increment. In a dynamic sense, individuals who care little about status will seek firms with more productive workers because getting paid more than their marginal productivity is well worth the sacrifice of being relatively poorly paid within the firm. Conversely, people who care enormously about status will seek firms with less productive workers because getting paid less than their marginal productivity is worth the benefit of being relatively well paid within the firm. The fact that a worker voluntarily joins a firm with workers of varying marginal productivities and differing wages means that the workers must be making wage-for-status trades that are beneficial to him or her.

by working for a firm that has a uniform wage scale because it employs workers with the same marginal productivity.²⁵⁵ These options are “investments” in status because of the opportunity cost each entails: by forgoing work with other workers or with other workers of higher productivity, an individual may sacrifice an absolute wage in order to avoid a “relatively” low wage. To avoid this waste, it is necessary that the more productive workers “bribe” the less productive workers to remain in the firm at a relatively lower wage by the affording them the prospect of receiving—through the bribe—more than their marginal productivity. But if each employee had to reach an enforceable agreement with every other employee whose status was affected by his contractual wage, then we should expect the high transaction costs to prevent workers from bargaining to the efficient outcome. How is it that the workers avoid this wasteful investment and reach the efficient outcome?

The answer is that firms facilitate the necessary bargaining. Firms attempt to gain the most productive combination of workers; where this includes workers of differing marginal productivities, firms can create a pay scale equivalent to marginal productivity or one that deviates from it. If workers desire relative wages (compared to coworkers), then firms offering compressed pay scales will dominate the market and drive out firms paying strictly according to marginal productivity. Employees, therefore, need not negotiate directly with each other; they can shop for an employer who offers them the most desirable combination of absolute and relative wages. Where workers face firms offering a rich selection of possible tradeoffs between absolute wages and status, and where they already bear the transaction costs of finding an employer, the transaction costs for reaching the best tradeoff among employees will be low.²⁵⁶ Most importantly, a single employer has the ability to “enforce” the current arrangement among employees much more cheaply than enforcing numerous employee/employee agreements by keeping the relative wages equal for workers of a given marginal product.²⁵⁷ This mechanism also eliminates some of the special transaction costs discussed above: workers need not admit to caring about relative wages, nor be conscious of bargaining over relative

255. FRANK, *THE RIGHT POND*, *supra* note 77. There are other ways workers might invest in preserving workplace status: (1) by sabotaging the efforts of coworkers, and (2) by working a job in which their marginal productivity equals or surpasses coworkers when they could earn more in absolute terms in a different occupation in which their productivity was below that of their coworkers.

256. Assuming a competitive market in which workers have the option of avoiding a wage-for-status trade altogether (by working alone or in a firm where equally productive workers are paid equally), the decision to take a job in a firm with coworkers of unequal productivity and unequal wages is to accept the implicit tradeoff made between wages and status.

257. Firms will experiment with different scales, attracting those workers who prefer their particular status-for-pay tradeoff. Firms that manage to attract workers of a certain preference for status will have an incentive to maintain the existing tradeoff in order to retain those employees. For example, a firm attracting people with little concern for status will tend to have larger disparities in wages, disparities more in line with disparities in marginal product. For this firm suddenly to compress wages would cause its most productive workers to leave. Conversely, a firm with workers who value status highly will have smaller wage disparities, and will lose its least productive workers if it makes them larger.

wages. In bargaining with the firm over wages, workers can consciously focus only on absolute wages, but still act "as if" they were attempting to maximize satisfaction of a relative preference for relative wages.

Stated this way, we can understand the difference between the market for labor and the market for growth hormone and other sectors in which serious resource misallocation may occur. In the growth hormone case, it is much more difficult to control the group of people with whom comparisons are to be made. Parties deciding whether to purchase growth hormones may be concerned about a very broad category of people whose decisions to purchase hormones may affect them. Because height is such an easily observable characteristic, one compares oneself to a very large group, and often to a group with whom one does not voluntarily choose to associate. Similarly, there are limits by which one can avoid unfavorable economic comparisons, and usually there is no collective decisionmaking process, other than government, to set minimum expenditure levels on nonpositional goods (like safety). Finally, even a firm's ability to facilitate wage-for-status bargains is unhelpful to the extent workers wish to be well paid relative to groups *other than* coworkers.²⁵⁸ In Frank's mine workers example,²⁵⁹ competition among neighbors for relative income drives workers to forgo health and safety investments that would make all parties better off.

Competitive consumption is a market failure. Individuals seeking to maximize satisfaction of their relative preferences will, under the conditions specified, fail to use social resources efficiently. Specifically, when individuals invest in satisfying their inherently conflicting preferences, they divert resources into a zero sum competition; the investment is wasteful because consumers are worse off using resources in this manner than they would be using those resources to satisfy nonconflicting preferences. Preferences inherently conflict when individuals (a) compare themselves with one another, (b) the comparison involves the same characteristic, (c) they desire incompatible positions with respect to one another regarding that characteristic, and (d) their respective positions will be observable and objective. These conditions will not cause economic waste where individuals voluntarily agree to refrain from such competition. But the nature of relative preferences—and more conventional problems—will often impede the necessary bargaining.

III. LEGAL REGULATION TO CORRECT FOR COMPETITIVE CONSUMPTION

As with any market failure, the practical issue is whether collective regulation can correct the failure without imposing more costs than are gained from

258. See, e.g., Philip E. Graves, Dwight R. Lee & Robert L. Sexton, *A Note on Interfirm Implications of Wages and Status*, 8 J. LAB. RES. 209 (1987) (arguing that in some fields, such as academia, workers may care more about reputation beyond firm than within it).

259. See *supra* notes 79-81 and accompanying text.

the correction. To improve the market result, we must be reasonably confident that we have isolated a particular instance of competitive consumption and that the benefits of regulating the market to correct the resource misallocation will exceed the costs of the regulation. This Part examines these issues. Part III(A) discusses three strategies that could be used to correct for competitive consumption: prohibiting or taxing consumption of goods that primarily serve relative ends, mandating consumption of goods that are commonly sacrificed in competitive consumption, and creating social norms against engaging in competitive consumption. The following sections examine in greater detail the normative implications of the most prevalent type of competitive consumption, that which is caused by the relative desire for social status. Part III(B) considers how individual competition for status might lead to inefficient investment of resources for which income taxation may be viewed as a corrective. Part III(C) considers how groups may compete for status and, in particular, suggests an understanding of antidiscrimination laws as seeking to prohibit a certain form of group-based status competition.

These latter two sections illustrate how the theory of relative preferences and competitive consumption can illuminate problems of legal theory. I emphasize, however, that this entire Part is a tentative exploration of possible regulatory responses to competitive consumption, rather than a definitive set of recommendations for solving the market failure.

A. *Strategies For Correcting Competitive Consumption*

Any strategy for correcting a market failure must begin by specifying how to identify the failure in practice, rather than in theory. Although I have specified the conditions above, I now enrich the model in two ways to account for certain real world complexities.

The social science evidence reviewed in Part II suggests the primacy of one form of competitive consumption: the consumption of status goods. Occasionally people may have independent preferences for particular status goods (e.g., one preference for the “best” car on the block, another for a socially acceptable home, another still for the most fashionable clothes in the office), or for achieving particular types of “distinction” (e.g., athletic and artistic distinction). On the whole, however, the superior interpretation of the evidence is not that consumers have a large collection of separate relative preferences, but that they purchase a combination of status goods in order to “produce” a single commodity of overall social distinction or prestige.²⁶⁰ The goods produce status by

260. See Stigler & Becker, *supra* note 43. Becker is even willing to entertain the possibility that “all households have precisely the *same* utility function and that all observed behavioral differences result from differences in relative prices and access to real resources.” Becker, *supra* note 171, at 145. Although Becker’s approach is generally useful to explain much of the evidence, I do not believe that, in fact, there is only one relative preference for status, and that every effort to achieve a better position regarding some

demonstrating certain constituent elements of status: relative income or the quality of one's tastes. Because one of the most prevalent types of competitive consumption is the investment in goods symbolizing income and status, many of the regulatory issues discussed below address this form of competitive consumption.

Second, in the real world, most consumer investments cannot be simply categorized as satisfying "relative" or "absolute" preferences. Most goods satisfy both; we might describe goods as having an "absolute value" based on their ability to satisfy absolute preferences, a "relative value" based on their ability to satisfy relative preferences, and a total value based on both. Goods fall along a continuum between satisfying solely relative preferences and solely absolute preferences. Some goods have almost exclusively an absolute value and very little relative value; other goods have almost exclusively a relative value and very little absolute value. Examples of the former might include health insurance, savings, and basic foodstuffs; examples of the latter might include steroids, animal furs, and diamonds. Moreover, some goods may tend to have a primarily absolute value at certain levels of consumption, but a primarily relative value at higher levels of consumption. Examples of this group might include housing space, "quality" of automobile and clothing, and educational degrees in business administration.

The market failure of competitive consumption is not merely that consumers buy goods satisfying relative preferences to the detriment of goods satisfying absolute preferences. In the real world, competitive consumption exists where the drive to satisfy relative wants inefficiently diverts resources from the production of the goods with a high ratio of absolute to relative value to goods with a low ratio of absolute to relative value. In addition, for goods which supply a primary value that changes from absolute to relative as the quantity consumed increases, we can expect individuals to consume to the level at which the ratio of absolute to relative value is lower than that of other goods the individuals choose not to consume. One may purchase a diamond ring, for example, not only to satisfy the relative preference for relative, visible wealth, but also for the absolute satisfaction of its intrinsic beauty. Under conditions of inherent preference conflict, however, such goods retain the characteristic that resources invested will not increase total consumer satisfaction by *as much*

particular good is but an attempt to satisfy that one relative desire. It is at least possible that people have desires for particular goods as ends in themselves. For example, certain people may desire to have more or better automobiles than others, solely as an end in itself and not as a means to obtaining general social status or distinction. Also, while a person may desire some general commodity like "social distinction," he or she may separately desire a narrower commodity like "athletic distinction," "artistic distinction," or "chess playing distinction." If no amount of general social distinction—no amount of wealth, fame, power or any other "good" that helps produce such a general commodity—satiates one's desire for distinction among chess players for playing chess, then it does not make sense to say that investing time in developing chess skills is merely a means of producing social distinction. Instead, we should say that while the person has a general desire for social distinction and chess playing may help achieve social distinction, he or she has an independent desire for chess playing distinction.

as an equal investment in a good valued to a greater degree for its satisfaction of absolute preferences. To the extent the diamond investment diverts resources from a good with a greater absolute value (although less total value to the consumer), the individual drive to satisfy relative preferences causes resource misallocation.

Having enriched the model, we must now concede that we will never have the information necessary to identify and correct every instance of competitive consumption. We lack the ability to separate precisely the absolute and symbolic value of particular goods.²⁶¹ We cannot identify small differences in the "absolute value" of different goods with sufficient confidence to justify market regulation for all instances of resource misallocation that likely exist. We can, however, identify goods that fall very near either end of the continuum. As a practical strategy, therefore, we can concentrate on (1) preventing overconsumption of goods with primarily a relative value (or with primarily a relative value at the levels being consumed), and (2) preventing underconsumption of goods with primarily an absolute value (or with primarily an absolute value at the levels being consumed). The former regulatory strategy might suggest prohibiting the consumption of certain goods or consumption above a certain level. The latter regulatory strategy suggests mandating consumption of particular goods or consumption up to a certain level. Alternatively, the government could deter excessive investment in primarily relative goods by taxing such consumption, and could encourage additional investment in primarily absolute goods by subsidizing such consumption. Finally, with or without governmental action, social norms may operate to restrain the waste of competitive consumption. The remainder of this Section will consider these strategies in turn.

1. *Prohibiting and Taxing Investment in Status Competition*

The first possible approach is to prohibit the consumption of goods with primarily a relative value, or with primarily a relative value at the levels being consumed. The difficulties inherent in this approach limit its usefulness. The effectiveness of prohibition depends critically on the ability to identify and prohibit close substitutes for a prohibited good. If consumers can choose among various goods to produce a status gain, then prohibiting one good will likely cause substitution of another. To block the substitution effect of prohibition, government must prohibit the whole class of substitute goods (or at least the class of substitute goods sharing an equally high ratio of relative to absolute

261. We might try answering questions like: "How much value would an individual place on a diamond if he or she lived alone on a desert island with no possibility of future human contact?" Subtracting that value from the current value within society would disclose what percentage of that individual's current value for diamonds is an absolute value. But merely stating this line of inquiry is to point out our inability to reach definite answers to these questions.

value). This approach might work, for example, in preventing overconsumption of artificial growth hormones or performance enhancing drugs, there being no close substitutes for these recent technologies.²⁶²

But the prohibition approach will generally fail to curb consumption of status goods. Indeed, "sumptuary" laws²⁶³ have historically failed for predictable reasons. First, when an item serves solely to enhance status, lacking any necessary function, substitutes are nearly infinite. And many goods are only momentarily status symbols; by the time they are generally known as "trendy" they have begun to lose their relative function. There is reason to doubt the government's ability to keep pace with the constant change in what constitutes a "fashionable" good. The inventiveness of people in creating alternative objects for status consumption would seem to doom any but the most extreme levels of prohibition.²⁶⁴

Of course, there are many stable status goods, goods such as automobiles and clothing. But the status function of automobiles and clothing is stable precisely because people need certain levels of these goods regardless of status; they only serve as status goods at higher levels of consumption. To prohibit status consumption of goods that have primarily an absolute value at lower levels of consumption, government must define the level of consumption at which the value of such goods becomes primarily relative. Because the level varies among individuals, this decision will prove difficult.²⁶⁵ The likely error is to define either too high a level, which means that some will continue to consume large quantities of such items to symbolize status, or too low a level, which means that some consumption satisfying primarily absolute preferences will be curtailed. Thus, the problems of prohibition are: (1) for goods that serve only as symbols of status, keeping one step ahead of what constitutes "fashionable" consumption, and (2) for goods that at low levels serve primarily to satisfy absolute preferences, selecting the appropriate level beyond which consumption is to be prohibited.

The latter problem is not necessarily insurmountable. One strategy for prohibiting stable status goods might be to err intentionally on the side of too

262. Similarly, if certain forms of cosmetic surgery constitute competitive consumption, an outright prohibition would probably succeed.

263. Societies have historically attempted to control the consumption of goods directly, through sumptuary laws, although the motivation was generally not to correct for market failure. See, e.g., MCKENDRICK, ET AL, *supra* note 159, at 37 (describing sumptuary laws that preserved elite status of Chinese and Roman Emperors by prohibiting public from wearing royal colors).

264. The prohibition will make the symbol more scarce and possibly exacerbate the problem of enforcement. See *id.* at 40.

265. We would expect the quantity and quality of these goods an individual consumes to rise as his or her income rises, even in the absence of any relative desires. Consequently, there is no one level at which consumption of a good becomes, for all or even most people, primarily of relative value. Theoretically, government could try to define acceptable levels of consumption based on income level, but we should also expect people to vary considerably in the intensity of their absolute preferences for items like food and clothing. In any event, the complexity of such regulation, and the intrusion on personal autonomy, would likely be prohibitive.

little regulation, prohibiting only the most lavish expenditures on such goods. But an even better strategy would be taxation, another means of deterring investment in goods providing primarily a relative value. In a variety of ways, taxation is a more flexible tool than prohibition. Although the harm of excessive taxation is that people must pay more to satisfy their absolute preferences, the harm of excessive prohibition is the total frustration of absolute preferences that the goods would satisfy. Because the error costs are lower, taxation can more safely target a larger span of consumption than can prohibition. In addition, taxation may be applied gradually to reflect a gradual rise in the proportion of the expenditure that serves to satisfy relative preferences. Suppose that the percentage of the price of a new automobile that buys the status component of the automobile rises as price rises. Where it might be impossible to prohibit all status elements of automobiles (without making everyone drive the same kind of car), it would be possible to deter the amount invested in the status component of automobiles with a "progressive" excise tax that increased as the amount spent on an automobile increased. Finally, it is easier to adjust taxation to account for changing economic variables than it is to adjust prohibitions.²⁶⁶

Even when taxation of goods serving primarily relative ends fails to deter the consumer's purchase of such goods, taxes on status goods may be preferable to certain other types of taxes. Taxes generally impose a social cost due to the manner in which they distort individual choices regarding the goods or activity taxed. Excise taxes, by raising the overall price of a good, reduce the value that the consumer can obtain from his budget. The consumer must either increase expenditures on the taxed good, in which case he or she loses value by spending less on some other good, or obtain a lower quantity of a now more expensive, taxed good and thus less value. This analysis is incomplete, however, *when the value of the good taxed depends, even in part, on the fact of its price.* When consumers value a good for its expensiveness—for the wealth it represents—then the taxation of that good, like any other factor that raises its price, will raise the value the consumer receives from a given unit.

Noting this effect, a number of economists, beginning with John Rae and John Stuart Mill,²⁶⁷ have advocated taxation of such goods. Yew-Kwang Ng

266. For example, it might make sense to consider how expensive a status car is in comparison to the average new automobile. Suppose expenditures on automobiles more than four times the price of an average automobile are primarily motivated by the desire for status. A decision to prohibit such expenditures would mean that, *for some years but not others*, entire brands of automobiles would be illegal. To say the least, it would be far less disruptive on the sale of such brands if the amount of tax, rather than the legality of the entire business, fluctuated periodically.

267. John Rae first advocated taxation of relative goods—what he called "luxuries"—as a costless means of raising revenue. *See* RAE, *supra* note 30, at 286-96 (taxes on goods valued merely as "marks of opulence" does not proportionately decrease consumer welfare). John Stuart Mill made a similar argument:

[T]he consequence of cheapening articles of vanity, is not that less is expended on such things, but that the buyers substitute for the cheapened article some other which is more costly . . . and as the inferior quality answered the purpose of vanity equally well when it was equally expensive, a tax on the article is really paid by nobody: it is a creation of public revenue by which nobody loses.

offers a formal analysis of optimal taxation for what he terms “diamond” goods.²⁶⁸ Ng offers diamonds as a prototypical example of goods that are valued “not for their intrinsic consumption effects but because they are costly.”²⁶⁹ Supposing this to be the case, Ng notes that after imposition of a tax doubling the price of diamonds, “a \$1000 gift of diamond is still valued at \$1000, though the size of the stone is smaller.”²⁷⁰ In other words, consumers value diamonds only relatively, so that the value they receive from diamond consumption is solely a function of where their consumption places them in relation to others. As long as everyone is subject to the tax, spending \$1000 on diamonds will place one in the same relative position regarding diamond consumption regardless of the fraction of that amount the tax represents. Thus, taxes on purely relative goods do not decrease consumer value.²⁷¹ The only costs are the administrative costs of collecting the tax.

Taxes on “diamond goods” can thus increase social welfare as long as the government collecting the tax spends the revenue on satisfying nonconflicting preferences. Ng and others note that few, if any, goods will be pure “diamond goods.”²⁷² The above analysis still means, however, that the greater the extent to which the good is valued for its price, the less the extent to which a rise in price caused by taxation decreases consumer value. For example, assume that the government places a hundred percent tax on diamonds and that ninety percent of the value consumers place on diamonds is for their ability to represent relative wealth. For each dollar of tax, the diamond rises by a value of ninety cents, lowering the effective tax rate to ten percent. Furthermore, taxation

MILL, *supra* note 30, at 869. As David D. Friedman points out in *Diamonds Are a Government's Best Friend: Burden-Free Taxes on Goods Valued for Their Values: Comment*, 78 AM. ECON. REV. 297 (1988), David Ricardo first had the basic insight, employed above, regarding the commodity of gold used exclusively for money. Ricardo observed that a tax on gold used as money would diminish the amount of gold in the economy but would proportionately increase the value of each unit of gold; the society would have the same amount of goods and services—the same wealth—but would trade it with fewer units of gold. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY* (1817) in 1 *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 194-96 (Piero Sraffa, ed., Cambridge Univ. Press 1951). *See also* Edward Miller, *Status Goods and Luxury Taxes*, 34 AM. J. ECON. & SOC. 141 (1975).

268. Yew-Kwang Ng, *Diamonds are a Government's Best Friend: Burden-Free Taxes on Goods Valued for their Values*, 77 AM. ECON. REV. 186 (1987). Ng credits Pigou with observing the significance of the “desire to possess what other people do not possess” for tax policy, *id.* at 187, (quoting A.C. PIGOU, *supra* note 30, at 226), but fails to note the prior contributions of Rae and Mill. *See supra* note 267. *See also* Konrad, *supra* note 76, at 259-62; Frank, *Frames of Reference*, *supra* note 77, at 82-84.

269. Ng, *supra* note 268, at 186.

270. *Id.*

271. This statement ignores the likely complication that some consumers already own diamonds when a tax is imposed (or increased). For those who did not own diamonds before the diamond tax, the tax decreases their ability to afford a diamond of a given size compared to those consumers who already own such a diamond. But those consumers who already own a diamond gain from the fact that a diamond of the size they own is now more expensive for others to obtain. Unless a luxury tax is imposed on *ownership*, rather than mere purchase, of diamonds, the tax will have the effect of preserving the effectiveness of the given distribution of status goods.

272. Ng, *supra* note 268, at 187 (stating that “most goods are valued partly for their intrinsic consumption effects (approaching 100 percent for ordinary items like bread) and their values (approaching 100 percent for precious jewels)”); Konrad, *supra* note 76, at 261 (arguing that most goods will have varying proportions of status and consumption aspects).

will increase welfare if the government taxes goods with primarily a relative value and spends the revenue on goods with primarily an absolute value.²⁷³ Assume, for example, that the government transfers the revenue raised by a hundred percent diamond tax to people who spend thirty percent of the transfer satisfying their (inherently conflicting) relative preferences, and the remainder on satisfying nonconflicting preferences. For each dollar raised by the tax, the government is actually taking only ten cents from the diamond consumer and potentially procuring seventy cents in satisfaction of absolute preferences. As long as the administrative costs are less than sixty cents of each dollar, the tax increases welfare.²⁷⁴

Of course, to achieve any of the above taxation advantages requires considerable information and more analytical work. But this section provides a general framework for efforts to deter consumption of goods which primarily satisfy relative preferences.

2. *Mandating Consumption of Nonstatus Goods*

The strategy of preventing underconsumption of nonstatus goods does not suffer as much from the substitution problems that plague sumptuary laws. First, not being valued for the sake of novelty, nonstatus goods are more stable and therefore easier to specify and regulate. Second, at least compared to prohibiting status goods, there is less reason to be concerned about substitution. When compelling consumption, the substitution concern is that requiring consumption of a good of primarily absolute value might cause the consumer to forgo some other good, previously consumed, that was of equal (rather than less) absolute value. Because the propensity to substitute goods for one another is measurable and stable, it should be possible to mandate consumption of goods that will avoid the substitution problem.²⁷⁵ In other words, if government mandates consumption of only those goods with the highest ratios of absolute to relative value, there is little chance a consumer will respond to the regulation by giving up a good with an even higher ratio of absolute to relative value.

273. In theory, a tax enhances welfare if the benefit the government provides with the tax revenue has a greater absolute value than the good the government taxed. The statement in the text qualifies this claim to reflect (a) the difficulty of determining exactly how much absolute or relative value a particular good has and (b) the fact that transaction costs will prevent the government from transferring the full amount it taxes.

274. As is standard in neoclassical economics, this analysis makes no use of interpersonal utility comparisons. The argument is not that people receiving money from the government will gain more utility from a dollar than diamond owners will gain from a dollar, but that more of the utility they gain will be from satisfying nonconflicting preferences. Because social welfare increases more when resources are used to satisfy absolute preferences rather than relative ones, recipients thus make better use of the resources.

275. For example, lawn mower safety devices are probably not substitutes for auto safety devices, nor is either of the latter a substitute for retirement savings.

There is, however, a problem with mandating consumption: the income effect. Requiring a new expenditure decreases the consumer's total discretionary budget, causing the consumer to cut back at the margin on goods she values least.²⁷⁶ To the extent those items are other goods of primarily absolute value, the regulation may create no net gain or a loss. However, as long as the income effect is small, and the compelled expenditure is directed toward a good with a high ratio of absolute to relative value, it is unlikely the income effect will cause a cutback in a similarly valued good.²⁷⁷ This feature suggests either that the total expenditures mandated by government must be limited, or that the government must know a great deal about the consequences of the income effect. With these effects in mind, we can turn to specific examples.

Frank's key insight is that government regulations mandating consumption of certain goods may be efficient if those goods are the sort that people otherwise tend to sacrifice wastefully in their competition for relative income. His primary example is workplace health and safety. His prisoner's dilemma analysis was reviewed above.²⁷⁸ Health and safety are often²⁷⁹ unobservable, and cannot therefore contribute to one's status as well as equal expenditures on more observable items. If Frank is correct, rules requiring some minimum levels of health and safety might efficiently prevent status competition from causing workers to underinvest in these goods. Similar arguments exist for setting minimum consumption levels of other, largely unobservable "goods" such as health insurance, pensions, vacation time, and workplace democracy.²⁸⁰ In addition, this analysis may demonstrate the efficiency of rules prohibiting people from selling certain goods they are nonetheless free to give away. For example, prohibiting the sale of human kidneys from living donors

276. The opposite effect occurs when prohibiting consumption—the consumer has more income, allowing greater purchases which might be directed toward goods that are not substitutes. Depending on the intensity of this effect, prohibition, while causing substitution, could also cause the consumer to purchase new items with primarily an absolute value.

277. I argue it is "unlikely" on the additional assumption that proportionately few of the goods the consumer is presently consuming have a "very high" ratio of absolute to relative value. If all goods presently consumed have an equal chance of providing the least marginal return to the consumer, it is statistically unlikely that the cutback caused by the income effect will fall on one of the few goods that has as high a ratio of absolute to relative value as the good whose consumption is compelled.

278. See *supra* text accompanying notes 78-86.

279. The argument is not that consumers will underinvest in *all* health and safety measures, but only in those that are unobservable (or fall near the unobservable end of a continuum). See discussion of observable/unobservable distinction *supra* notes 90-96 & 173-174 and accompanying text. There is no reason to expect that people will underconsume highly observable safety measures, which may themselves become symbols of status. Certain types of high status automobiles—Mercedes Benz, for example—are known for their high degree of safety. Manufacturers, by advertising how much safer their cars are than others, render that safety consumption highly observable. Unlike Frank's example of the worker in the dirty mine, the rest of the world knows how much safety the Mercedes Benz driver is enjoying. (Note also how certain automobiles advertise "antilock brakes" by a publicly observable symbol ("ABS") on the rear of the car).

280. FRANK, *THE RIGHT POND*, *supra* note 77, at 146-68.

in effect encourages kidney "consumption" by removing the financial incentive to give up one's organs.²⁸¹

Granting the general analysis, the difficult practical question is what *level* of health and safety regulation is actually efficient. How can we determine the precise floor of safety that will correct the problems of competitive consumption, without requiring more safety than workers would want in the absence of relative preferences? The answer, of course, is that we cannot exactly identify the welfare-maximizing level of safety. We cannot precisely separate the relative from the absolute reasons for consumption, nor precisely identify when relative preferences inherently conflict. But even if we adopt the principle that it is best to err on the side of too little regulation, we may be able to do better than assuming that the efficient level of regulation is zero.²⁸² We can seek to determine the minimum level of consumption in several ways. First, individuals may simply state a preference for a collective rule.²⁸³ If workers are aware that they sacrifice safety or health in a futile but unending effort to gain relative income, then they may favor collective regulation mandating minimum levels of safety.²⁸⁴ Second, there is a significant difference between the value placed on safety (and other unobservable compensation) by workers who bargain individually with employers and those who collectively bargain.²⁸⁵ To the extent other factors can be excluded, this difference may quantify the degree to which competitive consumption causes workers to excessively sacrifice such goods.

281. *See id.* at 178-97. Frank notes that prohibitions on the sale of human organs or parental rights are difficult to justify in economic terms, but notes that these too may be cases in which individuals will make wasteful sacrifices with the hope of gaining in relative income, or from the fear of losing relative income. A human kidney, for example, is a quintessentially nonstatus good. *See generally*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

282. Imprecision is inherent in any "hypothetical bargain" analysis that asks what parties would do if the world were different and transaction costs were absent. Whenever transaction costs prevent voluntary bargaining, legal economists simply argue about what people would do if those costs were not present. Given the strong evidence reviewed above that people desire status (and relative income and certain goods as a means of gaining status), it seems far more likely than not that workers would agree to *some* minimum safety and health standards in the absence of transaction costs.

283. Schelling quotes hockey players who chose not to wear helmets, but who argue in favor of a rule mandating such protection. *See* SCHELLING, *supra* note 81, at 213.

284. One implication of the theory of inherent preference conflict is that, for some issues, consumers may be better able to express their wishes in the voting booth than in the marketplace. The existence of public support for certain forms of economic regulation need not lead inevitably to the conclusion of public choice theorists that supporters seek to extract economic rents. But given the shame of admitting to relative preferences (even to oneself), *see supra* notes 246-252 and accompanying text, workers are unlikely to favor such regulations for the avowed purpose of limiting competitive consumption.

285. Frank, *Unobservable Commodities*, *supra* note 77, at 152 ("[T]he union worker must receive a risk premium that is \$8.08 per week higher than the premium required by an identically situated nonunion worker for accepting a 1/1,000 increase in the annual probability of death."); FRANK, *THE RIGHT POND*, *supra* note 77, at 150-58 (unionized workers devote higher budget share to unobservable commodities of insurance and pensions than nonunionized workers); *id.* at 158-59 (budget shares devoted to unobservables of savings and insurance higher in military than civilian sector).

Ultimately, we must use judgment. Consider the judgment that athletic competition leads to inefficient underconsumption of health and safety.²⁸⁶ The case for a rule requiring a hockey helmet or prohibiting steroids seems reasonably powerful (as are other mandatory safety rules in sports), but there *could* be nonrelative reasons for not wearing a helmet or using steroids.²⁸⁷ We may, nonetheless, have confidence in the mandatory rules because we imagine that we would not give up the safety of a helmet for any reason other than improving our chances of winning. Although this basis for regulation may immediately seem paternalistic, it is not. The judgment is not that hockey players do not desire the level of safety that they “should,” and that their decision against safety is therefore irrational. Instead, the judgment concedes the individual rationality of the decision not to wear the helmet, but asks whether the individuals are making the decision primarily to satisfy inherently conflicting relative preferences. If so, there is a nonpaternalistic basis for supposing the individual would prefer a collective rule foreclosing individual choice to the existing rule allowing it.

3. *Social Norms Against Relative Preferences*

Competitive consumption presents a problem of coordinating collective action. Aside from governmental responses, human cultures sometimes develop norms to solve such collective action problems.²⁸⁸ Existing social norms condemn both envy—negative feelings at the relative fortune of others—and “relative gratification”—positive feelings at the relative misfortune of others. Expressions of such feelings subject an individual to the sanction of negative public opinion. The holder is judged vain, shallow, and petty; the individual himself experiences shame. To the extent these norms actually dampen relative feelings, they succeed in diminishing the problem of competitive consumption, but the failure of these norms actually to extinguish these feelings in some ways contributes to the problem. These norms restrain Coasean bargaining that might limit the harm of competitive consumption.²⁸⁹ In the absence of social sanction, individuals would be more likely to admit their relative preferences to

286. See *supra* note 81, regarding hockey helmets and steroids.

287. Hockey players may play not only to “win,” but to satisfy their absolute desire for invigorating and exciting activity. They may find the game to be more “exciting or invigorating” without a helmet. Second, for those who are paid to play, the hockey salary also allows them the means to satisfy their absolute desires; if fans will pay more to watch helmetless players, the players can earn more playing without a helmet. Notwithstanding these possibilities, it is possible to feel some confidence in the judgment that the hockey player’s *primary* motivation for not wearing the helmet when given the choice is the relative desire to win, not these other concerns, and therefore that the players would be better off if they gave up the right to compete by exposing their skulls to the risks of the game. In addition, an athlete might like the “feel” of having the muscles that steroids make possible, although more typically steroids represent merely a means of gaining or preserving a competitive edge.

288. See, e.g., AXELROD, *supra* note 78; Ellickson, *supra* note 4.

289. See *supra* text accompanying note 246.

others and themselves, and thus more prepared to bargain in regard to such preferences. In addition, the existence of these norms contributes to the distinction between observable and unobservable goods.²⁹⁰ If overt manipulation of status symbols could produce status gains, people could advertise their otherwise unobservable consumption rather than sacrifice such consumption in a competition for observable consumption.

Society is probably still better off with the norms against envy and relative gratification than it would be without them.²⁹¹ Strengthening those norms would further curtail the harm of competitive consumption. The enumeration of conditions under which competitive consumption will occur isolates the particular categories of relative preferences that a social norm should condemn. For example, relative preferences do not conflict unless they are directed toward a common characteristic.²⁹² Similarly, desires for position are less likely to be incompatible and cause inherent conflict if they are directed toward "avoiding the bottom rank" or maintaining an average rank, than if they are directed towards obtaining the top rank.²⁹³ Thus, social norms need not, and largely do not, indiscriminately condemn relative preferences. Instead, they more strongly censure preferences the more they are commonly shared within society, and the more they are directed toward the top rank.²⁹⁴

An interesting question is whether society can, through law, seek to create or strengthen social norms. Should law be used not merely to create incentives and disincentives to behavior, but to shape consumer preferences? Neoclassical economic analysis treats consumer tastes or preferences as an exogenous variable; the nature of existing preferences is not explained but simply accepted as a fact.²⁹⁵ Despite this fact, some economists and legal theorists have of-

290. See *supra* text accompanying notes 164-174.

291. If the norms against envy and relative gratification did not exist, the market failure would not disappear. Considerable transaction costs would still impede private limits on competitive consumption. See *supra* text accompanying notes 243-244. In addition, advertising costs would still create a distinction between observable and unobservable goods. See *supra* text accompanying note 90. The market failure would worsen in several ways. First, to the extent that the norms actually dampen the intensity of relative preferences, people would become even more concerned with relative standing. Second, if there were no norm against "advertising" one's relative accomplishments, this would generate more inherent preference conflict. There would be fewer cases where people failed to discover that others had higher ranks on a given scale.

292. See *supra* text accompanying notes 205-207.

293. See *supra* text accompanying notes 209, 215-219.

294. People seeking to collect more stamps than others do not present the same potential for inherent conflict as those seeking to gain a higher income than others, and while there is no social sanction against the former behavior, there is some against the latter. Similarly, it is less shameful to admit that one seeks to "keep up with the Joneses" than to admit that one hopes to keep ahead of the Joneses and everyone else.

295. Positive economics thus describes and predicts how consumers with fixed preferences will respond to changes in endogenous variables such as price. Welfare economics evaluates the efficiency of different states based on how well the given preferences of individuals are satisfied. See BECKER, *supra* note 171, at 5 ("[P]references are assumed not to change substantially over time, nor to be very different between wealthy and poor persons, or even between persons in different societies and cultures."). Economics leaves to sociology and psychology the burden of explaining why people have the preferences they do, and what causes preferences to change. *Id.* at 14.

ferred models making tastes an endogenous variable, seeking to predict changes in tastes and to evaluate the possibility and desirability of policies that seek to shape consumer tastes.²⁹⁶ The suggestion that law may directly shape consumer preferences has profound implications for legal theory. To evaluate fully the efficacy and wisdom of using law in such a manner would require an extended discussion beyond the scope of the present Article.²⁹⁷ Nonetheless, there are two points worth making about using the law to diminish relative preferences (or to enforce social norms against such preferences), points that should prove useful for any serious discussion of the general issue.

First, the existence of inherent preference conflict caused by certain relative preferences presents a “special case” for reshaping preferences. One utilitarian argument that can always be advanced for shaping preferences—what I call the “general case” for reshaping preferences—is to alleviate conventional scarcity. If people simply can be made to “want less,” existing resources will go further in satisfying the remaining preferences. For compelling reasons, however, liberalism’s traditional solution to scarcity—economic growth—represents a politically safer solution than preference shaping.²⁹⁸ Inherent preference conflict, however, represents an occasion when increased productivity is *not* available to solve the problem of resource scarcity. When we cannot resolve preference conflict by economic growth, we have a special case for reshaping preferences to resolve the conflict.²⁹⁹ The question remains whether the case is “special” enough—whether the government should be permitted to shape preferences even in the case of inherent preference conflict.

The second point worth noting is that the cases in which theorists have advocated preference shaping fit the conditions of inherent preference conflict.

296. Although law and economics scholars almost uniformly treat law solely as a way of adjusting incentives for behavior *given* existing preferences, there are important exceptions. Guido Calabresi believes that preference shaping is a primary goal of law. See GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 84 (1985) (“Law, unlike economics, is not concerned only, or even primarily, with reduction of costs, ‘given tastes.’ It is fundamentally concerned with *shaping* tastes.”). Kenneth Dau-Schmidt is the first economist to use a theory of preference shaping to explain a body of legal doctrine (criminal law). See Kenneth Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990). Cass Sunstein has made a slightly different point about the effect of law on preferences. He argues that because preferences may “adapt” to existing legal institutions, those institutions cannot be justified solely by their ability to satisfy existing preferences. See SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 45. Sunstein relies on Elster’s concept of “adaptive preferences.” See ELSTER, *supra* note 15.

297. The suggestion raises at least two fundamental questions, one for social science and another for political philosophy: (1) Can law change preferences in a sufficiently significant and predictable manner to form the basis of policy? (2) When, if ever, is it morally permissible or politically prudent to use law to shape preferences—literally to determine what people want?

298. There is considerable political danger in sanctioning a broad governmental power to manipulate preferences to reduce scarcity. Totalitarian regimes have committed enormous atrocities in the name of eliminating certain bourgeois consumer wants. At a minimum, when increasing productivity may accomplish the same end, we should not condone preference shaping as a means of reducing resource scarcity.

299. Cf. FRANK, *THE RIGHT POND*, *supra* note 77, at 112-13; MARSHALL, *supra* note 32, at 136-37 (“[I]t would be a gain if the *moral sentiment* of the community could induce people to avoid all sorts of display of individual wealth.”) (emphasis added).

Several scholars have suggested that one function of civil rights laws was to state a moral principle delegitimizing racial discrimination, that is, to reduce the desire to discriminate.³⁰⁰ In economic terms, the claim is that the law has reshaped preferences. The preference of whites to avoid association with blacks (racial animus) is inherently inconsistent with the preference of blacks to be economically integrated in society (the desire for equal treatment). The preferences are for mutually exclusive outcomes; regardless of the level of wealth, one set of preferences had to remain unsatisfied. Thus, to the extent antidiscrimination laws actually diminish white animus toward blacks, the law alleviates an inherent preference conflict.³⁰¹

The same may be said, in part, about the criminal law.³⁰² Many preferences, the satisfaction of which criminal law prohibits, are for direct harm to others. Not all *actions* to harm others represent an inherent preference conflict; sometimes the act of harming another is merely a means to the end of obtaining material reward. In such cases, given sufficient resources, the criminal's desire to obtain wealth could be satisfied sufficiently to obviate his seeking to take wealth from others. On the other hand, sometimes harming others is not a means to a material end, it is the end itself.³⁰³ In those cases, one person's desire to cause another some physical pain or death, as an end, with rare exception, inherently conflicts with the desires of the victim. Economic

300. See, e.g., John J. Donohue, III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1338-39 & n.6 (1989); Richard Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 520 (1987) [hereinafter Posner, *Title VII*].

301. As a utilitarian principle, inherent preference conflict could only justify using law to reshape *either* set of incompatible preferences, in this case whites' preference for nonassociation or blacks' preference for equal treatment. There are powerful reasons for choosing, on utilitarian as well as other grounds, the former over the latter. The utilitarian argument must follow from a detailed theory of *how* the law shapes preferences, something largely absent from the existing literature. For the most complete account to date, see Dau-Schmidt, *supra* note 296, at 17-22. In my view, such a theory must recognize that law has only a finite ability to shape preferences, substantially limited to reinforcing pre-existing cultural norms. For the law to succeed in diminishing the desire for equality upon the part of blacks and other minorities would essentially require the establishment of a full-blown caste system, with lower ranked individuals conditioned not merely to tolerate but to desire their lot. I believe, although I will not here try to prove, that the law and norms of American society, partially committed to the principle that "all persons are created equal," was and is better equipped to move individual preferences toward fuller realization of that principle than toward a caste system.

302. Dau-Schmidt notes the difficulty of using existing normative principles to judge the desirability of preferences. Dau-Schmidt, *supra* note 296, at 16. Consequently, he argues that in choosing what preferences to reshape, society need not "count" in a social welfare calculation the satisfaction of preferences it has deemed criminal. *Id.* at 12 ("Even among economists, there is a growing consensus that criminal benefits should carry no weight in the social welfare function."). As a utilitarian justification, this argument fails; any set of criminal laws might seem to maximize social welfare if we need not count the nonsatisfaction of preferences the laws criminalize. In deciding whether to criminalize gambling, for example, the pleasure some would receive from legalized gambling *should* count in a utilitarian decision. Cf. Donohue, *Sex Discrimination*, *supra* note 300, at 1343-44. As explained in the text, however, we can count the preferences of the criminal, however, and still decide to use the law to reshape those preferences.

303. Not every preference to harm others that creates inherent preference conflict is "relative." One might say that some persons have an "absolute" preference that others be physically harmed or placed in pain. Such a malicious or sadistic preference would give rise to an inherent conflict even if it has no relative aspect. Thus, negative relative preferences are only one special case for preference shaping. The more general category is any inherently conflicting preferences.

growth—increasing the size of the “economic pie”—cannot resolve this preference conflict. The inherent nature of this conflict again provides a special (though not necessarily sufficient) case for using the criminal law to reshape—to diminish—preferences to harm others.³⁰⁴ Although this theory does not explain or justify all or even most of the criminal law, it provides a reason for using the criminal law to reshape and diminish the malicious preferences often responsible for the most serious criminal offenses—murder, rape, and battery.³⁰⁵ This particular characteristic of crimes motivated by malice may also explain attempts to punish more severely crimes motivated by group hatred.³⁰⁶

B. *Regulating Individual Status Competition: The Case of Income Taxation*

The above section explored possible solutions to correct for the market failure of competitive consumption. This Section and the next will illustrate the usefulness of a theory of relative preferences to legal theory by addressing two policy issues: income taxation and antidiscrimination laws. Each may be viewed as attempting to correct for a particular form of competitive consumption: income taxation is directed at individual status competition, and antidiscrimination laws are directed at group-based status competition.

Of the various arguments for and against income taxation, and particularly progressive taxation, I will focus on the following economic claim that such taxation is inefficient. First, welfare economics refuses to make interpersonal utility comparisons; the concept of efficiency is designed to avoid such comparisons. If there is no way of knowing whether the beneficiary of government spending gains more or less than the individual taxpayer loses, redistributing wealth is, at best, neutral. Second, even assuming that transaction costs are zero,

304. As stated *supra* note 301, inherent preference conflict provides a utilitarian justification only for using law to reshape *either* set of incompatible preferences. An additional utilitarian argument will generally be necessary to determine which set of preferences the law should seek to diminish. In the case of criminal law, however, it should be self-evident that however difficult it may be to diminish the desire to harm others, it is not possible for law to diminish the desire not to be harmed.

305. The claim that separate treatment may reshape malicious preferences is merely illustrative and necessarily incomplete. To fully evaluate the claim, we require a psychological or sociological theory of how the law shapes preferences. I am currently engaged in such an undertaking, but it is beyond the scope of this Article.

306. The unique need to reshape preferences when crime is maliciously motivated may justify efforts to provide separate treatment of “hate crimes.” Separate treatment of hate crimes may facilitate the reshaping of the underlying malicious preferences, either by direct symbolism of the additional gravity of such offenses or the indirect symbolism achieved by more severe punishment. Although hate crimes generally are not defined to include any crime motivated by hate, but only those motivated by hatred of certain groups, this is not inconsistent with the theory of inherent preference conflict. Violence against minority groups, who historically faced discrimination, may symbolically reinforce the legitimacy of such violence in a way that violence against an individual one personally hates does not.

Some theorists claim that rape is a “hate” crime—a crime of violence that is not primarily a means of satisfying the desire for male sexual gratification, but for satisfying the desire for demeaning a woman by nonconsensual sex. *See, e.g.,* SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975). Such a description may justify using the law not merely as a vehicle for deterring rape, but as a means of diminishing the desire to rape.

taxation diminishes wealth. Because income taxes (proportional or progressive) decrease the rewards of work to an individual, they decrease the amount of time the individual will spend working as well as the amount of time and money the individual will invest in human capital. Thus, taxing income decreases the amount of income each worker generates. This cost represents the true “dead weight loss” of income taxation; although those who benefit from government expenditures may theoretically gain an amount equal to what those who are taxed lose, they cannot gain from the income the worker forgoes by working less. Nor does the worker gain by working fewer hours; prior to the income tax, the worker valued the income from working those hours more than he valued the use of those hours for leisure.³⁰⁷ Taxing income thus contracts the total wealth created. Finally, a progressive tax may undermine work incentives more significantly than a proportional tax because it taxes most intensely the high-income workers whose marginal hours are likely to be the most productive.³⁰⁸

The existence of relative preferences, however, undermines this efficiency analysis. Income taxation may correct the tendency of people competing for relative income to sacrifice leisure excessively.³⁰⁹ Although Veblen talked of “conspicuous leisure” as a means of demonstrating pecuniary success,³¹⁰ there is reason to believe that, today, most leisure is less observable—and contributes less to one’s status—than the goods one can obtain and consume by working longer hours.³¹¹ There is also evidence that in recent years economic growth

307. For example, assume that without taxes, A would consume fourteen hours of leisure per day, working for ten hours at \$10/hour, and that the fifteenth hour of leisure provides only \$9 of benefit to A. A 20% income tax would mean that A would earn only \$8/hour, so that he would consume the fifteenth hour of leisure and work one fewer hour per day. Ignoring the tax on the nine hours that the worker still works (as theoretically creating an equal benefit to others), the worker is still worse off by \$1 as a result of adding a marginal hour of leisure (\$10 wage minus \$9 leisure value). The government receives no tax and therefore no benefit from the marginal hour that the worker now takes as leisure, so there is a deadweight loss of \$1. In addition to decreasing the incentive to engage in productive work (work where total benefits exceed total costs), income taxes may create losses by reducing the incentive to invest in human capital, such as education and training. Because the government captures some of the benefit of such investments, the worker may forgo education and training where the total benefits exceed the total costs.

308. POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 473. Although a progressive tax may undermine work incentives less at the lower levels of income where the tax is less than proportional, it undermines work incentive more at higher incomes. Assuming that the highest paid workers are the most productive, the work hours sacrificed are more valuable than the work hours increased. *Id.*

309. See generally Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1961-62 (1987); Michael Boskin & Eytan Sheshinski, *Optimal Redistributive Taxation When Individual Welfare Depends Upon Relative Income*, 92 Q.J. ECON. 589 (1978); Konrad, *supra* note 76, at 264-68; Layard, *supra* note 66; Yew-Kwang Ng, *Relative-Income Effects and the Appropriate Level of Public Expenditure*, 39 OXFORD ECON. PAPERS 293, 299 (1987). Frank notes that the desire for relative income may cause an inefficient sacrifice of leisure, which he uses to explain laws requiring overtime pay. FRANK, *THE RIGHT POND*, *supra* note 77, at 133-35.

310. See *supra* note 35.

311. Certainly some forms of leisure—expensive and fashionable hobbies and vacations for example—may still demonstrate one’s wealth, but spending a few more hours at home each day—reading, sleeping, talking to one’s family, and engaging in the other unobservable parts of everyday life—contribute far less to demonstrating wealth than the consumer goods one might purchase by working more. Conspicuous consumption has long surpassed conspicuous leisure in symbolic significance. As wealth becomes greater

has not allowed people more leisure time, but less.³¹² These facts support the theoretical prediction that people seeking relative wealth will work excessively. If so, the disincentive effects of taxation will be desirable.

To illustrate these points, suppose that neighbors³¹³ A and B earn \$10/hour, and each value their leisure time according to Table 1:³¹⁴

TABLE 1

Marginal Hour Worked	Marginal Benefit (wage)	Marginal Cost (marginal value leisure)	Net Marginal Value
...
12th	\$10	\$14.50	-\$4.50
11th	\$10	\$13.00	-\$3.00
10th	\$10	\$11.75	-\$1.75
9th	\$10	\$10.50	-\$0.50
8th	\$10	\$ 9.50	\$0.50
7th	\$10	\$ 8.75	\$1.25
...

In the absence of a desire for relative income, we would expect each worker to choose sixteen hours of leisure and eight hours of work per day because they each value the first sixteen hours of leisure more than the \$10/hour wage, and the remaining hours of leisure at less than \$10/hour.

Assume, however that A and B each seek relative income, and that they each value relative income in the following simple manner: (i) an equal income

and more equally distributed, only a very few can afford the truly conspicuous leisure of not working at all, while more can afford conspicuous consumption. See MASON, *supra* note 41, at 30, 41, 107 (arguing that when lower income groups achieve ability to consume conspicuously, the rich find that conspicuous consumption is less effective as means of status reinforcement). In addition, leisure is more ambiguous than consumption. As society becomes more fragmented and transient, it becomes more important to display wealth to strangers who may mistake conspicuous leisure for unemployment. *Id.* at 9-10.

312. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 1-2 (1991) ("In the last twenty years the amount of time Americans have spent at their jobs has risen steadily. . . . Since 1948 . . . [t]he level of productivity of the U.S. worker has more than doubled. . . . [but] we did not use any of the productivity dividend to reduce [work] hours."). See also STAFFAN B. LINDER, *THE HARRIED LEISURE CLASS* 77-93 (1970).

313. The assumption that A and B are neighbors (or members of some comparison group other than coworkers) is significant because, in such case, the analysis above, *supra* text accompanying notes 243-252, shows that transaction costs will likely impede private bargaining to limit competitive consumption. But as also noted previously, where A and B are coworkers, there is a greater likelihood that, through their selection of a firm or through collective bargaining, they can bargain toward a solution.

314. The cost of an hour of work is the value the worker attaches to using that hour for leisure. This analysis is static rather than dynamic, because it ignores the effect that changes in hours worked (caused by taxation) will have on the prevailing wage. This simplification, while making the example more accessible, does not alter the conclusion.

provides \$0 worth of relative satisfaction; (ii) an income superior to the other provides \$2 worth of relative satisfaction for every \$10/day increment; and (iii) an income inferior to the other provides a \$2 cost of relative dissatisfaction for every \$10/day increment.³¹⁵ How many hours will A work under these circumstances?

Taking the initial eight-hour day as the baseline, A is now better off working two extra hours (for a total of ten per day) regardless of the choice B makes. If B works eight hours, A's decision to work two additional hours produces a net gain of \$1.75 (\$20 in wages + \$4 of relative value - \$22.25 of leisure). This net gain is larger than that created by working any other number of hours.³¹⁶ If B works nine hours, A's decision to work ten produces a net loss³¹⁷ of \$0.25 (\$20 in wages + \$2 of relative value - \$22.25 of leisure), but larger losses are incurred by working less than ten hours.³¹⁸ If B works ten

315. The following chart shows the relative gains and losses for one from working between three hours more and three hours less per day than the other:

<i>Relative Income Position</i>	<i>Value</i>
...	...
+\$30	+\$6
+\$20	+\$4
+\$10	+\$2
\$0	\$0
-\$10	-\$2
-\$20	-\$4
-\$30	-\$6
...	...

Undoubtedly, no utility function for relative income would be this simple. It is especially unlikely that the relationship between relative income and value would be linear. For example, if the first incremental differences in income created no definitive difference in observable consumption, this increment would have a proportionately lesser effect than subsequent ones. Conversely, the first increment that firmly establishes the fact of income superiority or inferiority would have a proportionately greater effect than subsequent increments. Nonetheless, the simpler function above is useful for illustrating the possible consequences of a desire for relative income.

316. If A chooses to work nine hours, A's net gain is only \$1.50 (\$10 in wages + \$2 of relative value - \$10.50 of leisure). Obviously, if B works eight hours, A's decision to continue working eight hours produces no net gain or loss. To work seven hours would produce a net loss of \$2.50 (- \$10 in wages - \$2 of relative loss + \$9.50 in leisure). To work fewer hours only increases the relative losses and sacrifices \$10 of wages for leisure valued at less than that amount.

If A chooses to work eleven hours, A's net gain is only \$0.75 (\$30 in wages + \$6 of relative value - \$35.25 in leisure). In general, workers will stop increasing the hours they work to obtain relative income when the difference between the wage and the value of leisure (the net absolute loss from working an additional hour) rises above the marginal relative gain of an additional hour's wage. Here that occurs at the eleventh hour, where the leisure sacrificed is worth \$3.00 more than the wage, and the relative gain of working that hour is only \$2.00.

317. Let me emphasize that throughout this example I am comparing A's situation to that which prevailed when A and B were indifferent to relative income and both worked eight hours. Thus, a net loss of \$0.25 means only that A is \$0.25 worse off when working ten hours while B works nine than he was in the earlier circumstance.

318. If A chooses to work nine hours, A's net loss is \$0.50 (\$10 in wages + \$0 of relative value - \$10.50 of leisure). If A chooses to continue working eight hours, A's net loss is \$2 (\$0 in wages - \$2 in relative loss - \$0 in leisure). Working fewer hours only incurs greater absolute and relative costs. For the reasons stated *supra* note 316, A will not work more than ten hours. For example, A's working eleven hours

hours, A's decision to work ten hours produces a net loss of \$2.25 (\$20 in wages + \$0 of relative value - \$22.25 of leisure), but that is also superior to the alternatives.³¹⁹ A will therefore choose to work ten hours. Because B faces exactly the same circumstances, B will also work ten hours. Consequently, neither will experience any relative gain and each will sacrifice \$22.25 of leisure for only \$20 in wages. This outcome conforms to the prisoner's dilemma in which each party sacrifices absolute resources but fails to achieve any relative gain.

With a change in the value A or B places on leisure or relative income, the problem may shift to either of the other two cases of competitive consumption,³²⁰ or the problem may disappear entirely.³²¹ Suppose, for example, that A has the desire for relative income expressed above, but that B values relative income only half as much (receiving \$1 gain or loss for every \$10 difference in wages).³²² Using reasoning identical to that of the above paragraph, B is now better off working one extra hour for a total of nine per day, regardless

produces a net loss of \$1.25 (\$30 in wages +\$4 of relative value - \$35.25 in leisure).

319. If A chooses to work nine hours, A's net loss is \$2.50 (\$10 in wages - \$2 of relative loss - \$10.50 of leisure). If A chooses to continue working eight hours, A's net loss is \$4 (\$0 in wages - \$4 in relative loss - \$0 in leisure). To work fewer hours only increases the relative losses and sacrifices \$10 of wages for leisure valued at less than that amount. For the reasons stated *supra* note 316, A will not work more than ten hours. For example, A's working eleven hours produces a net loss of \$3.25 (\$30 in wages +\$2 of relative value - \$35.25 in leisure).

320. For example, even with A working ten hours per day, B would not work more than eight hours if either (a) working the ninth hour (and subsequent hours) would require sacrificing an hour of leisure B valued at more than \$2, or (b) B lacked any concern for relative position at all. In case (b), there is no market failure: A is made better off by satisfying a preference for relative income and B is made no worse off. In case (a), A's gain is exactly matched by B's loss. But if B values relative position more than A (e.g., at \$3 per increment), B would continue working only eight hours if B valued the marginal hour of leisure net of wages even more (e.g., at \$4). This constitutes the first case of competitive consumption, in which one party's investment in position creates a net loss in welfare.

321. For example, if A and B each valued their last hour of leisure more than they valued the relative and absolute (wage) gain working that hour would produce, neither would work more than eight hours.

322. In other words, A values relative income as stated above, and B values relative income as follows: (i) an equal income provides \$0 worth of relative satisfaction; (ii) a superior income provides \$1 worth of relative satisfaction for every \$10/day increment more than the income of the other; and (iii) an inferior income provides \$1 cost of relative dissatisfaction for every \$10/day increment less than the income of the other. The following chart shows the relative gains and losses for B from working between three hours more and three hours less per day than A:

<i>Relative Income Position</i>	<i>Value</i>
...	...
+\$30	+\$3
+\$20	+\$2
+\$10	+\$1
\$0	\$0
-\$10	-\$1
-\$20	-\$2
-\$30	-\$3
...	...

of the choice A makes.³²³ A will face the same options as before and choose to work ten hours. With A working ten hours and B nine, A's net loss is \$0.25 (\$20 in wages + \$2 of relative value - \$22.25 of leisure) and B's net loss is \$1.50 (\$10 in wages - \$1 of relative value - \$10.50 of leisure). A has "won" the positional competition; he has achieved a superior income. But here we have the third case of competitive consumption: B's extra hour of work and one of A's hours of extra work are wasted. A could achieve the same relative outcome by working nine hours while B works eight, in which case B's net loss is reduced to \$1 and A's net *gain* is \$1.50.³²⁴ The difference in these two outcomes, representing the total waste of this competition, is \$2.25.³²⁵

How does this analysis affect consideration of income taxes?³²⁶ If A's and B's incomes were taxed at twenty percent, their after tax wage would fall to \$8/hour. In the absence of a desire for relative income, each would have originally worked eight hours. But neither would be willing to work an eighth hour with the tax, sacrificing leisure worth \$9.50 for only \$8. Instead, from Table 2, we observe that the tax will cause A and B to cut back to five hours of work per day, all remaining hours of leisure being worth more than \$8:

323. If A works eight hours, B's net gain from working nine is \$0.50 (\$10 in wages + \$1 of relative value - \$10.50 of leisure). Other choices produce worse outcomes for B: at ten hours, B's net loss is \$0.25 (\$20 in wages + \$2 of relative value - \$22.25 in leisure); above ten hours would increase his absolute losses (difference in marginal wage and value of leisure) more than increasing relative gains (\$1 per increment). At eight hours, B's net gain/loss is \$0; below eight hours, B would increase his relative losses and sacrifice \$10 of wages for leisure valued at less than that amount.

If A works nine hours, B's net loss from working nine is \$0.50 (\$10 in wages + \$0 of relative value - \$10.50 of leisure). But B's net loss from working ten hours is \$1.25 (\$20 in wages + \$1 of relative value - \$22.25 in leisure) and from working eight hours is \$1 (\$0 in wages - \$1 of relative value - \$0 of leisure). For the reasons stated above, working more than ten or less than eight hours only increases B's losses.

If A works ten hours, B's net loss from working nine is \$1.50 (\$10 in wages - \$1 of relative value - \$10.50 of leisure). But B's net loss from working ten hours is \$2.25 (\$20 in wages - \$0 in relative loss - \$22.25 in leisure) and from working eight hours is \$2 (\$0 in wages - \$2 of relative income - \$0 in leisure). As before, working more than ten or less than eight hours only increases B's losses.

Again, all "gains" and "losses" are in comparison to B's situation when A and B were indifferent to relative income and each worked eight hours.

324. In this example, despite A's "victory," he is worse off than he would have been in the absence of a competition. Both parties would be better off working only eight hours. But the joint welfare maximizing outcome is having A work nine hours while B works eight.

325. Here, A "invested" \$2.25 by trading two hours worth of leisure worth \$22.25 for only \$20 of wages. B "invested" \$0.50 in relative income by trading an hour of leisure worth \$10.50 for only \$10 in wages. The total investment is \$2.75. The "minimally necessary investment" is only \$0.50 (A trading one hour of leisure worth \$10.50 for only \$10 in wages and B making no trade). The difference, \$2.75 - \$0.50, represents the total waste, \$2.25.

326. Aside from taxation, this analysis suggests a justification for laws regulating work hours or permitting or requiring collective bargaining of work hours. Given the existence of a moderately strong desire for relative income, some restraints on work hours may enhance welfare. See FRANK, *THE RIGHT POND*, *supra* note 77, at 133-35.

TABLE 2

Marginal Hour Worked	Marginal Benefit (wage-tax)	Marginal Cost (marginal value leisure)	Net Marginal Value
...
10th	\$8	\$11.75	-\$3.75
9th	\$8	\$10.50	-\$2.50
8th	\$8	\$ 9.50	-\$1.50
7th	\$8	\$ 8.75	-\$0.75
6th	\$8	\$ 8.25	-\$0.25
5th	\$8	\$ 7.75	\$0.25
...

However, with the initially stated desire for relative income,³²⁷ A and B would each work ten hours per day. Given this relative desire, how long will A and B work after imposition of the income tax? Because the tax decreases the absolute wage for any hour worked from \$10 to \$8, it likely also reduces the relative gain created by one party working an hour more than the other. Assuming proportionality to the previous relationship, each party receives a \$1.60 relative gain or loss for every \$8 difference in wages.³²⁸ If so, each party will now choose to work eight hours. The absolute net cost of working the ninth and tenth hour (\$3.75 and \$2.50) is in each case higher than the \$1.60 increment of marginal relative loss one will suffer if the other continues working ten hours, so it is cheaper not to work those hours. But the absolute net cost of the eighth and lower hours of work is less than the \$1.60 relative value, so it pays to work eight hours.³²⁹ Because each will work eight hours,

327. A and B have the same desire for relative income as stated *supra* note 315.

328. As explained *supra* note 315, a linear relationship between absolute income and relative value is unlikely, but useful for illustration. The following chart shows the post tax relative gains and losses from working between three hours more and three hours less per day than the the other:

Relative Income Position	Value
...	...
+\$24	+\$4.80
+\$16	+\$3.20
+\$8	+\$1.60
\$0	\$0
-\$8	-\$1.60
-\$16	-\$3.20
-\$24	-\$4.80
...	...

329. The same tedious analysis of the previous examples would demonstrate more rigorously that A and B are each better off working eight hours regardless of how many the other works.

each gains back \$22.25 in leisure for a sacrifice of \$20 (in pretax) wages. Rather than distort the tradeoff in work and leisure, the income tax operates here to correct excessive work caused by competitive consumption, and *enhances* welfare.³³⁰

Now consider the issue of tax progressivity. There are two reasons why it may be efficient to make income taxes progressive. First, if the proportion of one's income devoted to satisfying relative preferences rises with income—if status goods are “superior” goods in this economic sense³³¹—then progressivity combined with redistribution may enhance welfare.³³² If government taxes the income of those who are spending a high proportion of their income seeking to satisfy inherently conflicting preferences (e.g., on “fashion goods”) and distributes the revenue to those who spend a low proportion of their income seeking to satisfy inherently conflicting preferences, then the tax may increase welfare. It is a plausible, though still empirically untested, assumption that the proportion of one's income devoted to such goods rises as income rises. If so, some level of progressivity is efficient.³³³

Even if the above analysis fails, a progressive tax may be the optimal structure for achieving the goals of raising revenue and correcting for excessive levels of work. In the above illustration, for example, the desire that neighbors A and B have for relative income causes them to work beyond an optimal level. A twenty percent proportional income tax exactly offsets the relative gain from working more hours than the other, and causes the workers to work at the optimal level. But it is not necessary that the government take a flat twenty percent of each worker's income. To correct the tendency to work excessively, the government need only tax the income earned from working above the optimal level. In other words, a zero percent tax up to \$80/day (from eight hours work/day) and then a twenty percent tax on all income over \$80/day induces the workers to work the optimal eight hours/day. Thus, an income tax

330. This same analysis applies to the decreased investment in human capital an income tax produces. Education has been noted as being a positional good because people often seek simply to be *more* educated or at least more credentialed, than others. See Hirsch, *supra* note 67, at 48-51. Because much of the value of a certain level of education is determined by how many others lack that level, the value of high school and college degrees to employment opportunities has fallen over the past several decades. We should expect, therefore, that the competition to be “more educated than others” leads to excessive investment in certain types of education and that some levels of income taxation may correct this distortion.

331. Goods are “superior” if the amount consumers buy increases more than proportionately as income increases.

332. Pigou believed that those who earn more than the “mass of the population” spent a greater portion of their income on positional goods, and that this fact justified progressive income taxes. PIGOU, *supra* note 30, at 89-90; see also DUESENBERY, *supra* note 33, at 44, 101-03, 113; PIGOU, *supra* note 36, at 91.

333. This claim is not the conventional argument for making the interpersonal utility comparison that the poor would gain more from a marginal dollar gained than the rich would lose from the marginal dollar taxed. In the claim here, the rich person may lose the same (or more) utility than the poor gains. But the rich person's expenditure of that dollar on relative satisfaction imposes a greater external cost (by lowering the relative position of others) than does the poor person's expenditure of that dollar satisfying absolute preferences.

structure that functions only to correct the tendency to overwork will inevitably be progressive, here with rising rates of zero percent and twenty percent.

Such a tax would deter excessive work (because neither A nor B would work over eight hours) but raise no revenue, a function usually considered indispensable. The government can, however, raise revenue by taxing income earned on the optimal hours of work—in this example, by setting the tax on the first eight hours of work per day to some positive amount less than twenty percent.³³⁴ The choice of a tax rate greater than zero percent and less than twenty percent will depend entirely on the level of revenue the government requires. Thus, the tax will be proportional only if, by coincidence, the revenue requirement necessitates a twenty percent tax on the first \$80/day. At any lesser revenue requirement, the optimal tax structure will be progressive.

Of course, there is no perfect information. In the real world, taxpayers earn differing wages, value relative income differently, and do not precisely disclose the value they place on their leisure time. In practice, it will be quite difficult to determine the level of tax that will prevent wasteful competition for relative income while not discouraging an optimal amount of work. Nonetheless, the above analysis suggests that the conventional economic view of income taxation and progressivity—based only on absolute preferences—is seriously incomplete.

C. *Regulating Group Status Competition: The Case of Antidiscrimination Laws*

Thus far, our discussion, like the existing work on relative desires, has focused on how individuals compete against each other for position. But status competition is not limited to the level of individual against individual. An individual's status depends in part on the status of the social groups of which he or she is a member. Thus, some competition takes the form of competition between groups. Group competition takes many forms, but for illustrative purposes, this Section will address one particularly salient manner in which individuals are stratified: by race. A relative preferences theory of group competition may help illuminate the causes and consequences of racially discriminatory behavior.

Although arguments for and against prohibiting race discrimination usually involve claims of justice or rights, there has also been considerable discussion concerning the efficiency of such prohibitions.³³⁵ Gary Becker's path-breaking

334. At less than 20%, A and B will still work the full eight hours because the relative wage premium for a marginal hour is greater than the tax. At substantially more than 20%, A and B will work less than the optimal amount.

335. For example, Richard Posner and John Donohue recently engaged in an exchange concerning the efficiency of such laws. See John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Posner, *Title VII*, *supra* note 300; John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987); Richard Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989), Donohue, *supra* note 300. See also RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992).

economic model of discrimination³³⁶ has served as the foundation for this analysis.³³⁷ A theory of group status competition may provide an economic description of discriminatory behavior superior to Becker's,³³⁸ one revealing antidiscrimination laws as a possible corrective for wasteful inter-group status competition.

Becker posits that people discriminate on the basis of race because they have a "taste" for avoiding association with members of another race; "contact" with other races imposes a "non-monetary cost" on the discriminators.³³⁹ That discrimination predominantly takes the form of whites refusing to associate with blacks (in employment, public accommodations, neighborhoods, etc.) means that whites have, on the whole, discriminatory tastes and blacks do not. Becker draws an analogy between these tastes and transportation costs,³⁴⁰ both impose costs on trades between certain individuals and consequently tend to decrease the amount of trade that occurs. Whites give up otherwise favorable trades with blacks when the psychological "costs" of association exceed the benefits of the trade. The harm of discrimination, in Becker's model, is the loss of the benefit these forgone trades would have created. These lost trades harm both whites and blacks,³⁴¹ although blacks are hurt more because, as an economic minority, trade with whites represents a larger proportion of all possible beneficial trades for them than trade with blacks does for whites.³⁴² Becker criticizes black nationalists for suggesting that blacks cease all contact with whites because, he asserts, this conduct would only increase the economic harm blacks suffer from forgone trades.³⁴³

Becker also claims that market competition will decrease discrimination against blacks. Regarding employment discrimination, for example, Becker

336. Originally the subject of Becker's 1955 Ph.D. dissertation, his theory was published as *THE ECONOMICS OF DISCRIMINATION* (1st ed. 1957). See also BECKER, *supra* note 171, at 15-30 (1976).

337. In their exchanges, see *supra* note 335, Posner and Donohue disagree as to the ultimate efficiency of laws prohibiting race and sex discrimination (Donohue claiming and Posner denying that such laws may efficiently encourage nondiscriminatory firms to dominate the market), but both premise their analysis on Becker's model of discrimination. In calling for the repeal of all antidiscrimination laws, EPSTEIN, *supra* note 335, also relies on Becker's model.

338. Like Becker, I am interested in explaining discriminatory behavior that is caused by racial animus. Although significant discriminatory behavior results from ignorance and unconscious stereotypes, this Section focuses on the kind of discriminatory behavior that is immune to new "information." See BECKER, *supra* note 336, at 8 ("Ignorance may be quickly eliminated by the spread of knowledge, while a prejudice (i.e., preference) is relatively independent of knowledge.") (footnote omitted). A theory of racial animus based on relative preferences is therefore not a complete theory of discrimination, but I think it provides an account of this facet of the problem that is superior to Becker's.

339. BECKER, *supra* note 171, at 6-9. See also POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 615 ("Some people do not like to associate with the members of" other groups).

340. BECKER, *supra* note 171, at 11-13 & n.3, 24-30.

341. *Id.* at 11-13.

342. *Id.* at 21-22 & n.16. See also POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 616 (Nonassociation hurts blacks more than whites just as a trade embargo between the United States and Switzerland, while injuring both nations, would hurt Switzerland more. For Switzerland, the United States represents a much larger market, and a much greater opportunity for beneficial trade, than Switzerland represents for the United States.)

343. BECKER, *supra* note 171, at 21 & n.7.

concludes that the market will favor employers who have little or no taste for nonassociation with blacks over employers with a moderate or strong taste. The stronger the taste, the higher the "costs" of employing black workers, and the more the employer will forgo black workers with skills superior to those of their white employees.³⁴⁴

From Becker's model, Posner draws the conclusion that antidiscrimination laws are inefficient.³⁴⁵ If discriminatory preferences are like any other preferences, then a law that prevents their satisfaction is not likely to maximize wealth. An antidiscrimination law will at times require white employers to employ black workers even if the employers prefer not to do so. Posner argues that the loss from this trade to the white is not likely to be compensated by the gain to the black, for if the trade created a net surplus of wealth, we would have seen the black worker "bribe" the white employer by offering his labor at a lower cost in the absence of any statutory compulsion.³⁴⁶ For example, suppose the white owner of a firm employing whites at \$100/day values the cost of associating with black workers at \$10/day. Black workers (equally as productive as existing white workers) whose best alternative pays less than \$90/day should be willing and able to "bribe" the white employer to hire them at \$90/day. When black workers have failed to be hired at this lower wage, Posner would infer that their existing alternatives are superior (for example, they are elsewhere earning \$95/day). If so, the only blacks a new antidiscrimination law compels the white employer to hire are those who will gain less than the white employer loses by the hiring.³⁴⁷ Thus, Posner thinks antidiscrimination laws are inefficient for the same reason that laws forbidding consideration of transportation costs would be inefficient: in both cases, the law compels trades that would not take place voluntarily because they do not increase net wealth.

The theory of relative preferences suggests a different explanation of racial discrimination with different normative implications. To appreciate fully the superiority of this theory, it is necessary to examine the "household production function" Becker more recently set forth in his "new theory" of consumer behavior.³⁴⁸ Becker describes traditional consumer theory as the view that

344. White-owned firms that do not discriminate will employ their ability to hire better workers to drive more prejudiced white owners out of the market. *Id.* at 35-37. See also POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 616.

345. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 622-23; Posner, *Title VII*, *supra* note 300. See also EPSTEIN, *supra* note 335. I focus here on the argument that such laws are necessarily inefficient because they frustrate preferences. A complete evaluation would require consideration of the efficacy and costs of enforcing such laws.

346. POSNER, *ECONOMIC ANALYSIS*, *supra* note 50, at 622-23.

347. The black worker who was elsewhere earning \$95/day gains only \$5 from the result compelled by the law, while the white employer loses the \$10 association cost. The black workers currently employed at \$90/day do gain an amount—\$10—equal to what the white employer loses, but this wealth transfer represents no actual efficiency gain.

348. See BECKER, *supra* note 171, at 131.

“the consumer unit . . . attempts to maximize utility . . . which it obtains directly from the services of goods . . . purchased in the marketplace” subject to a budgetary constraint.³⁴⁹ He criticizes this theory because it attributes the considerable amount of behavior it cannot explain by income and prices, to inexplicable “variations in tastes.”³⁵⁰ Relying on “differences in tastes” as an explanatory variable is unsatisfactory, according to Becker, because economists (and other social scientists) have no adequate theory to explain “how tastes are formed.”³⁵¹

To solve this problem, Becker draws a distinction between “goods” and “commodities.” Rather than view the consumer as obtaining utility directly from “goods” purchased in the market, Becker suggests that we view the consumer as obtaining utility from “commodities” that the consumer or household “produces” by “combining purchased market goods and services with some of the [consumer’s] own time.”³⁵² For example, a consumer does not derive utility directly from an automobile, but uses an automobile—a specific “good”—to produce the more general “commodity” of transportation (and also, perhaps, status). By imagining consumers as using goods and time to “produce” their own utility, the economist need not explain behavior simply with prices and income, but can also use production variables such as the household’s availability of time, investment in human capital, and decisions regarding marriage and fertility.³⁵³ The corresponding advantage to the new theory is “its reduced emphasis on the role of ‘tastes’ in interpreting behavior.”³⁵⁴

Becker has never revised his theory of racial discrimination to take account of his household production theory. Yet the former theory suffers from the defects the latter is meant to address. Under Becker’s model of race discrimination, “taste” (for nonassociation with those of another race) plays a central role. If changes in the discriminatory behavior of whites over time, or differences in discriminatory behavior by different whites, cannot be attributed to price or income, then Becker would have to rely on changes or differences in associational tastes, changes and differences he has no theory for explaining. Instead, the household production theory demands that we ask, what “commodity”

349. *Id.* at 131-32.

350. *Id.* at 132-33.

351. *Id.* at 147 (tastes “have defied effective theoretical analysis”).

352. *Id.* at 134.

353. *Id.* at 141-44. For example, Becker notes, a household purchases more heating oil in the winter, when prices are highest, than at other times. The better explanation is not that the household’s tastes seasonally change, but that it purchases the “good” of heating oil in order to produce the “commodity” of a comfortable living temperature, and that as production conditions (i.e., climate) change, so does the behavior of the household. Becker is not actually suggesting that any economist would explain the cyclical change in demand for heating oil by reference to a change in tastes; his point is that in such cases, however, the economist either relies on a change in tastes or some *ad hoc* rationalization outside of the theory of behavior. “[B]y incorporating an intuitively appealing explanation in each case, economists usually interpret these observations in reasonable ways. The important point, however, is that the received theory of choice itself is of modest use in that undertaking.” *Id.* at 133.

354. *Id.* at 144.

whites are “producing” when they purchase the “good” of nonassociation. The concept of relative preferences suggests an answer: consumers have a preference for a “commodity” that might be thought of as social distinction or status, and consumers may purchase the “good” of nonassociation in order to produce greater social distinction.³⁵⁵

As noted previously, Becker and Stigler have written, outside the context of race discrimination, that “social distinction” is a “commodity,” and that consumers purchase what they call “fashion goods” in order to obtain it.³⁵⁶ Becker and Stigler list as examples of “fashion goods” “elaborate parties [and] a respected occupation.”³⁵⁷ These two are particularly interesting examples because they suggest the role of social group membership in determining one’s individual social rank. One’s social status depends in large measure on the social status of those with whom one associates. The more exclusive the “party” or the “occupation”—the more people who wanted but were denied admission—the greater the social distinction created by one’s being accepted into the group. People will therefore seek to join exclusive groups, and also to preserve the exclusivity and generally enhance the distinction of the groups to which they already belong.³⁵⁸

Race discrimination by whites may be seen not as an attempt to satisfy an irrational “taste” for nonassociation with blacks, but as an attempt to produce the “commodity” of individual distinction by raising the relative status of a particularly salient social group—one’s race. As Becker and Stigler note, the scarcity of social distinction means that “an increase in one person’s distinction generally requires a reduction in that of other persons.”³⁵⁹ One option for increasing one’s distinction is therefore to directly lower the status of another. Although “subordinating” any individual may raise one’s status to some extent, *subordinating a member of another group will often be more productive of status because it allows one to lower the status of the other individual’s entire group, as well as that of the individual.*³⁶⁰ Whites who discriminate against blacks may therefore be said to act “as if” they were producing social distinction for their group, and derivatively for themselves, by subordinating members of a nonwhite race. This theory views discrimination not as the result of a

355. Although I present this theory of group-based status competition to explain race discrimination, the same concept can be usefully applied to other forms of discrimination in a fairly straightforward way.

356. Stigler & Becker, *supra* note 43, at 84.

357. *Id.*

358. In the latter case, it is not necessary that one’s membership be in any sense voluntary; individuals competing for status will compete to obtain more status for the groups to which they belong, whether or not they “choose” to join the group.

359. Stigler & Becker, *supra* note 43, at 88.

360. Of course, not every effort at discrimination will be effective. Also, discriminatory efforts—especially when overt—may violate norms of other groups to which discriminators belong.

random taste for nonassociation, but as one alternative for producing the “basic pleasure” of social distinction.³⁶¹

There are several reasons for favoring this descriptive model of discrimination over Becker’s. First, in addition to employing Becker’s new theory of consumer behavior, the model also finds considerable support in sociological and psychological accounts of intergroup behavior. For example, in what is known as the “minimal intergroup situation,” people immediately identify with and favor others they perceive as belonging to their same group.³⁶² In repeated experiments, psychologists created “groups” under circumstances they expected would cause no intergroup bias: (i) the groups were created artificially by the researcher for the purpose of the experiment; (ii) individuals were placed in groups on a trivial or random basis; (iii) there was no prior hostility between the individuals; (iv) no social interaction took place between the individuals; and (v) the experiment gave no external incentive for favoring members of one’s group.³⁶³ Nonetheless, people consistently evaluated members of their own group more favorably than the members of other groups. In essence, “the mere awareness of the presence of an out-group is sufficient to provoke intergroup competitive or discriminatory responses on the part of the in-group.”³⁶⁴

Individuals view their welfare as so dependent on the welfare of groups to which they may belong that they seem predisposed to compete for their group and against others. This evidence supports the claim that people perceive themselves as deriving individual status from the status of the groups to which they belong, and therefore compete to enhance the status of those groups, and to diminish the status of other groups.³⁶⁵ One would expect that an individu-

361. Others have attacked Becker’s model for failing to address discrimination motivated by the desire to subordinate minorities or women. *See, e.g.,* Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1667-70 (1991). In this particular criticism, however, Mary Becker does not reject the existence of the category of discrimination that Gary Becker explains as the product of whites’ taste for nonassociation. Rather, she adds another category of discrimination, one resulting from a desire to subordinate racial minorities or women. My point is different. I am seeking to deny any explanatory significance to Gary Becker’s model and to recharacterize the behavior his model addresses as group-based status competition. The suggestion is not that all discrimination results from a conscious desire to injure or humiliate others, but that people engaging in discriminatory behavior act as if they were maximizing group status. Unlike Mary Becker’s claim that “[m]uch discrimination is not . . . rational,” *id.* at 1664, the theory I am proposing also suggests that most discrimination is a rational means of attaining status for one’s group.

362. *See supra* notes 145-147 and accompanying text.

363. For the initial experimental methodology, *see* Tajfel & Turner, *supra* note 145, at 13-14. The results were subsequently replicated “even when the assignment to groups was made explicitly random.” *Id.* at 14. *See also* Leigh L. Thompson & Jennifer Crocker, *Downward Social Comparison in the Minimal Intergroup Situation: A Test of a Self-Enhancement Interpretation*, 20 J. APPLIED SOC. PSYCHOL. 1166, 1167 (1990) (“The tendency to favor [one’s] in-group over outgroups is so powerful that it has been demonstrated when group membership is determined arbitrarily by a coin flip . . . or through a lottery procedure.”) (citations omitted).

364. Tajfel & Turner, *supra* note 145, at 13. “The basic and highly reliable finding is that the trivial, ad hoc intergroup categorization leads to in-group favoritism and discrimination against the out-group.” *Id.* at 14.

365. The studies show that individuals sacrifice absolute gains to maximize the relative advantage of their group over others. *See supra* notes 145-147.

al's membership in genuine social groups (e.g., stratification by family, gender, ethnicity, race, religion, school, neighborhood, car ownership, etc.) would matter to them more than the artificial groups the experimenter creates briefly and randomly in the laboratory.³⁶⁶ Social identity theorists and other social scientists interpret the laboratory and field data as supporting the idea that some intergroup bias and hostility, like race discrimination, is the product of group-based status competition.³⁶⁷

The second reason for preferring the status competition theory to Becker's theory of the taste for "nonassociation" is its ability to explain more precisely the discriminatory behavior observed in society. It is apparent that prejudiced whites rarely seek to avoid all association with blacks; they seek to avoid certain types of association but are indifferent to (or actually desire) others.³⁶⁸ Certainly in the segregated South at the time of Becker's dissertation, some of the whites who refused to work with blacks, patronize establishments that served blacks, and use bathrooms open to blacks, employed blacks as domestic servants. If such whites sought nonassociation, why did they allow a black person to enter their home, clean their belongings, cook their food, and rear their children? On the other hand, why would whites oppose marriage of interracial couples with whom they did not and would never associate? And why would whites oppose the election of black politicians with whom they would never share personal contact?³⁶⁹ A better explanation than a taste for

366. Recall the earlier evidence that "fraternalistic" relative deprivation (based on comparison of one's group to other groups as distinct from comparing oneself to other individuals) is highly predictive of social protest and other significant behavior. See *supra* note 139.

367. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 349 (1953) ("Out-groups, as status builders, have the special advantage of being near at hand, visible (or at least nameable), and occupying a lower position by common agreement, thus providing social support for one's own sense of status enhancement."); Jennifer Crocker & Riia Luhtanen, *Collective Self-Esteem and Ingroup Bias*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 60, 66 (1990) ("[W]e suggest, with social identity theorists, that prejudice may represent an attempt to enhance social identity or collective self-esteem."). See also Dion, *supra* note 139, at 168-69; Dubé & Guimond, *supra* note 139, at 210-11; Luhtanen & Crocker, *supra* note 124. See generally Tajfel & Turner, *supra* note 145; *DIFFERENTIATION BETWEEN SOCIAL GROUPS* (Henri Tajfel ed., 1978).

368. See Kenneth J. Arrow, *Models of Job Discrimination*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 83, 89 (Anthony H. Pascal ed., 1972) ("Physical proximity is probably significant only because of its implications for status and for feelings of superiority and of fear. The slave owner and his overseer felt no reluctance to work with an all-black labor force.").

369. One does not "associate" with a politician by privately casting a vote in his favor. Of course, there are nonstatus explanations for whites voting against black political candidates. Whites may believe that a black candidate will enact policies against the interests of whites. Psychologists and political scientists attempting to determine the reasons for white opposition to black candidates and black political causes have found, however, that a theory of "symbolic racism" better explains the data than simple models of self-interest:

[A]bstract, moralistic resentments of blacks—what we have called symbolic racism—proved to be the overriding determinant of voting, for whites shielded from possible tangible threats posed by blacks as well as for those in more imminent jeopardy. . . . Our findings imply that the white public's political response to racial issues is based on moral and symbolic challenges to the racial status quo in society generally rather than on any direct, tangible challenge to their own personal lives.

Donald Kinder & David Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threat to the Good Life*, 40 *J. PERSONALITY & SOC. PSYCHOL.* 414, 427, 429 (1981). See also David Sears et al., *Whites'*

nonassociation is that such whites, seeking to preserve a superior group status, will not tolerate associations that imply equal or superior rank, but do tolerate (and even desire) associations that imply a lower rank for blacks.³⁷⁰

Third, the relative preference theory points to an obvious harm of discrimination that is entirely missed by Becker's account: the psychological harm to the victims of discrimination. Even though Becker realizes that "an increase in one person's [social] distinction generally requires a reduction in that of other persons,"³⁷¹ the only harm his theory recognizes from discrimination is the forgone benefit of trades that discrimination precludes. Becker's model may accurately describe all the harm created if, for example, Rotarians refused to trade with members of the Kiwanis Club. To be excluded from a group when one has chosen to join a roughly equal competing group is likely to have minimal status effects. Even to be excluded involuntarily from a particular group within society is not likely to affect one's social status dramatically if one has the choice of being a member of other groups with similar size, power, and wealth. But what should be clear to us now is that the majority of a society, possessing disproportionately greater wealth, power, education, and symbols of leadership, is fully capable of depriving the members of a minority group of social status by ostracizing them in daily life. When members of the minority group desire the status of full and equal citizens, intentional discrimination by a majority group is likely to deprive them of such status and substantially harm their self-esteem.³⁷²

As evidence of the significance of the stigmatizing harms of discrimination, Becker might have considered more carefully the possible rationality of black nationalists' calls for complete segregation. One way to eliminate inherent preference conflict is to eliminate the reciprocity of the relative preferences, directing one's concern away from the existing scale toward some other ranking. In this case, if blacks could "give up" their desire to be equal citizens of a predominantly white America, they would cease to suffer from the failure to achieve such status.³⁷³ Although this alternative would mean giving up an

Opposition to 'Busing': Self-Interest or Symbolic Politics?, 73 AM. POL. SCI. REV. 369 (1979). The finding of symbolic racism supports the theory that whites act as if they were seeking to maximize the status of their race by minimizing the status of blacks. Note that groups seeking to use the political process to lower the status of other groups as an end in itself (rather than merely as a means to greater share of scarce resources), exacerbate the public choice problems of political action.

370. For the same reason, Becker's model does not explain sex discrimination. Sexist males do not typically have the desire to avoid association with females. An advantage of the status competition theory is that it is broad enough to include sex discrimination: males act as if they were maximizing the status of their gender group by lowering the status of females. Sexual harassment in the workplace, for example, operates to preserve this status relationship where women would otherwise gain status by obtaining traditionally male occupations.

371. Stigler & Becker, *supra* note 43, at 88.

372. See, e.g., ALLPORT, *supra* note 367; ERVING GOFFMAN, *STIGMA* (1963). See also Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

373. It creates no loss in self-esteem to be separated from a group in which one has no desire to be a member. One imagines that the Amish, who have chosen to remain largely separate from American society, feel little stigma in being segregated from it.

even larger number of beneficial trades, some black nationalists apparently perceive the psychological harms of racism to be greater than the harms of forgoing all trade with whites. Absent a theory recognizing any stigmatizing harms of ostracism, Becker has no basis for challenging this judgment.

One may, however, raise an important objection to this status competition theory of discrimination: although individuals will compete for individual status, the problem of “free riding” will prevent them from competing for group status by seeking to lower the status of other groups. Efforts to lower the status of others, such as forgoing beneficial trades with blacks, entail costs. It might serve all whites for each member to bear some cost in lowering the status of nonwhites, but for any individual white, the dominant strategy will be to gain all the benefit from the discriminatory behavior of other whites, while making no such efforts oneself. When each white attempts to free ride on the group efforts of others, there will be no group status competition.

This objection fails, however, if groups have an effective way of inducing individuals to contribute to group status.³⁷⁴ One likely mechanism is the awarding of status *within* the group. For most groups, a fundamental norm is that those who contribute to the group are esteemed above those who do not. Elevated *intragroup* status is an implicit payment group members make to members who contribute the most to raising their group’s *intergroup* status; lowered intragroup status (culminating in ostracism or expulsion) is the implicit punishment of those who fail to contribute to enhancing the group’s status, or worse, who lower it. Of course, discrimination is not the only means of enhancing group status; one may achieve greater glory for a group (and oneself) by positive achievements (e.g., earning fame in sports, entering a respected profession, succeeding in business). Positive achievements may be the more efficient way of gaining individual status because such achievements may gain one status across group lines, while discriminatory conduct will not. If so, we should expect that while people pursue the achievement strategy when available, those who fail in this regard—and who otherwise suffer from low status within their group—will more commonly turn to discrimination as their only means of seeking intragroup distinction. This prediction is supported by the social science literature, which consistently finds an inverse relationship between social status and racial prejudice among whites.³⁷⁵

374. The objection also fails in cases where there is no “cost” to discrimination because the white is choosing among transactions of equal monetary value. Suppose, for example, that a white employer receives two equally productive applicants for a single job, one being black and the other white. There is no monetary “cost” to hiring the white; the employer necessarily must reject one applicant. But the prejudiced white does not choose randomly; rejecting the black applicant offers a greater opportunity for producing status. If many choices are otherwise in equipoise, there will be significant discrimination even among whites unwilling to bear a cost to enhance the status of their group.

375. ALLPORT, *supra* note 367, at 80 (“[I]t seems fairly well established that white people in the lower socio-economic levels are, on the average, more bitterly anti-Negro than white people at the higher levels.”); Donald Noel & Alphonso Pinkney, *Correlates of Prejudice: Some Racial Differences and Similarities* 69 AM. J. SOC. 609, 611-12 (1964) (finding “among whites that the higher the occupational status, the lower

The status competition theory also leads to different conclusions about the fate of discriminatory behavior in the face of market competition. Other theorists have noted that when the act of discrimination is a form of consumption, rather than a means of lowering the costs of production, there is no reason to expect the market to drive out more discriminatory whites.³⁷⁶ The status competition theory views discriminatory behavior as an act of consumption, or more precisely, as a good that permits the white consumer to "produce" the commodity of greater status. That some whites engage in greater discrimination than others does not mean that the former suffer greater "costs" from association with blacks than the latter, but, for a variety of reasons, that the former receive more utility from engaging in such behavior than the latter. If discrimination is generally a matter of consumption, we should expect the market to cater to rather than eliminate it.³⁷⁷

We have thus far considered only the failings of Becker's positive model of race discrimination. What are the normative implications of the group status competition theory of race discrimination? Here, we should return to the Coasean bargain argument Posner raises in condemning antidiscrimination laws as inefficient. As explained above,³⁷⁸ Posner argues that if blacks could gain more than whites lose from a mutual transaction, then blacks would bribe whites to engage in that transaction. Status effects, however, make Posner's inferences problematic. Assume again that the white employer offers white workers \$100/day and black workers of equal productivity \$90/day. Taking status into account, we can now imagine that a black worker who refuses to take the \$90/day wage could gain *more* than \$10/day when an antidiscrimination law compels the white employer to hire him at \$100/day.

We can imagine, in other words, why a black worker earning only, say, \$75/day at an all black firm might still refuse to accept the \$90/day job with white coworkers earning \$100/day. Frank has produced significant evidence that the desire for status among one's coworkers is sufficient to cause individuals to forgo significant absolute income to secure superior relative income within a firm.³⁷⁹ But Frank's model concerns the status loss from being paid less than *more* productive workers; here the black worker suffers the greater indigni-

the proportion prejudiced," consistent with previous studies); Thomas Pavlak, *Social Class, Ethnicity, and Racial Prejudice*, 37 PUB. OP. Q. 225, 229-30 (1973) (finding "moderately strong inverse relationship between racial prejudice and each of . . . three indicators of social status," occupation, education and income; consistent with previous studies).

376. John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1723 (1991) ("[W]here the employer gets positive utility from hiring workers of a given racial group, if this conduct serves to brand the nonpreferred races as inferior . . . the positive utility . . . is sufficient to compensate for the lower earnings that result from the failure to look only to productivity narrowly defined.").

377. See generally Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POLICY 22 (1991).

378. See *supra* text accompanying notes 345-347.

379. See *supra* notes 188-191 and accompanying text.

ty of being paid less than equally productive workers, possibly even less than less productive workers. In addition, while a firm in Frank's model might find it desirable to keep salaries confidential to preserve the morale of lower paid employees, the prejudiced white employer has every reason to extract the greatest symbolic significance from race-based wage discrimination. After all, a lower wage track is not just an economic bribe of the employer, it is one means of subordinating blacks (even while associating with them) and thereby producing group status. Finally, although being paid less than one's coworkers may say little about one's worth or status in the world outside one's job, the loss of status from accepting a wage inferior to white coworkers is likely to adversely affect one's status vis-à-vis all whites. Thus, a black worker earning \$75/day might refuse the lower track job because the status loss it carries exceeds the \$15 gain in absolute wages.

The antidiscrimination law allows this black worker to gain \$25/day from the higher paying job, while the white employer must only pay him \$10/day more than he previously offered. But one should not too quickly conclude that the white employer only loses only \$10/day per black employee. Under the theory of group status competition, the lower wage track not only saved wage costs but produced status for whites. Under the antidiscrimination law, black workers lose the stigma of relatively poor wages, while the white employer loses the status derived from paying whites relatively superior wages.

Here, one may be tempted to reassert the inferences of Coasean bargaining: if the total status gains (to blacks) from equal pay outweighed the total status losses (to whites), then the parties would achieve the efficient outcome voluntarily. But this inference is also unavailable. Previously, I discussed a special impediment to bargaining for status: the impossibility of attaining status by paying for it.³⁸⁰ This problem arises here: a black worker seeking equality cannot "bribe" a white employer (e.g., by offering to accept a lower wage) without *by the fact of the bribe* losing equal status. Where equal pay (for equal productivity) is a critical symbol of equal status, one cannot accept less than equal pay and still obtain that status; the bargaining itself implies inequality. Thus, if blacks lose more in status from unequal pay than whites gain, the market will not achieve what would be the efficient outcome: equal wages. Conversely, that the market produces unequal wages is no evidence that whites lose more from antidiscrimination laws than blacks gain.

Of course, if whites were to gain more from enhanced status than blacks lose, then the discriminatory behavior produces an efficient result. But even if the status gains and losses between whites and blacks are exactly equal, this group competition presents a wasteful example of competitive consumption. Competing racial preferences create an inherent preference conflict. The desire of whites for a higher social rank than blacks and the desire of blacks for equal

380. See *supra* notes 245-252 and accompanying text.

social rank are reciprocal and incompatible. Although there are many instances in which social status is difficult to measure, ostracism by the vast majority of individuals in society is objectively and observably inconsistent with having equal status. Consequently, the resulting competition for status is zero sum; a gain by one group comes at the expense of the other.

Note how discrimination consumes resources in a zero sum competition for status. The "forgone trade" that Becker identifies as the harm of discrimination is the investment whites make in improving their social status at the expense of blacks.³⁸¹ Whites forgo transactions that would increase their own absolute income because refusing to associate with blacks in ways that imply equal standing preserves or increases their relative status vis-à-vis blacks. Unless the parties would have invested all the resources generated by the "forgone trade" into satisfying some other inherently conflicting preferences (e.g., if a white refused to buy from a black certain jewelry valued only for its relative value), this discriminatory behavior constitutes competitive consumption. If only whites discriminate, i.e., if whites alone invest in group status, race discrimination represents the first form of competitive consumption, in which case we cannot know whether laws prohibiting discrimination are efficient or not. The possibility remains that discriminatory behavior not only benefits whites more than it harms blacks, but benefits them sufficiently to outweigh the lost wealth from these forgone trades. Of course it is at least equally possible that the status loss to blacks exceeds the gain to whites in which case the forgone trades merely increase the net welfare loss. Most importantly, even if one believes that the status gain to whites exactly equals the loss to blacks, then the investment by whites wastes resources by forgoing wealth-creating transactions without producing a *net* status gain.

It becomes more likely that antidiscrimination laws are efficient if blacks also engage in group status competition. Such "investment" might take the form of blacks discriminating against other groups to raise the status of their own, or blacks distancing themselves from their own racial group and discriminating against other blacks in an effort to raise their individual status. To the extent such behavior is significant, race discrimination may present the second or third form of competitive consumption, in which competing groups (or individuals) match each other's investment in gaining status at the expense of the other. If so, antidiscrimination laws may efficiently terminate a repetitive cycle of investment in a zero sum competition for status.

Intended as an illustration, this analysis is necessarily incomplete. When a market failure is identified, it does not inevitably follow that collective regulation will correct the failure, or that it will save more resources than market intervention costs. But rejection of Becker's model of race discrimina-

381. This "investment" is in the form of opportunity costs rather than direct expenditures, but it is an investment nonetheless.

tion, and consideration of the above theory, fundamentally alters how one evaluates the efficiency of antidiscrimination laws.

IV. CONCLUSION

Humans are social animals, and it should come as no surprise that among the strongest of human desires is that for social position: to be respected by others, to have status, and to consume at levels that match or exceed the prevailing standard of living. Adam Smith saw this clearly, but classical and neoclassical economics developed along simpler lines. The irony is that even as economics shunned analysis of these preferences, individual economists occasionally acknowledged their existence and strength. Milton Friedman once provided an example of a positional desire that is accessible to economic and legal scholars alike:

The college professor whose colleague wins a sweepstake will envy him but is unlikely to bear him any malice or to feel unjustly treated. Let the colleague receive a trivial raise that makes his salary higher than the professor's own, and the professor is far more likely to feel aggrieved. After all, the goddess of chance, as of justice, is blind. The salary raise was a deliberate judgment of relative merit.³⁸²

But however obvious it is that people value salary and goods, in part, as a symbol of their place in a particular hierarchy, mainstream economic theory and "law and economics" have failed to perceive how pervasive these preferences are and how useful a general analysis of such preferences might be.

This Article, I hope, will stimulate an increased awareness of and interest in the effect of relative preferences. The social science evidence strongly suggests that relative wants are too important to be ignored: people habitually compare themselves with others, and through this process they gain or lose self-esteem. When, after social comparison, one realizes that one lacks what others have, there is a resulting sense of relative deprivation which explains a wide range of human behavior. The pervasiveness of status symbols provides further support for the importance of positional desires: if people did not strongly desire status, they would not invest in symbols of status. Finally, a variety of economic data (savings, wages, gambling, insurance, and fashion) are well-explained by the existence of relative desires.

A number of conclusions follow from the reality and power of relative preferences. First, I have shown, following Frank, that investments in relative position may be socially wasteful. Second, I have isolated the conditions under which such investments will be wasteful. Relative preferences inherently

382. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 166 (1962). I am indebted to Coelho, *supra* note 76, at 96, for this example.

conflict when (1) people make a comparison among one another, (2) the comparison concerns the same characteristic, (3) people desire incompatible positions regarding one another and that characteristic, and (4) people's positions are reasonably observable and objective. By specifying in some detail what makes positions "incompatible," I have shown that the market failure of competitive consumption may exist even when the positions desired are less than the top position, and consequently that the analysis has broad application even when making only minimal assumptions about the type of position people seek. By specifying some special transaction costs of resolving conflicts caused by relative preferences, I have shown that the market failure is unlikely to correct itself.

Finally, I have provided some examples of how this market failure may explain and justify certain market regulations. Laws setting minimum levels of safety, health, and savings may efficiently limit wasteful investment in competitive consumption. The effects of income and "luxury" taxation on social welfare are quite different once relative preferences are considered; taxation is even necessary in some cases to correct competitive consumption. Finally, a theory explaining race discrimination as the product of group-based status competition is superior to the prevailing economic model. The economic rationale for antidiscrimination laws is best explained by an efficiency analysis sensitive to relative preferences.

Ultimately, recognizing the waste of competitive efforts to satisfy inherently conflicting relative preferences may not definitively resolve any particular legal controversy. A thorough assessment of the importance of competitive consumption requires a complete theory of relative preferences for which this Article has only begun to lay the groundwork. However, the analysis I have advanced suggests the power of relative preferences and points the way to future applications.