



1-1-2012

# Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse

John Mixon

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

## Recommended Citation

John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 327 (2011).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol24/iss2/4>

This Essay is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# NEOCLASSICAL ECONOMICS AND THE EROSION OF MIDDLE-CLASS VALUES: AN EXPLANATION FOR ECONOMIC COLLAPSE

JOHN MIXON\*

## INTRODUCTION

The American middle class is sandwiched between, on the one hand, an elite few whose wealth and power are beyond middle-class reach, and on the other, the despairing poor, whose plight the middle class hopes to avoid. These social divisions may be defined in terms of power, education, income, morality, or a dozen other attributes. However defined, it is neither the elite nor the poor, but the middle class whose commitments to the virtues of honesty, hard work, integrity, and community morality most fueled twentieth-century economic and institutional success. A strong middle-class belief in justice and fairness underlies the legal and political systems that protect and advance individual and community interests.

Individual middle class members have little direct influence on economic, legal, and political institutions. But when institutions crash, as they did during the Great Depression and during the past two years, the middle class suffers more than either the elite or intractably poor members of society. Unlike Wall Street elites, the hard-working middle class could not sell short and profit from the downturn.<sup>1</sup> Unlike the destitute poor, the middle class was heavily invested in jobs, retirement funds, and homes whose values were destroyed when financial and business institutions collapsed.

This article's thesis is that some blame for the institutional failures of the past two years is directly traceable to systematic and conscious replacement of the middle-class theory of virtuous person by a contrary, sociopathic, purely economic theory of person that is totally individualistic, totally self-concerned, and coldly rational, with no sense of obligation

---

\* John Mixon, Law Alumni Professor of Law, University of Houston Law Center. The author would like to thank colleagues Brigham Daniels and Robert Ragazzo, and friends Lenya and Lance Gould, Robert and Bev Wiemer, Evelyn Keyes, Deborah Rappaport, Robert Kauffman, William Wayne, Charles O'Neil, Margaret Ewell, Nancy Bradley, Andrea Baker, Mary Ann Kleuser, Jim Wilkinson, Terry Brandt, and particularly Micelle Anne Simms, who commented on early drafts and ideas, and Donald S. Williamson, whose constant focus on integrity inspired the undertaking.

1. *Goldman to Pay \$450G*, *NEWSDAY* (New York), May 5, 2010, at A34 (describing Goldman Sachs' settlement with the Securities and Exchange Commission in response to allegations of short-selling violations).

to community. Middle-class values emerged out of necessity, community, religion, and genetic evolution. The theory of the rational, self-interested person, on the other hand, was resurrected by neoclassical economic theorists, taught in universities, and exported as religion to the places where it could do the most damage—the financial and political institutions and markets of the world. The purely economic theory of person is becoming increasingly absorbed in legal reasoning as well.

Advocates of a purely economic theory of person justify behavior that is destructive and sociopathic by asserting that purely selfish players in free (i.e., unregulated) markets produce maximum individual satisfactions (utility) that cumulatively result in maximum community good (efficiency). It is true that an economically driven person may work as hard as, or harder than, a worker who follows traditional middle-class values and may produce more beneficial products. It is true that self-interest is a powerful force for producing personal and societal good. But it is not proven that purely self-interested behavior reliably results in maximum community good.

A great deal of blame for the abandonment of middle-class values falls on university courses in business economics and law that reject the middle-class theory of virtuous person and preach instead a theory of the rational self-interested person without concern for the implicit loss of virtue.

As disciplines, neither economics nor law deals directly with personal or community morality, middle-class or otherwise. Economics purports to follow the amoral procedures of scientific inquiry by postulating a testable model for explaining and predicting human behavior in a world with limited resources.<sup>2</sup> The neoclassical model limits its theory of person to two and only two characteristics: (1) people are rational, and (2) people are self-interested. The model further assumes that rational, self-interested behavior in an idealized market produces an “efficient” outcome that puts scarce resources to optimal use.<sup>3</sup> There is no assumption that people in the market are honest, truthful, fair, or just, except to the extent they gain some advantage from such behavior.

University courses in economics concern wealth and markets; law courses deal with the existing social order system. Graduates absorb the foundational assumptions of their separate disciplines and assume that their practice advances the public good. Increasingly over the past half-century, economics and legal education have become entwined and mutually reinforcing, arguably to the detriment of both the economy and justice. Law does not claim to be a science, but much of legal practice and education reinforces the economic model of amoral rational and self-interested behavior. Incorporating economic analysis into legal education

---

2. See *infra* Part III.B.

3. See *infra* notes 588–66 and accompanying text.

and practice reinforces a dangerous Hobbesian theory of person that produces legal rules of engagement appropriate for equally endowed, war-like, self-interested creatures, but diminishes or eliminates a community sense of justice from judicial decisions and legislative policy.

This article advances its critique as follows: First, it describes and clarifies the sociopathic nature of person that is taught as science in universities. Second, it argues that the middle-class values of honesty, integrity, and concern for community are essential to a healthy society. Third, it examines the content of current and recent economics texts to document the advocacy of rational self-interest as approved behavior. Fourth, it postulates a cause-and-effect connection between the ascendant theory of purely economically driven person and the bad behavior that led to the recent failure of economic institutions. Fifth, it connects economics and legal education with the predations that logically flow from their flawed theory of person. Sixth, it invokes cognitive science to explain some aspects of human moral and political thought. And seventh, it looks at some practical implications of the theory of virtuous person for both economics and law.

#### I. THE ECONOMIC PERSON AS TAUGHT IN NEOCLASSICAL ECONOMICS IS A SOCIOPATH

An article in the 2008 book *Moral Markets* declares that *Homo economicus*, the archetypal economic actor at the core of neoclassical economics courses, is a sociopath.<sup>4</sup> That is a serious charge. Sociopaths are bad actors whose totally selfish behavior is not bounded by ordinary community values or concern for others.<sup>5</sup> Published just before the recent mortgage market disaster, the book invites an obvious question:

---

4. Lynn Stout, *Taking Conscience Seriously*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 157, 159 (Paul Zak ed., 2008) [hereinafter *MORAL MARKETS*] (“[Modern professors] teach their students in economics, law, and business courses . . . to assume that people are ‘rational maximizers’ who behave like members of the mythical species *Homo economicus*. Economic Man does not worry about morality, ethics, or other people. Instead, Economic Man is cold and calculating, worries only about himself, and pursues whatever course brings him the greatest material advantage . . . . *Homo Economicus* is a sociopath. The hallmark of sociopathy is extreme selfishness as shown by a willingness ‘to lie, cheat, take advantage, [and] exploit.’”). See Kelley Holland, *Is It Time to Retrain B-Schools?*, N.Y. TIMES, Mar. 14, 2009, at BU1 (“[W]ith the economy in disarray and so many financial firms in free fall, analysts, and even educators themselves, are wondering if the way business students are taught may have contributed to the most serious economic crisis in decades.”); Herbert Gintis & Rakesh Khurana, *Corporate Honesty and Business Education: A Behavioral Model*, in *MORAL MARKETS*, *supra* note 4, 300–01 (stating that “current business school teachings socialize students into an ethic of selfishness and limited accountability”). See Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL’Y 737 (2009), for a review of *Moral Markets: The Critical Role of Values in the Economy*.

5. See *infra* Part I.A.

Did widespread, cult-like sociopathic behavior induced by business education cause or contribute to worldwide disaster?<sup>6</sup>

A. *Psychopaths Are Born Bad; Sociopaths Learn To Be Bad*

Though their behavior overlaps, it is useful to distinguish sociopaths from psychopaths.<sup>7</sup> As defined by Paul Babiak and Robert D. Hare, psychopathy is a psychiatric condition. Psychopaths have no conscience, and they are incapable of empathy, guilt, or loyalty to anyone but themselves.<sup>8</sup> Perhaps because of basic brain structure, they literally cannot understand or identify with the feelings of other people.<sup>9</sup> They do not obey societal rules, they may be abusive to others, they are manipulative, and they pursue their own goals without regard for pain inflicted on others. Hannibal Lecter, the sophisticated cannibal in *The Silence of the Lambs*, is undoubtedly a psychopath.<sup>10</sup>

Sociopaths, on the other hand, may have a well-developed conscience and a normal capacity for empathy, guilt, and loyalty, but their sense of right and wrong is based on the norms and expectations of their subculture or group, and they may act out bad subculture norms as if

6. *But see* Floyd Norris, *It May Be Outrageous, but Wall Street Pay Didn't Cause the Crisis*, N.Y. TIMES, July 31, 2009, at B1 (reporting that bad executive behavior influenced by exorbitant salaries and bonuses was less at fault than previously assumed).

7. MARTHA STOUT, *THE SOCIOPATH NEXT DOOR: THE RUTHLESS VERSUS THE REST OF US* 6 (2005) ("According to the current bible of psychiatric labels, the *Diagnostic and Statistical Manual of Mental Disorders IV* . . . the clinical diagnosis of 'antisocial personality disorder' should be considered when an individual possesses at least three of the following seven characteristics: (1) failure to conform to social norms; (2) deceitfulness, manipulativeness; (3) impulsivity, failure to plan ahead; (4) irritability, aggressiveness; (5) reckless disregard for the safety of self or others; (6) consistent irresponsibility; (7) lack of remorse after having hurt, mistreated, or stolen from another person. The presence in an individual of any three of these 'symptoms,' taken together, is enough to make many psychiatrists suspect the disorder."). AMERICAN PSYCHIATRIC ASSOCIATION, *THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 701-706 (4th ed. 2000) combines both behaviors as Antisocial Personality Disorder, characterized by a lack of regard for the moral or legal standards in the local culture. There is a marked inability to get along with others or abide by societal rules. Individuals with this disorder are sometimes called psychopaths or sociopaths.

8. PAUL BABIAK & ROBERT D. HARE, *SNAKES IN SUITS: WHEN PSYCHOPATHS GO TO WORK* 19 (2006). *See also* STOUT, *supra* note 7, at 26 ("Not everyone has a conscience, this intervening sense of obligation based in our emotional attachments to others. Some people will never experience the exquisite angst that results from letting others down, or hurting them, or depriving them, or even killing them. If the first five senses are the physical ones—sight, hearing, touch, smell, taste—and the 'sixth sense' is how we refer to our intuition, then conscience can be numbered seventh at best. It developed later in the evolution of our species and is still far from universal.")

9. BABIAK & HARE, *supra* note 8, at 24 (suggesting a strong genetic component and some environmental factors). Babiak and Hare also describe fMRI scans of the brains of psychopaths as showing distinct characteristics from those of normal people. *Id.* at 26, 55.

10. *THE SILENCE OF THE LAMBS* (Orion Pictures Corp. 1991).

they were true psychopaths.<sup>11</sup> Bernard Madoff and Los Angeles gang members are likely sociopaths.

Psychopaths who don't go to college are likely to go to jail, but psychopaths and sociopaths who obtain college degrees may succeed in business and pass unnoticed in the corporate halls. A great deal of recent literature asserts that many business leaders exhibit "toxic" sociopathic (or psychopathic) behavior (amoral, abusive, manipulative, deceitful, charming, antisocial),<sup>12</sup> and equity holders and employees encourage, support, and reward their bad actions.<sup>13</sup> And why not, if their aggressively self-seeking behavior is channeled into greater corporate earnings and destruction of competitors?

One might guess that highly functioning sociopaths would be better than other people at getting the work done in high office.<sup>14</sup> Strategic,

11. *Id.* at 19 ("Sociopathy is not a formal psychiatric condition. It refers to patterns of attitudes and behaviors that are considered antisocial and criminal by society at large, but are seen as normal or necessary by the subculture or social environment in which they developed.").

12. See Michael Steinberger, *Psychopathic C.E.O.'s*, N.Y. TIMES MAG., Dec. 12, 2004, at 90 ("If I couldn't study psychopaths in prison, I would go down to the Stock Exchange.") (quoting psychologist Robert Hare)); JEAN LIPMAN-BLUMEN, THE ALLURE OF TOXIC LEADERS: WHY WE FOLLOW DESTRUCTIVE BOSSES AND CORRUPT POLITICIANS – AND HOW WE CAN SURVIVE THEM 21 (2005) (listing dysfunctional personal characteristics of toxic leaders such as "[l]ack of integrity that marks the leader as cynical, corrupt, hypocritical, or untrustworthy[;] insatiable ambition that prompts leaders to put their own sustained power, glory, and fortunes above their followers' well-being; enormous egos . . . [;] [a]rrogance that prevents acknowledging their mistakes and, instead, leads to blaming others[;] [a]morality that makes it nigh impossible for them to discern right from wrong; avarice that drives leaders to put money and what money can buy at the top of the list[;] [r]eckless disregard for the costs of their actions to others as well as to themselves[;] [c]owardice that leads them to shrink from the difficult choices; and [f]ailure both to understand the nature of relevant problems and to act competently and effectively in leadership situations"). See also ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US (1993); ROY H. LUBIT, COPING WITH TOXIC MANAGERS, SUBORDINATES . . . AND OTHER DIFFICULT PEOPLE (2004); D. QUINN MILLS, BUY, LIE, AND SELL HIGH: HOW INVESTORS LOST OUT ON ENRON AND THE INTERNET BUBBLE (2002); STOUT, *supra* note 7.

13. BARBARA KELLERMAN, BAD LEADERSHIP: WHAT IT IS, HOW IT HAPPENS, WHY IT MATTERS 22 (2004) ("Even bad leaders often satisfy our most basic human needs, in particular, safety, simplicity, and certainty.").

14. Oliver Goodenough & Monika Gruter Cheney, *Preface* to MORAL MARKETS *supra* note 4, at xiii, xvi ("The cartoon of 'greed is good' is nearly ubiquitous in Western countries, and often is even more strongly accepted in less developed nations."). See also HARE, *supra* note 12, at 113 ("However, many psychopaths never go prison or any other facility. They appear to function reasonably well—as lawyers, doctors, psychiatrists, academics, mercenaries, police officers, cult leaders, military personnel, businesspeople, writers, artists, entertainers, and so forth—without breaking the law, or at least without being caught and convicted. These individuals are every bit as egocentric, callous, and manipulative as the average criminal psychopath; however, their intelligence, family background, social skills, and circumstances permit them to construct a façade of normalcy and to get what they want with relative impunity. . . . [Some] argue that individuals of this sort

manipulative behavior can be useful in pushing aside competitors to get the top job,<sup>15</sup> after which winners can fire employees, breach contracts, and destroy people who might get in their way.<sup>16</sup> But sociopathic behavior can be self-destructive as well as socially destructive. It does not take much imagination to read sociopathic, if not psychopathic, behavior into the machinations among executives at Enron, Tyco, WorldCom, Qualcomm, HealthSouth, and Qwest, not to mention several recent Ponzi schemers. Purely self-interested, reckless behavior eventually destroyed or severely damaged those individuals and the enterprises they ran.

The extent to which bad behavior led to the recent home mortgage and credit meltdown has yet to be determined. What is clear is that the recent economic disaster hurt the dependent middle class more than it hurt Wall Street operatives who, thanks to public largesse, did not lose their jobs and health insurance to recession and their homes to foreclosure. A disturbing notion is that the recession itself was a product of the theory of person that comes straight out of the university course taught as neoclassical economics.

### B. *Homo Economicus Is Rational, and Self-Interested—and Amoral*

*Homo economicus* is a flippant name given to the hypothetical economic actor that is taught in universities as the model of neoclassical

---

benefit society. Just as they are able to ignore society's rules . . . intelligent psychopaths are able to transcend the bounds of conventional thought, providing a creative spark for the arts, the theatre. . . . Rather than refer to these individuals as successful psychopaths—after all, their success is often illusory and always at someone else's expense—I prefer to call them *subcriminal* psychopaths . . . ."); GEORGE K. SIMON, IN SHEEP'S CLOTHING 140 (1996) ("Capitalism, in its 'survival of the fittest' style of economic freedom, encourages a great deal of unbridled as well as channeled-aggression in the daily competition for personal wealth and financial security. But the system also encourages—even rewards—covert aggression. Employees of free-marketeters know there is no safety or security within the 'dog-eat-dog' workplace environment. As a result, rather than cooperate, workers generally compete with one another for limited company resources, benefits and rewards. . . . [Sometimes] the competition is ruthless and accompanied by the under-handed, back-stabbing, dirty-tricking behaviors that are the hallmarks of covert-aggression."); *Id.* at 67 (connecting covert-aggressive behavior with sociopathy).

15. BABIAK & HARE, *supra* note 8, at xi ("[P]sychopaths can be very charming, able to talk their way past even the most seasoned interviewers. When it is to their advantage, they can display a charisma that can disarm and beguile even the most wary individuals. . . . Psychopaths are skilled at social manipulation, and the job interview is a perfect place to apply their talents.").

16. KELLERMAN, *supra* note 13, at 131 ("The deal . . . created a \$12 billion global consumer-product company whose stock, under Dunlap's leadership, went up 225 percent. . . . Along with his reputation for being effective, Dunlap brought to Sunbeam a similarly strong reputation for being callous to the point of ruthlessness. Within months of arriving at Scott he had drafted a job cutting plan so extreme that it amounted to a 'brutal prescription' for anyone who worked there.").

microeconomic behavior. *Homo economicus* has only two attributes, and they are simply stated: (1) People are rational; and (2) People are motivated by self-interest.<sup>17</sup> Although acknowledging that actual human behavior is more complex than this, neoclassical economists deem these two attributes, standing alone, sufficient for constructing a theoretical model to explain and predict human economic behavior. A real person who acted out the postulated role to the extreme would be a sociopath, if not a psychopath. In stark contrast with the economic model, most people's societal behavior incorporates, in the absence of extraordinary stressors, civility, integrity, empathy, conscience, community morality, fairness, and honesty. Presumably, business operatives who are not psychopaths would observe these community norms in their professional lives unless they became immersed in a cultish subculture that expected and encouraged sociopathic behavior.<sup>18</sup>

Economics' total absorption with self-interest is often blamed on Adam Smith, who is considered the father of modern economic theory. Yet, Smith did not assume that people acted with unconditional self-interest or that such behavior was good.<sup>19</sup> In his monumental early work, *The Theory of Moral Sentiments*, Smith wrote extensively and sensitively about ethics, and rejected the utilitarian pleasure-pain test as a measure of

17. See *infra* notes 59–60 and accompanying text.

18. In informal interviews, a retired Wall Street executive, a current financial analyst, two former CEOs of small business firms, and a current CEO of an independent oil company, each of whom asked not to be named, disavowed the negation of ethics in real business practice. One interviewee remarked, "I could not sleep at night if I had done such things [as the mortgage market brokers]." Another asked, "Are you sure that is what they teach in business school?" A third stated that unethical (not necessarily illegal) behavior could not be tolerated in business.

An inherent understanding of fairness can be traced back up the evolutionary chain. See Sarah F. Brosnan, *Fairness and Other-Regarding Preferences in Nonhuman Primates*, in *MORAL MARKETS* *supra* note 4, at 77, 99 ("Both human and nonhuman primates dislike being treated inequitably, whether as a result of unequal distribution or an unfair partner."); Robert C. Solomon, *Free Enterprise*, in *Moral Markets* *supra* note 4, at 16, 34 ("This [a sympathetic community defined by fellow-feeling and an abhorrence of seeing one's fellow citizens in pain or suffering] . . . is also the basis for the free market, not 'the profit motive' and other made-up euphemisms for self-interested behavior but the sensitivity to be concerned about other people, what they need and what they want. Other-interest, not self-interest, is the engine of a healthy free market system.")

19. 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 291 (Cannan ed., 1976) (giving the purpose of stock accumulation "in order to carry on the business of the society") [hereinafter SMITH, *WEALTH OF NATIONS*]. Smith's concern for morality and empathy are revealed in his statement,

"But what improves the circumstances of the greater part can never be regarded as an inconvenience to the whole. No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable. It is but equity, besides, that they who feed, cloath, and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, clothed, and lodged."

*Id.* at 88.



social and personal “good” in favor of what he called “sympathy” (and what today would be regarded as “empathy”).<sup>20</sup> In his later work, *Wealth of Nations*, he introduced his famous “unseen hand” that promotes social good through the *instrumentality* of self-interest.<sup>21</sup> But he also warned against entrusting the public interest to merchants.<sup>22</sup>

Today’s neoclassical economists disregard the moral person Smith described in *Moral Sentiments*, and they adopt a contradictory, isolated, grasping, purely self-interested creature plucked from passages in *Wealth of Nations*. For example, Milton Friedman, a giant of the Chicago School of economic thought, disdainfully rejected the notion that corporations should sacrifice any profit to support socially beneficial causes by declaring that “few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social

---

20. See E. RAY CANTERBERRY, 1 *THE MAKING OF ECONOMICS* 8 (4th ed. 2003). Smith began *The Theory of Moral Sentiments* with the statement “How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.” ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 11 (Haakonssen ed., 2004) [hereinafter SMITH, *MORAL SENTIMENTS*]. Smith had an unbelievably complete and complex discussion of ethics, and unless he abandoned the commitment in the fifteen years between publication of *The Theory of Moral Sentiments* in 1759 and *Wealth of Nations* in 1776, he would not have bought into the sociopathic inclinations of *Homo economicus*. See DOGAN GÖÇMEN, *THE ADAM SMITH PROBLEM: RECONCILING HUMAN NATURE AND SOCIETY IN THE THEORY OF MORAL SENTIMENTS AND WEALTH OF NATIONS* (Taurin Academic Studies 2007), for a discussion of various views on whether the two books reflect a change in Smith’s own moral philosophy.

21. SMITH, *WEALTH OF NATIONS*, *supra* note 19, at 18. Smith’s statements are often cited for the concept that self-interest leads to the advantage of the community. See, e.g., *id.* at 18 (“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.”); *id.* at 477 (“By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.”).

22. *Id.* at 278 (“[Merchants’] superiority . . . is, not so much in their knowledge of the public interest, as in their having a better knowledge of their own interest. . . . It is by this superior knowledge of their own interest that they have frequently imposed upon [the country gentleman’s] generosity, and persuaded him to give up both his own interest and that of the public. . . . The interest of the dealers . . . in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public . . . . [Proposed regulation] comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.”). There is no indication that Smith approved of merchants’ behavior. He acknowledges the self-interest of investors by stating that “[t]he consideration of his own private profit, is the sole motive which determines the owner of any capital to employ it either in agriculture, in manufactures, or in some particular branch of the wholesale or retail trade.” *Id.* at 396. Smith accused mercantile interests of “mean rapacity” and “impertinent jealousy.” *Id.* at 519.

responsibility other than to make as much money for their shareholders as possible.”<sup>23</sup>

Judge Richard A. Posner’s negation of ethical duty<sup>24</sup> is even stronger, as summarized in his exculpation of the players in the recent mortgage finance disaster,

[A]lthough the financiers bear the primary *responsibility* for the depression, I do not think they can be *blamed* for it—implying moral censure—any more than one can blame a lion for eating a zebra. Capitalism is Darwinian. Businessmen take risks (mostly within the law) that promote their financial interest; it would make no more sense for an individual businessman to worry that because of the instability of the banking industry his decisions and those of his competitors might trigger a depression than for a lion to spare a zebra out of concern that lions are eating zebras faster than the zebras can reproduce.<sup>25</sup>

Friedman said we should not expect corporations to be *benevolent*. Judge Posner goes further and declares *destructive* behavior is morally unassailable if players act rationally.<sup>26</sup> He blames government and government alone for the recent recession because it failed to regulate the financial institutions that produced the crash.<sup>27</sup> Apparently, Posner admits of no moral standard for assessing the behavior of a rational business player, and there is no moral limit for players themselves *so long as their activity is rationally directed toward an economic goal*. In short, we should not expect an economic actor to be concerned about either community advantage or public disaster when pursuing self-serving action.

23. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1963). See also Milton Friedman, *The Sole Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (specifying his objection was to expectations that corporations would engage in good works, such as hiring from disadvantaged groups, which might have interfered with profitability).

24. See RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 285 (2009) (“The journalists and politicians, and some who should know better, like the distinguished macroeconomist Paul Krugman, are engaged in an orgy of recrimination against Wall Street.”) [hereinafter POSNER, A FAILURE OF CAPITALISM].

25. *Id.* at 284. Smith, on the other hand, praises ethical conduct, including generosity and delayed gratification. See SMITH, MORAL SENTIMENTS, *supra* note 20, at 221.

26. See POSNER, A FAILURE OF CAPITALISM, *supra* note 24, at 77 (“I am skeptical that readily avoidable mistakes, failures of rationality, or the intellectual deficiencies of financial managers whose IQs exceed my own were major factors in the economic collapse.”).

27. See *id.* at 113 (“The housing bubble and the risky lending practices could have been prevented by more aggressive regulation and the elimination of tax benefits for homeowners. But the absence of these or other preventive measures was the result not of too much government but of too little; not of intrusive, heavy-handed regulation of housing and finance but of deregulation, hostility to taxation and to government in general, and a general laissez-faire attitude.”).

Posner's "mostly within the law" qualification does not seem even to make criminal behavior unacceptable.

## II. INTEGRITY AND TRUST ARE ESSENTIAL FOR MARKETS TO WORK EFFICIENTLY

### A. *Self-Interest Must Be Bounded by Concern About Community Values*

This article does not criticize self-serving behavior as such. Without a healthy self-preservation instinct, the human species would have disappeared long ago. The point to be made is that self-serving behavior occurs in a community context, and when it inflicts substantial damage on the public interest, it should not be tolerated. When not punished, it should be shamed, publicly and privately. It certainly should not be approved of and encouraged. When appropriate, courts should expand business tort liability and reimburse stakeholders whose fortunes were damaged or destroyed by bad behavior. Criminal conduct should be redefined and broadened when necessary to protect public interests from reckless behavior. Even hardcore market players need to behave in a way that maintains public trust in institutions and the system itself.

Francis Fukuyama writes that trust is a public good.<sup>28</sup> In nations that have a high level of trust in government, banking, industry, and other institutions, people are willing to invest the capital that is necessary for economic growth. Countries with high levels of trust, such as Japan and Germany come easily to mind.<sup>29</sup> Countries where trust is low also

---

28. FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 26–28 (1995) ("Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of other members of that community. . . . Social capital is a capability that arises from the prevalence of trust in a society or in certain parts of it. . . . Economists typically argue that the formation of social groups can be explained as the result of voluntary contract between individuals who have made the rational calculation that cooperation is in their long-term self-interest. By this account, trust is not necessary for cooperation: enlightened self-interest, together with legal mechanisms like contracts, can compensate for an absence of trust and allow strangers jointly to create an organization that will work for a common purpose. . . . But while contract and self-interest are important sources of association, the most effective organizations are based on communities of shared ethical values. These communities do not require extensive contract and legal regulation of their relations because prior moral consensus gives members of the group a basis for mutual trust. . . . [P]eople who do not trust one another will end up cooperating only under a system of formal rules and regulations, which have to be negotiated, agreed to, litigated, and enforced, sometimes by coercive means. This legal apparatus, serving as a substitute for trust, entails what economists call 'transaction costs.' Widespread distrust in a society, in other words, imposes a kind of tax on all forms of economic activity, a tax that high-trust societies do not have to pay.")

29. *Id.* at 7–9. "The banks and suppliers that engineered the Mazda and Daimler-Benz rescues felt an obligation to support these auto companies because the latter had supported them in the past and would do so again in the future." *Id.* at 8.

come to mind—for example, much of South America and Africa.<sup>30</sup> The United States had a reasonably high level of institutional trust<sup>31</sup> until the recent events caused other nations and firms to question the safety of their investments.<sup>32</sup> Without capital investment, economies wither. Maintaining trust as a public good requires, for example, banks to avoid risky behavior that threatens their solvency and ability to repay depositors. Trust requires government to provide a stable legal system to protect investments and property. Trust also requires that businesses provide goods and services that have value to customers, and that borrowers pay their honest debts.<sup>33</sup> Trust, fairness, honesty, and integrity work hand-in-hand.<sup>34</sup>

As Zak (not Adam Smith) proclaimed in *Moral Markets*, “[m]oral behavior is necessary for exchange in moderately regulated markets, for example, to reduce cheating without exorbitant transaction costs.”<sup>35</sup>

---

30. Fukuyama identifies France as a modern country that suffers a trust problem. “Private firms in France over the past 150 years have never been leaders in new organizational forms, nor have they been noted for their large scale or ability to master complicated industrial processes. The most successful, apart from those owned or subsidized by the state, have tended to be family concerns serving relatively small, high-quality consumer or specialty markets. . . . France shares with the typical Chinese society a weakness in intermediate associations between the family and the state that has constrained the French private sector’s ability to produce large, strong, and dynamic enterprises.”

*Id.* at 114. For an example of Mexico’s current troubles see, e.g., Leah Hazard, *Mexico’s War on Drugs: A War on the Economy?*, GLOBAL ENVISION, Sept. 8, 2008, <http://www.globalenvision.org/2008/09/08/mexicos-war-drugs-war-economy>.

31. FUKUYAMA, *supra* note 28, at 10 (“The United States . . . has historically been a high-trust, group-oriented society . . .”). Fukuyama notes, however, that levels of trust in the United States have been declining. *Id.* at 10–11.

32. See generally, Gretchen Morgenson, *O Wise Bank, What Do We Do Now? (No Fribbing Now)*, N.Y. TIMES, Jan. 27, 2008, at WK1 (“But for all its power, the Fed cannot change this troubling fact: trust in much of the financial system—banks, brokerage houses, ratings agencies, bond insurers, regulators—has been severely damaged by the subprime mortgage crisis. And that damage cannot be reversed with a quick cut in interest rates.”).

33. See W. EDWARDS DEMING, *OUT OF THE CRISIS* 5 (9th ed. 2000) (“The consumer is the most important part of the production line.”). Deming’s focus on quality improvement and customer satisfaction helped bring Japan out of post-World War II economic disaster, and briefly brought about improvement in American industry.

34. See Paul Zak, *Introduction* to *MORAL MARKETS*, *supra* note 4, at xv (“Finally, market exchange itself may lead to a society where individuals have stronger character values. . . . [A study by Henrich and colleagues] showed that the likelihood of making fair offers to a stranger in one’s society is more strongly predicted by the extent of trade in markets than any other factor they have found. Exchange is inherently other-regarding—both you and I must benefit if exchange is to occur. In this sense, exchange in markets is virtuous: one must consider not only one’s own needs but also the needs of another.”). See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005) for a focus on production—the new opportunities for doing things faster, better, or cheaper as global trade barriers disappear—not simple pursuit of personal gain.

35. Zak, *supra* note 34, at xv.

Moreover, “‘free enterprise’ is effective only because most of the time most of its participants abide by internally motivated ‘positive’ values, such as trustworthiness, fairness and honesty.”<sup>36</sup>

The implicit moral position is that players must forego potentially profitable action that would inflict significant public harm.<sup>37</sup> An immoral example would be Enron’s Andrew Fastow, a sophisticated criminal who destroyed billions of dollars of wealth to line his own pockets with a few million.<sup>38</sup> Less dramatically, many mortgage originators abandoned good lending practices so they could charge commissions on home loans that far exceeded the borrowers’ ability to repay. When greedy lenders put these insecure mortgage notes into the secondary market, they sowed the seeds of default and worldwide recession. Major financial institutions made justifiable profit by guaranteeing performance of packaged home mortgage securities. But they recklessly expanded that useful enterprise into a virtual casino by selling trillions of dollars in guarantees to Wall Street gamblers with no stake in the underlying securities. The threat of default on these derivatives caused a credit crisis and triggered worldwide recession. Most major financial players in the recent meltdown focused on immediate profit without any concern that their reckless actions could damage or destroy the entire world’s economy. A few who saw the pending disaster got out of the market to save their own fortunes, but fewer still tried to change its direction. It is unclear what exact moral assessment should be made of people whose non-criminal behavior brought about the crash. What is clear is that the economy is not well-served by encouraging individual and institutional behavior that intentionally or recklessly damages the economy itself.<sup>39</sup>

---

36. Goodenough & Cheney, *supra* note 14, at xxiii. Defining integrity by community usage incorporates the community’s normative content (it is generally viewed as a “good” characteristic by the community). This notion calls into question an expansive application of the notion of “efficient breach.” An efficient breach may make sense in a case such as *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929) when the county decided a bridge to nowhere should not be built. But justifying breach whenever the cost of performing exceeds the return benefit does both law and the economy a disservice. Trust requires that the norm of business and of law should be good faith performance, not lawsuits for breach.

37. See FUKUYAMA, *supra* note 28, at 8 (referring to auto and casting industry’s deferring immediate profit to save their companies). Fukuyama notes that “[t]he common thread that runs through these four apparently unrelated vignettes is that in each case, economic actors supported one another because they believed that they formed a community based on mutual trust. The banks and suppliers that engineered the Mazda and Daimler-Benz rescues felt an obligation to support these auto companies because the latter had supported them in the past and would do so again in the future.” *Id.*

38. David Barboza & John Schwartz, *Fastow: The Financial Wizard Tied to Enron’s Fall*, N.Y. TIMES, Feb. 6, 2002, at A1. (“Besides the \$30 million he made in the LJM partnerships, Mr. Fastow earned a hefty salary and stock options at Enron. In 1999 and 2000, he sold about \$23 million in Enron stock.”)

39. See Holland, *supra* note 4.

For want of a better term, the word “integrity” is used to signify the individual and corporate conduct that is required both to make a profit and to satisfy the general and special community expectations that generate stability and trust in the market.<sup>40</sup> There is an obvious disconnect between the level of trust and integrity required to maintain a stable market economy and what we expect from a sociopathic *homo*

---

40. The definition seeks to apply the insight of LUDWIG WITTEGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §43 (3d ed., 2001) (“For a *large* class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.”). The word “community” as used herein clearly encompasses the English speaking community, with some limitation to the people in the United States who are not criminals, who possess the predominant morality of the middle class, who have at least an average level of education, and who are part of the general working population of the country. Some readers may criticize using the “is” of current community opinion as the definitional standard for discussing “oughtness” of human behavior. We do not believe there is a metaphysical or transcendental reference for “oughtness” or any other word outside the vernacular. We are stuck with community meanings if we want to communicate with one another. People have a rich and deep understanding of their language and community moral structure. Their language incorporates those moral judgments in ordinary, well-understood, sentences. Today’s cognitive science says all meaning, all understanding, comes from neural patterns physically situated inside human brains. The word “integrity” makes sense when used in a sentence, and it makes sense inside the heads of listeners who speak English. If not defined by community usage that has been absorbed and implanted in the individual brains of community members, there is no way to use the term in ordinary discourse.

See also Michael C. Jensen, *Foreword* to MORAL MARKETS *supra* note 4, at ix, ix (“Economics, having traditionally focused on the positive analysis of alternative institutional structures, has far too long ignored the normative world. . . . By the term ‘positive analysis,’ I mean . . . the analysis of the way the world is, how it behaves, independent of any normative value judgments about its desirability or undesirability. Such analysis leads to empirically testable propositions that are falsifiable in the sense of Karl Popper’s revolutionary work. . . . By ‘normative,’ I mean establishing, relating to, or deriving from a standard or norm that specifies desirable or undesirable conduct or behavior, that is, what ought to be. . . . The positive analysis of normative values may sound like a non sequitur, yet, in my opinion, it is among the major issues the world faces today. It does not take much reflection or study of history to begin to see the import of different judgments about normative values on the tensions and conflicts between human beings.”); Zak, *supra* note 34, at xii (“The encompassing theme of *Moral Markets* is that human beings are a highly social species and gauge our own and others’ behavior against social expectations that manifest as values. . . . The rationale for this approach is to provide convergent evidence that modern market exchange is inconceivable without moral values.”).

This definitional model is also consistent with GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987), which emphasizes the use of idealized cognitive models as a basis for categorizing and dealing with perceived objects and ideas. The subject has a mid-level model of, say, “tree” and “flower” that are separately represented in physical neural patterns in the brain. When the subject perceives, say, a shrub with blossoms, the subject compares the new entity with “tree” and with “flower” and may classify it according to the similarity measured by the perceiver’s brain. Thus, it is instructive to describe the person with integrity as a way of defining the concept itself.

*economicus*. Self-interest need not be abandoned, but it needs to conform to community expectations, at least as reinforced by the sophisticated evolutionary theory of reciprocity.<sup>41</sup>

B. *Self-Restraint Operates as a Low-Cost Way To  
Achieve Business Integrity; Regulations Cost  
More and Are Less Effective*

Personal and corporate integrity is important because it works as a low-cost self-constraint, not as an expensive and haphazard external constraint (such as regulations and criminal law) that requires prediction, codification, discovery, and punishment to control behavior. Integrity is not (and probably cannot be) sufficiently ingrained in business practice to prevent all bad behavior, but it can be a powerful leavening force, particularly if reinforced with clear expectations that people will behave.<sup>42</sup>

Judge Posner acknowledges a need for government to regulate market behavior to prevent the sort of catastrophe now being experienced.<sup>43</sup> But he does not acknowledge a role for the parallel and supporting internal constraint of conscience,<sup>44</sup> declaring: “The media’s coverage of the crisis . . . [is] turning silly, with ignorant denunciations of “Wall Street” for greed and extravagance. (What did reporters think businessmen were like?)”<sup>45</sup>

Posner’s assignment of sole responsibility to government is an incomplete answer.<sup>46</sup> Government regulation is necessary, but if that is the only constraint, playful CEOs can always command enough lobbyists, legislators, lawyers, and accountants to pull off an Enron and laugh at regulators who try unsuccessfully to patch up the system after the fact.<sup>47</sup> It was Phil Gramm, a former economics professor, who disman-

41. See Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1647 (2007) (“[I]f you share with me today in exchange for my sharing with you yesterday, we are both better off than if neither of us shares. In social animals, reciprocity can involve such things as alerting other group members when food has been discovered, sharing food over time, and supporting a comrade in action against others.”).

42. Posner acknowledges that “[h]onesty, trustworthiness, and love reduce the cost of transactions,” making these virtues an element in efficiency analysis.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 270 (7th ed. 2007) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*].

43. POSNER, *A FAILURE OF CAPITALISM*, *supra* note 24, at 106–107.

44. *Id.* at 325 (“Businessmen can no more afford to consider the effect of their decisions on the economy as a whole than consumers can.”).

45. *Id.* at xiii.

46. *Id.* at 270 (“The seeds of [government] failure were sown in the movement to reduce the regulation of banking and credit, which began in the 1970s.”).

47. See Gretchen Morgenson & Don Van Natta, Jr., *Even in Crisis, Banks Dig in for Battle Against Regulation*, N.Y. TIMES, June 1, 2009, at A1 (describing coordinated resistance to potential regulation).

tled the regulatory system that Posner says should have constrained the financial institutions that brought about the crash of 2008.<sup>48</sup> Moreover, not even criminal law constrains bad actors who treat the risk of punishment as a mere cost of business.

Madoff's Ponzi schemes clearly violated criminal law, but criminality proved no deterrent as he bilked a trusting public out of \$50 billion.<sup>49</sup> Only his conscience or concern about reciprocity could have kept him from stealing his trusting clients' money, given the inattention of government regulators. Madoffs are all around us, and we have to watch out for them. Expecting all market players to act with integrity by any definition is not only naïve; it is nonsense. But economists are fond of looking "at the margin," where a formal expectation of good behavior can exert a significant force for good at low cost.

The tin man needed a heart; Wall Street operatives and some CEOs need a conscience, even as a matter of self-interested behavior. University courses in economics cannot be expected to make their graduates more moral, but they can be expected not to make them less so.

---

48. See Eric Lipton & Stephen Labaton, *A Deregulator Looks Back, Unswayed*, N.Y. TIMES, Nov. 17, 2008, at A1 ("A fierce opponent of government intervention in the marketplace, Mr. Gramm, a Republican from Texas, recalled the episode during a 2001 Senate debate over a measure to curb predatory lending. What some view as exploitive, he argued, others see as a gift. 'Some people look at subprime lending and see evil. I look at subprime lending and I see the American dream in action' . . . . On Capitol Hill, Mr. Gramm became the most effective proponent of deregulation in a generation, by dint of his expertise (a Ph.D. in economics), free-market ideology, perch on the Senate banking committee and force of personality. . . . And in one remarkable stretch from 1999 to 2001, he pushed laws and promoted policies that he says unshackled businesses from needless restraints but his critics charge significantly contributed to the financial crisis that has rattled the nation. . . . He advanced legislation that fractured oversight of Wall Street. . . . And he pushed through a provision that ensured virtually no regulation of the complex financial instruments known as derivatives, including credit swaps, contracts that would encourage risky investment practices at Wall Street's most venerable institutions and spread the risks, like a virus, around the world.").

Alan Greenspan could not believe that the derivatives market would not correct itself. See Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 24, 2008, at B1 ("Those of us who have looked to the self-interest of lending institutions to protect shareholders' equity, myself included, are in a state of shocked disbelief," he told the House Committee on Oversight and Government Reform.").

49. Bernard Madoff's tradeoff of billions against spending his few remaining years of life in prison provides an example of application of cost-benefit balancing as applied to criminal behavior. See Diana B. Henriques & Jack Healy, *Madoff Goes to Jail After Pleas*, N.Y. TIMES, Mar. 13, 2009, at A1. See also DOMINICK SALVATORE, MICROECONOMICS: THEORY AND APPLICATIONS 164 (5th ed. 2009) ("Risk analysis can be used to analyze crime deterrence. A 1973 study found that criminals often respond to incentives in much the same way as people engaged in legitimate economic activities. For example, the rate of robberies and burglaries was found to be positively related to the gains and inversely related to the costs of (i.e., punishment for) criminal activity. . . . Thus, it seems that increasing the efficiency of the police in apprehending criminals and the imposition of stiffer sentences discourages crime.").



### C. *Trust and Integrity Cannot Thrive in a Neoclassical World Run by Sociopaths*

A question raised in *Moral Markets* is whether the neoclassical model as taught in universities encourages business graduates to act out sociopathic behavior. An additional question is whether incorporating neoclassical economics into legal education can have a similarly bad influence on law. This article speculates that the answer to both questions is “yes.”

This is not an attack on economics professors (or law and economics professors) as people. Those known to the author are decent, caring people whose personal lives do not mimic the sociopathic actor they postulate in classroom explanations of economic behavior. Yet, what they teach from a traditional neoclassical foundation may inadvertently encourage students to act as functional sociopaths when they enter business or law practice after graduation. That possibility may seem a far stretch for anyone who has slept through an economics or a law course. But not everybody sleeps. The best and brightest listen, and learn.

What do the best and brightest students learn from a traditional university course in microeconomics?

## III. NEOCLASSICAL COURSES TREAT PSYCHOPATHIC/SOCIOPATHIC BEHAVIOR AS NORMAL

### A. *“Supply Side” Economics Texts Focus on Producers’, Not Consumers’ Interests*

Five current or recent college economics texts were reviewed, not for technical aspects (which are well beyond the author’s competence), but to discover whether their fundamental orientation supports the sociopathic charge.<sup>50</sup> Three of the texts focused on economics doctrine with a general tilt toward the business side and profit maximization.<sup>51</sup> Called

---

50. BABIAK & HARE *supra* note 8, at 26. An empirical study might be possible to discover whether their fundamental orientation may contribute to creation of a business subculture that acts as functional sociopaths. Sociopaths have a distinct brain scan pattern that could be measured by fMRI. *Id.*

51. N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* (Thomson South-Western 3d ed. 2004) [hereinafter MANKIW (3d ed.)] and N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* (Thomson South-Western 4th ed. 2007) [hereinafter MANKIW (4th ed.)]; DOMINICK SALVATORE, *supra* note 49; EDGAR K. BROWNING & MARK A. ZUPAN, *MICROECONOMICS: THEORY & APPLICATIONS* (Addison-Wesley Educational Publishers, Inc. 6th ed. 1999). Browning and Zupan’s advanced text appears to be the most sophisticated of the reviewed books. It is also the oldest edition, and would more closely reflect the course materials that were covered by some of the players in the 2007–08 market. It very clearly states the fundamental precepts of the discipline, and best documents the major points of the economic model that is discussed herein.

“supply-side”<sup>52</sup> texts in this article, they championed the amoral positivist<sup>53</sup> neoclassical model as a scientific description of human and market behavior.<sup>54</sup> This model treats all market participants as fully informed and rational participants, and its application ordinarily benefits producers and sellers, not consumers.<sup>55</sup> Two texts that focused more on consumers’ interests and on an unqualified benefit of economic analysis—measuring costs and benefits of private and public action—were set aside as not likely to encourage or produce sociopathic behavior.<sup>56</sup> The discussion that follows draws on themes in the three supply-side texts.

---

52. This usage may be objectionable, but the term has been popularly taken to reflect affinity for a production, not consumption point of view.

53. MANKIW (4th ed.), *supra* note 51, at 29 (“Much of economics is positive: it just tries to explain how the economy works. Yet those who use economics often have goals that are normative: they want to learn how to improve the economy. When you hear economists making normative statements, you know they are speaking not as scientists but as policy advisers.”).

54. *Id.* at 20 (“Economists try to address their subject with a scientist’s objectivity. They approach the study of the economy in much the same way as a physicist approaches the study of matter and a biologist approaches the study of life: They devise theories, collect data, and then analyze these data in an attempt to verify or refute their theories.”); *id.*, at 18 (“In microeconomic theory, we seek to predict and explain the economic behavior of individual consumers, resource owners, and business firms and the operation of individual markets. For this purpose we use models. A model abstracts from the many details surrounding an event and identifies a few of the most important determinants of the event.”); *see also infra* Part III.B.

55. *See, e.g.*, SALVATORE, *supra* note 49, at xxxiii (listing as exciting new theoretical developments: behavioral economics, learning curves, open innovation markets, new pricing practices, contestable markets, experimental economics, new advances in game theory, financial microeconomics, the theory of public choice, industrial policies and firm competitiveness, and the economics of information). Apart from behavioral economics, all of these exciting new theoretical developments are aimed directly at production (supply) issues, not consumer (demand) issues.

56. JOSEPH E. STIGLITZ & CARL E. WALSH, *PRINCIPLES OF MICROECONOMICS* (4th ed. 2006) and ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF MICROECONOMICS* (3d ed. 2007) presented fundamental economic doctrine with a consumer orientation. In the text authored by Frank and Bernanke, rational self-interest was discussed in terms of cost and benefit analysis of consumer choices. The assumption of selfishness was itself questioned in the text. *See id.* at 338. The market was not lionized. The explanatory examples were taken from ordinary life, and cautionary reminders that real life may be different from the economic model softened the edges of the doctrine. Moreover, the book spent three chapters discussing matters that depart from rarified, perfect market doctrine. A chapter on environment, health, and safety avoids pure free-market analysis that ordinarily skirts the real problems of pollution, disease, and worker safety. One example illustrates that moral behavior affects an outcome. *See also* EDGAR K. BROWNING, *STEALING FROM EACH OTHER: HOW THE WELFARE STATE ROBS AMERICANS OF MONEY AND SPIRIT* (2008) (using economic analysis to measure costs and benefits of particular government programs).

B. *Neoclassical Assumptions Are Presented as  
Factual and Scientific*<sup>57</sup>

The positive economic model postulates a set of fundamental assumptions that are benign in themselves, but potentially toxic if adopted as a personal moral structure. A composite of propositions gleaned from the three texts are that (1) resources are scarce;<sup>58</sup> (2) people are rational;<sup>59</sup> (3) people pursue their own goals and welfare;<sup>60</sup> (4) people have perfect information, or at least enough to make a rational deci-

57. See SALVATORE, *supra* note 49, at 19–20 (“In discussing the methodology of economic analysis, an important distinction is also made between positive and normative analysis. Positive analysis studies what *is*. It is concerned with how the economic system performs the basic functions of what to produce, how to produce, for whom to produce, how it provides for growth, and how it rations the available supply of a good over time. In other words, how is the price of a commodity, service, or resource actually determined in the market? How do producers combine resources to minimize costs of production? How does the number of firms in a market and the type of product they produce affect the determination of the price and quantity sold of the commodity? . . . For the most part, positive analysis is factual or hypothetically testable and objective in nature, and it is devoid of ethical or value judgments.”).

58. BROWNING & ZUPAN, *supra* note 51, at 5 (“[M]arket participants . . . confront scarce resources.”); MANKIW (4th ed.), *supra* note 51, at 3 (“The management of society’s resources is important because resources are scarce.”).

59. SALVATORE, *supra* note 49, at 75 (“Given the tastes of the consumer (reflected in his or her indifference map), the rational consumer seeks to maximize the utility or satisfaction received in spending his or her income. A rational consumer maximizes utility by trying to attain the highest indifference curve possible, given his or her budget line. . . .”); BROWNING & ZUPAN, *supra* note 51, at 5 (“[T]he second assumption economists make about market participants is that they engage in rational behavior.”); MANKIW (4th ed.), *supra* note 51, at 496 (contrasting Behavioral Economics’ view that people are not rational); *id.* at 6 (“Economists normally assume that people are rational. Rational people systematically and purposefully do the best they can to achieve their objectives, given the opportunities they have.”). This assumption is taken seriously only in the economic model. At the neuroscience level, MARVIN MINSKY, *THE SOCIETY OF MIND* (1988) describes mental activity that is constantly in flux, never coldly logical; STEPHEN PINKER, *HOW THE MIND WORKS* 395 (1997) describes the inability of brains to overcome self-defeating behavior; DAN ARIELY, *PREDICTABLY IRRATIONAL* 23–48 (2008) humorously illustrates the fallacy of economists’ assumption that rationality lies behind pricing according to laws of supply and demand; ORI BRAFMAN & ROM BRAFMAN, *SWAY* 139 (2008) documents irrationality through MRI scans. From within the discipline, behavioral economists make the same point and admit that people are not fully rational actors. MANKIW (4th ed.), *supra* note 51, at 496–99 similarly at least acknowledges irrationality. BROWNING & ZUPAN, *supra* note 51, at 5 (“[M]arket participants are presumed to be goal-oriented—that is, interested in fulfilling their own, personal goals.”). Browning and Zupan make it clear that goals are not necessarily monetary, referring to Mother Teresa’s concerns about children in Calcutta. *Id.* at 5. There is no attempt to look at actual, personally held preferences. Instead actual behavior is assumed to reflect personally held preferences. *Id.* at 72 (“[P]eople reveal that some commodities are desirable by the way they allocated their spending. . . .”); MANKIW (3d ed.), *supra* note 51, at 7 (“Because people make decisions by comparing costs and benefits, their behavior may change when the costs or benefits change. That is, people respond to incentives.”).

sion;<sup>61</sup> (5) market participants make voluntary exchanges they deem beneficial;<sup>62</sup> (6) in a competitive market,<sup>63</sup> supply and demand reliably set

---

60. BROWNING & ZUPAN, *supra* note 51, at 5 (“[M]arket participants are presumed to be goal-oriented—that is, interested in fulfilling their own, personal, goals.”). These authors make it clear that the goals need not always be monetary. *Id.* at 502 (“[E]ach person is the best judge of his or her own welfare.”). But profit is never far from the discussion. See SALVATORE, *supra* note 49, at 191 (“Just as consumers seek to maximize utility or satisfaction, firms generally seek to maximize profits. Both consumers and firms can be regarded as maximizing entities. Profits refer to the revenue of the firm from the sale of the output after all costs have been deducted. . . . The profit-maximizing assumption provides the framework for analyzing the behavior of the firm in microeconomic theory. It is from this assumption that the behavior of the firm can be studied most fruitfully. This assumption has recently been challenged by the so-called ‘managerial theories of the firm,’ which postulate multiple goals for the firm. That is, after attaining ‘satisfactory’ rather than maximum profits, the large modern corporation is said to seek to maintain or increase its market share, maximize sales or growth, maintain a large staff of executives and lavish offices, minimize uncertainty, create and maintain a good public image as a desirable member of the community and a good employer, and so on. However, because many of these goals can be regarded as indirect ways to earn and increase profits in the long run, we will retain the profit-maximizing assumption.”).

61. BROWNING & ZUPAN, *supra* note 51, at 204 (“Firms, consumers, and resource owners must have all the information necessary to make the correct economic decisions.”); *id.* at 529 (“If consumers or producers are not accurately informed they may take actions that run counter to the dictates of Pareto optimality. . . . Of course, the existence of imperfect information does not in and of itself imply that government intervention can best remedy the problem. After all, information may be considered to be just another good for which private markets provide better production and consumption incentives than do government edicts.”).

62. SALVATORE, *supra* note 49, at 110 (“A and B . . . have a given amount of good X and good Y and decide to trade some of these goods with each other. If the exchange is voluntary, the strong presumption is that both individuals gain from the exchange (otherwise, the individual who loses would simply refuse to trade.”); BROWNING & ZUPAN, *supra* note 51, at 503 (“The fundamental point can be stated simply: Voluntary exchange is mutually beneficial . . . [absent fraud or trickery].”); MANKIW (4th ed.), *supra* note 51, at 9 (“Trade allows countries to specialize in what they do best and to enjoy a greater variety of goods and services.”); SALVATORE, *supra* note 49, at 81 (“a consumer’s [preference] . . . can be derived from observing the actual market behavior of the consumer and without any need to inquire directly about preferences.”). See also *id.* at 124–41; *id.* at 180 (“Until the late 1980s, the ‘efficient market hypothesis’ was regarded as one of the best established facts of traditional economics. The efficient market hypothesis postulates that (1) stock prices are correct in the sense that asset prices reflect the true or rational value of the security and (2) it is not possible to predict future stock price movements based on publicly available market information.”); MANKIW (4th ed.), *supra* note 51, at 75 (“[T]here is one point at which the supply and demand curves intersect. This point is called the market’s equilibrium. The price at this intersection is called the equilibrium price . . .”).

63. BROWNING & ZUPAN, *supra* note 51, at 203 (“Perfect competition is distinguished largely by its impersonal nature. More specifically, four conditions characterize a perfectly competitive industry. 1. Large number of buyers and sellers . . . . 2. Free entry and exit . . . . 3. Product homogeneity . . . . 4. Perfect information . . . . Probably no industry completely satisfies all four conditions.”).

correct prices<sup>64</sup> and quantities;<sup>65</sup> (7) left alone, a frictionless (perfect) market produces maximum personal and public utility;<sup>66</sup> and the pro-

---

64. SALVATORE, *supra* note 49, at 9 (stating “[t]he prices of goods and services are determined in the markets for goods and services . . . while the prices of resources and their services are determined in the markets for resources”); *id.* at 11 (“In the United States and other free-enterprise or mixed economies, the price system operates so smoothly that people are not even aware of it. Only on rare occasions (usually as a result of government interference) do we become aware that something is wrong.”); MANKIW (3d ed.), *supra* note 51, at 65–66 (“If the price of ice cream rose to \$20 per scoop, you would buy less ice cream . . . . If the price of ice cream fell to \$0.20 per scoop, you would buy more . . . . This relationship between price and quantity is true for most goods in the economy, and, in fact, is so pervasive that economists call it the law of demand. Other things being equal, when the price of a good rises, the quantity demanded of the good falls, and when the price falls, the quantity demanded rises.”).

65. MANKIW (4th ed.), *supra* note 51, at 65–66 (“Having analyzed supply and demand separately, we now combine them to see how they determine the quantity of a good sold in a market and its price.”); *id.* at 82 (“Supply and demand together determine the prices of the economy’s many different goods and services; prices in turn are the signals that guide the allocation of resources.”).

66. SALVATORE, *supra* note 49, at 566 (“The fact that perfect competition leads to optimum economic efficiency and Pareto optimum in production and exchange is no small achievement. It proves Adam Smith’s famous law of the invisible hand stated more than 200 years ago. Smith’s law postulates that in a free market economy, each individual by pursuing his or her own selfish interests is led, as if by an invisible hand, to promote the well-being of society more than he or she intends or even understands. This law leads to the first theorem of welfare economics. This postulates that an equilibrium produced by competitive markets exhausts all possible gains from exchange, or that equilibrium in competitive markets is Pareto optimal. There is also a second theorem of welfare economics. This postulates that when indifference curves are convex to their origin, every efficient allocation (every point on the contract curve for exchange) is a competitive equilibrium for some initial allocation of goods or distribution of inputs (income). The significance of the second welfare theorem is that the issue of equity in distribution is logically separable from the issue of efficiency in allocation. This means that whatever the redistribution of income that society wants would lead to the exhaustion of all possible gains from exchange under perfect competition. Pareto optimality does not, therefore, imply equity. Society can use taxes and subsidies to achieve what it considers to be a more equitable distribution of income. These may discourage work, however, and show that there is usually a trade-off between efficiency and equity. . . . For economic efficiency and Pareto optimum to be reached, there should be no market failure. Market failures arise in the presence of imperfect competition, externalities, and public goods.”) (footnote omitted); BROWNING & ZUPAN, *supra* note 51, at 524 (“[A] perfectly competitive economy results in an efficient distribution of products among consumers.”); *id.* at 525 (“[I]f perfect competition prevails, then all three conditions for economic efficiency are satisfied. Perhaps the most intuitive way of understanding why perfect competition efficiently solves the three basic economic problems of distribution, production, and output is to note that a competitive economy relies on voluntary exchange. Whenever any possible change in the allocation of either inputs or goods promises mutual benefits to market participants, people have an incentive to work out exchanges to realize these gains. If all mutually beneficial exchanges are consummated, as they are in competitive markets, then no further change will benefit some without harming others. The outcome is efficient.”) (emphasis omitted).

position that prompts this article—(8) *ethical and moral judgments are subjective, controversial*,<sup>67</sup> and beyond the purview of the course.<sup>68</sup>

The hypothetical perfect market, where the pure profit game is played, is impersonal and “perfectly competitive”—goods are the same, and buyers and sellers are so numerous that no single player can influence market price.<sup>69</sup> There are other important assumptions, among them that transactions impose no external costs, there are no transaction costs, and there are no taxes.<sup>70</sup> The discipline’s preachments come from logical extensions of these formal propositions based on a perfect market that does not exist in fact.

From a critical perspective, the end product of these propositions is not pretty. Postulating scarcity of resources implies a Darwinian, Hobbesian struggle for life’s essentials, and justifies warlike acquisitiveness even in the midst of Wall Street affluence. Assuming all players are rational pretends the playing field is level for everybody, thereby ignoring

---

67. SALVATORE, *supra* note 49, at 20 (“Normative analysis, on the other hand, studies what *ought* to be. It is concerned with how the basic economic functions *should* be performed. Normative analysis is thus based on value judgments and, as such, is subjective and controversial. Whereas positive analysis is independent of normative analysis, normative analysis is based on positive analysis and the value judgments of society. Controversies in positive analysis can be (and are) usually resolved by the collection of more or better market data. On the other hand, controversies in normative analysis usually are not, and cannot, be resolved.”) (emphasis original).

68. *Id.* (“This book is primarily concerned with positive analysis . . .”); BROWNING & ZUPAN, *supra* note 51, at 379–81, has an extended description of moral hazard, but this is not the same as rules of market morality. Consistent with the economic model, moral hazards are described as seductive opportunities for gain.

69. SALVATORE, *supra* note 49, at 263 (“The economist’s definition of perfect competition is diametrically opposite to the everyday usage of the term. In economics, the term ‘perfect competition’ stresses the *impersonality* of the market. One producer does not care and is not affected by what other producers are doing. The output of all producers is identical, and an individual producer can sell any quantity of the commodity at the given price without any need to advertise. On the other hand, in everyday usage, the term ‘competition’ stresses the notion of *rivalry* among producers or sellers of the commodity.”); *id.* at 262 (“Perfect competition refers to the type of market organization in which (1) there are many buyers and sellers of a commodity, each too small to affect the price of the commodity; (2) the commodity is homogeneous; (3) there is perfect mobility of resources; and (4) economic agents have perfect knowledge of market conditions (i.e., prices and costs).”); MANKIOW (3d ed.), *supra* note 51, at 64–65 (“We assume . . . that markets are *perfectly competitive*. Perfectly competitive markets are defined by two primary characteristics: (1) the goods being offered for sale are all the same, and (2) the buyers and sellers are so numerous that no single buyer or seller can influence the market price.”).

70. For a further limiting definition, see Robert N. Stavins, Professor, Belfer Center for Science and International Affairs, Harvard University, *The Myth of the Universal Market* (Feb. 17, 2009), <http://belfercenter.ksg.harvard.edu/analysis/stavins/?tag=scarcity-rent> (“Private markets are perfectly efficient only if there are no public goods, no externalities, no monopoly buyers or sellers, no increasing returns to scale, no information problems, no transactions costs, no taxes, no common property, and no other distortions that come between the costs paid by buyers and the benefits received by sellers.”).

differences in power and wealth, and justifying collateral damage on other people, who are viewed mechanistically as rational adversaries battling for the same scarce resources.<sup>71</sup> Assuming all players have perfect information implies that everyone who enters the market as a supplier or consumer deserves to lose any time they act on bad or deficient information. A seller with defective goods can therefore legitimately pass them off to anybody who will pay the price. Unilaterally drafted, tucked-away writings become declarations of formalist contract gospel. In short, suckers are fair game. People are implicitly assumed to have an array of choices, and whatever they do reflects both what they wanted to get and what they were willing to pay. So, no matter how unfair the contract, unlucky players simply made bad choices, and they alone are responsible for the bad bargain. Overcharging is impossible because the market sets prices and regulates supply and demand. And most important, the market's invisible hand operates quietly in the background to produce maximum utility for all, thereby justifying the most outrageous outcomes as "efficient." The economic actor can dismiss any criticism of self-seeking actions as subjective and controversial, and irrelevant for a scientific description of economic activity.

### C. *Players in the Amoral Market Are Assumed To Be Amoral*

In addition to absorbing the scientific amorality of economic analysis,<sup>72</sup> students are likely to infer from supply-side texts that players in the economic game are as amoral—and as free from moral constraint—as the explanatory model itself. This assumption eliminates any distinction between good and bad behavior as judged by community standards; thus interpreted, the positive model implies neutral acceptance of criminal behavior as it explains and predicts. From an economics perspective, bribes, violation of trade restrictions, and even successful bank robbery accomplish personal economic goals<sup>73</sup> and they may be considered normal strategies in an all-inclusive positive description of economic behav-

---

71. The prisoner's dilemma highlights strategies for outwitting another player, but the best outcome results from cooperation. See SALVATORE, *supra* note 49, at 395–99; MANKIW (4th ed.), *supra* note 51, at 354–60; BROWNING & ZUPAN, *supra* note 51, at 363–71. See also SALVATORE, *supra* note 49, at 401, which describes coercive behavior sympathetically. ("One way to make its threats credible is for firm A to develop a reputation for carrying out its threats, even at the expense of its profits. Although this may seem irrational, if firm A actually carried out its threat several times, it would earn a reputation for making credible threats.") (emphasis omitted).

72. SALVATORE, *supra* note 49, at 689 (defining positive analysis as "[t]he study of what *is* or how the economic system performs the basic economic functions" and as "entirely statistical in nature and devoid of ethical or value judgments").

73. The bank robber's preference to rob instead of work is revealed by his actions. See SALVATORE, *supra* note 49, at 81 ("For example, if a consumer purchases basket A rather than basket B, even though A is not cheaper than B, we can infer that the consumer prefers A to B."). See also POSNER, A FAILURE OF CAPITALISM, *supra* note 24, at

ior.<sup>74</sup> A thief is no more or less concerned that theft reduces social utility than is a chemical company concerned that its pollution kills. The rational thief and the rational chemical company must, of course, consider the possibility of discovery and punishment, but only as a cost of doing business. The only term of modest opprobrium, *opportunistic behavior*, is not defined in the glossaries nor indexed in any of the texts. Nor is it assigned any moral content.

Supply-side texts minimize most bad behavior by simply labeling it as market failure.<sup>75</sup> They then shrug off market failure as just market failure. After all, there are no perfect markets.<sup>76</sup> There is little or no serious discussion about the consequences of really bad behavior that leads to really bad market failure other than to note that the model's basic assumptions don't apply when failure occurs.<sup>77</sup> In pursuing their non-critical presentations, the texts can become "how to do it" handbooks for pursuing maximum personal profit without regard to consequences on self, firm, industry, or society. In doing so, they glorify psychopathic behavior and encourage functionally sociopathic actions that will be in the long run both inefficient and self-defeating.<sup>78</sup>

Oscar Wyatt, a Houston oilman who confessed to violating federal laws against dealing with Saddam Hussein, would probably be considered

285 (noting that businessmen take risks *mostly* within the law, drawing no distinction between lawful and unlawful behavior).

74. The index to Salvatore's text does not contain a reference for bribery, crime, fraud, illegal, stealing, or theft. "Bad" is defined only in terms of personal preferences as "an item of which less is preferred to more." SALVATORE, *supra* note 49, at 678. "Moral hazard" is defined as the "increased probability of a loss when an economic agent can shift some of its costs to others." *Id.* at 687. Theft probably meets this definition, but no more so than pollution.

75. *Id.* at 687 (defining market failure as "the existence of monopoly, monopsony, price controls, externalities, and public goods that prevent the attainment of economic efficiency or Pareto optimum"). Bank robbery and rent control are in the same category by this definition, though only rent control is targeted as bad behavior. The strongest opprobrium for bad behavior used in the texts was "opportunistic behavior." The attempt to follow the rules of empirical science may have led to excessive sanitizing of language and failure to criticize bad behavior.

76. *Id.* at 262 ("[T]hese conditions have seldom if ever existed in any market.").

77. *Id.* at 567 ("For economic efficiency and Pareto optimum to be reached, there should be no market failure.").

78. See, e.g., BRAFMAN & BRAFMAN, *supra* note 59, at 144–147 (documenting the corrosive effect of shifting attention from intrinsic value in education to a performance-reward system). Teachers went for the reward and learning suffered. See also Barry Schwartz, *Money for Nothing*, N.Y. TIMES, July 2, 2007, at A19 ("New York City has decided to offer cash rewards to some students based on their attendance records and exam performance. Diligent, high-achieving seventh graders will be able to earn up to \$500 in a year. The plan is the brainchild of Roland G. Fryer, an economist who has been appointed as 'chief equality officer' of the city's Department of Education. The assumption that underlies the project is simple: people respond to incentives. If you want people to do something, you have to make it worth their while. This assumption drives virtually all of economic theory.").



a normal, acceptable, and rational actor in the market.<sup>79</sup> Bernard Madoff was a rational actor who, late in life, paid the price for decades of living high on stolen money.<sup>80</sup> For predicting and explaining, the economic model would legitimately anticipate this sort of behavior any time potential profit outweighs the risk of prison. Approval of the action is another matter. But the economics professor would likely just smile and say that a scientist does not evaluate—he/she just describes, explains, and predicts.

#### D. *Government Is Portrayed as an Enemy*

Despite Posner's assignment of regulatory responsibility to government, supply-side texts, for the most part, describe government as the enemy of efficiency (an ill-defined optimal allocation of resources).<sup>81</sup> The unregulated market is championed as an implicit norm in the economics texts.<sup>82</sup> Texts claim that, if government takes goods from a party who has

79. See Alan Feuer, *In Surprise, Oilman Admits Iraq Kickbacks*, N.Y. TIMES, Oct. 2, 2007, at A12 (describing the event).

80. Henriques & Healy, *supra* note 49.

81. SALVATORE, *supra* note 49, at 40 (“[I]n the analysis presented so far in this chapter, we have implicitly assumed that the market is allowed to operate without government or other interferences.”); BROWNING & ZUPAN, *supra* note 51, at 27–31 (linking rent control with housing shortages in New York); *id.* at 288–89 (linking government franchises, licensing, and advertising regulations with higher consumer prices); *id.* at 471–76 (describing minimum wage legislation as eliminating job opportunities); *id.* at 490–94 (implying that Earned Income Tax Credit reduces work incentives); MANKIWI (4th ed.), *supra* note 51, at 9 (“When the government prevents prices from adjusting naturally to supply and demand, it impedes the invisible hand’s ability to coordinate the millions of households and firms that make up the economy.”); *id.* at 10–11 (acknowledging useful roles for government in making and enforcing laws to protect property rights, correct market failures (as from externalities), and make equitable distributions of prosperity). Mankiw, a member of the recent Bush Administration, is somewhat charitable toward government intervention but likens government’s income-leveling efforts to a leaky bucket. See *id.* at 438. Mankiw also criticizes rent control and tariffs. See *id.* at 33. See also SALVATORE, *supra* note 49, at 11, 40–42, 600 (chiding government for regulating gas prices and causing lines at filling stations, criticizing rent control, and warning against economic behavior by elected officials (public choice theory)). What was striking in this research was how little the preachments of economics have changed in the past sixty years. When the author took the course in 1950, his professor railed against FDR and the New Deal and used the example of too many hamburgers to illustrate the Law of Diminishing Returns. Salvatore uses the exact example. *Id.* at 13.

82. Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 830 (1989) (“The same claim to be value free cannot be extended to Pareto efficiency . . . [Cooter’s Professor said] . . . ‘The economist *qua* economists makes no value judgments.’ ‘Efficient’ is a desirable property of law, just as ‘nutritious’ is a desirable property of food. ‘Nutritious’ is a term of praise for food because it implies predictions about the effect of food on health, which is one of food’s most important values. That is why it would seem odd if a person said, ‘This food is nutritious but I am not making any value judgments.’ Similarly, ‘efficiency’ commends and ‘inefficient’ condemns in law and economics.”).

more and gives to one who has less, the result may be (is likely to be) less efficiency and not more.<sup>83</sup> Although course materials and professors may sometimes refer to distributional fairness, or “equity,” specific government action aimed at reducing income disparities may also be likened to theft or extortion.<sup>84</sup> To students eager to understand the world, it is exciting to learn the detested tax on their income is not merely a price paid for public services, but a criminal act committed by government. The characterization also blurs the distinction between legal and illegal behavior.

Supply-side texts do assign government a few acceptable roles—primarily in enforcing rules of property so the free market can work,<sup>85</sup> correcting market failures,<sup>86</sup> and (without enthusiasm) making equitable distributions of property.<sup>87</sup> Additional functions may include taking care of public goods.<sup>88</sup> But, as Posner implies, assigning responsibility to government to set the rules for market play inferentially relieves the market players themselves of all responsibility for outcomes.

To its credit, the most tilted textbook warned that regulation might be required to avoid a potential collapse in derivatives well before these leveraged interests spun out of control and precipitated a credit crunch and recession.<sup>89</sup> Supply-side texts also acknowledge that “equity” is an

83. See, e.g., BROWNING, *supra* note 56, at 107–27 (describing economic problems with the current social security system). The title implies the message. Meanwhile, Mankiw is comparatively soft on wealth transfer. See MANKIW (4th ed.), *supra* note 51, at 439.

84. BROWNING, *supra* note 56, at 170 (“Government transfers produce the same result as theft.”).

85. See MANKIW (4th ed.), *supra* note 51, at 10–11 (acknowledging useful roles for government in making and enforcing laws to protect property rights and making equitable distributions of property).

86. SALVATORE, *supra* note 49, at 15 (“One situation that leads to [government intervention] arises in the presence of imperfect competition and justifies government intervention in the economic system to overcome the problem, or at least to minimize its harmful impact. Indeed, whenever some individuals in society can be made better off without making someone else worse off, there is a case for government intervention at the margin to improve society’s welfare.”).

87. MANKIW (3d ed.), *supra* note 51, at 10–11 (“We all rely on government-provided police and courts to enforce our rights over the things we produce . . . There are two broad reasons for a government to intervene in the economy—to promote efficiency and to promote equity.”).

88. *Id.* at 256 (“Just as government has a role in providing a public good such as national defense, it also has a role in encouraging the research and development of new technologies.”).

89. SALVATORE, *supra* note 49, at 535–36 (“By allowing users to make big bets with little or no money down (i.e., by providing huge leverage), derivatives became very popular during the 1992–1993 bull market in bonds. . . . But when interest rates abruptly reversed course in early 1994, a number of companies that had invested heavily in these exotic derivatives faced huge losses.”). The collapse is described in Gretchen Morgenson, *A.I.G., Where Taxpayers’ Dollars Go to Die*, N.Y. TIMES, Mar. 8, 2009, at BU1 (“When A.I.G. couldn’t meet the wave of obligations it owed on the swaps last fall

important consideration that their positive model does not deal with, and that economic activity can dump external costs such as pollution (or destruction of the world's economy) on bystanders.<sup>90</sup> But instead of digging into substantive harm or considering a strong role for regulation,<sup>91</sup> supply-side texts tended to classify such matters as “market imperfections” or market failures and then move on.<sup>92</sup> Market imperfections, by definition, lie outside the model's hypothetical purity once they have been identified as such.<sup>93</sup>

When the sons and daughters of the middle class are taught that government is inefficient, even evil, they are encouraged to buy into a system that in the recent past destroyed the regulations that could have prevented the recession that cost them their jobs, homes, and savings. They may even come to believe that the taxing system that favors the rich actually operates to the advantage of the middle class. It is middle-class students who eventually come to fill the critical positions in business and government. If they are taught that people are best viewed as two-dimensional, rational, and self-interested automatons, they will act accordingly.

### E. *Ignoring Community Values Implies Denial of Community Values*

Texts describe the market players just as a scientist might describe an Ebola virus using the human body for its own replication. It should not be a surprise that real-life economics students, even those who come from middle-class beginnings, could identify with the virus and come to view cost externalities and market deception not as problems to be addressed, but as exciting opportunities to be pursued.<sup>94</sup> For example, it

---

as Wall Street went into a tailspin, the Federal Reserve stepped in with an \$85 billion loan to keep the hobbled insurer from going bankrupt; over all, the government has pledged a total of \$160 billion to A.I.G. to help it meet its obligations and restructure operations.”) [hereinafter Morgenson, *A.I.G.*].

90. MANKIW (3d ed.), *supra* note 51, at 206 (“Now let’s suppose that aluminum factories emit pollution: For each unit of aluminum produced, a certain amount of smoke enters the atmosphere. Because the smoke creates a health risk for those who breathe the air, it is a negative externality.”); BROWNING & ZUPAN, *supra* note 51, at 550–555 (extensively describing pollution and other externalities).

91. For an exception, see BROWNING & ZUPAN, *supra* note 51, at 542–55.

92. MANKIW (3d ed.), *supra* note 51, at 11 (“Although the invisible hand usually leads markets to allocate resources efficiently, that is not always the case. Economists use the term market failure to refer to a situation in which the market on its own fails to produce an efficient allocation of resources.”).

93. *Id.* (“One possible cause of market failure is an externality, which is the impact of one person’s actions on the well-being of a bystander.”).

94. *Id.* at 480, 484 (dealing with asymmetric information—“difference[s] in access to relevant knowledge”—as a problem, but stopping short of providing a model of efficient behavior that addresses the market failure). For example, Mankiw describes used car, labor, and insurance transactions as instances of asymmetric information “in markets where the seller knows more about the attributes of the good being sold than the buyer

will become abundantly clear to bright students that they can make more profit by dumping pollution costs on the public than by cleaning it up, and by dreaming up new ways to conceal toxic debt and corporate risk.<sup>95</sup> It is, after all, government's responsibility to take care of externalities,<sup>96</sup> so personal responsibility can be ignored. A text that compares market behavior with military strategy implicitly justifies collateral damage to bystanders in the struggle over scarce resources.<sup>97</sup>

Is it possible for a single course of study to change fundamental moral orientation?

#### IV. STUDENTS' MORAL STRUCTURES MAY BE ALTERED BY NEOCLASSICAL PREACHMENTS

##### A. *Students Come to University with a Moral Structure Shaped by Community Values and a Middle-Class Belief in Integrity*

Marc Hauser, a cognitive scientist, holds that people's brains have an evolutionary capability, even a necessity, to comprehend, absorb, and record the moral structure and principles of their community as physical neural patterns.<sup>98</sup> Community morality, thus implanted, is as automatic

---

does." *Id.* at 481–82. The self-seeking avatars in the virtual market would not disclose information that helps them get a better deal from the other guy.

95. For example, one text includes a new clip about Enron and other companies' strategies designed to mislead the public, which is presented as tongue-in-cheek, but carries a toxic message to students being trained to play the amoral market game. See MANKIW (3d ed.), *supra* note 51, at 271 (citing Paul Krugman, *Flavors of Fraud*, N.Y. TIMES, June 28, 2002, at A27).

96. *Id.* at 10–11 (identifying a role for government in improving efficiency, including managing externalities).

97. In an example titled "Military Strategy and Strategic Business Decisions," Salvatore writes that

[a]ccording to William E. Peacock, the president of two St. Louis companies and former assistant secretary of army under President Carter, decision making in business has much in common with military strategy and can thus be profitably analyzed using game theory. . . . Peacock points out that throughout history, military conflicts have produced a set of basic Darwinian principles that can serve as an excellent guideline to business managers about how to compete in the marketplace. Neglecting these principles can make the difference between business success and failure . . . . More than ever before, today's business leaders must learn how to . . . muster the courage to steer the firm in radical new directions when necessary. Above all, firms must think and act strategically in a world of increasing global competition. Game theory can be particularly useful and can offer important insights in the analysis of oligopolistic interdependence. Indeed, more and more firms are making use of war-games simulations in their decision making."

SALVATORE, *supra* note 49, at 391.

98. MARC D. HAUSER, *MORAL MINDS* 155–59 (2006) ("If the arguments in linguistics hold for morality, then we will have to ignore what appears obvious at the surface in terms of our descriptions of behavior, turning to a layer underneath, which contains the moral faculty's codes. What we see in terms of moral behavior and justification is

and as accessible as speech—we make moral judgments without resorting to logic or reason, just as we speak without having to pre-think syntax and meanings of the words we use.<sup>99</sup> An individual's moral structure operates at an unconscious level, unknown to, and unexamined by the brain's owner except as it emerges in specific judgments.<sup>100</sup> Moral judgments themselves are likely to show a great deal of consistency and conformity with the actor's (sub)culture, but efforts to explain them logically and rationally are less coherent.<sup>101</sup>

A primary consideration in most moral systems is avoiding unjustified injury to other community members, popularly attributed to empathy. Empathy is a likely product of mirror neurons that, in the brain of an observer, mimic neural activity in the brain of an observed actor. When, for example, an observed primate reaches for a peanut, neural activity in the observer's brain occurs in the same patterns and regions as in the actor's brain.<sup>102</sup> Primate brains respond empathetically to the sight of another person in distress. Hauser concludes that the underlying and (to individual members) virtually unexamined moral structure of western societies roughly follows the formal principles advanced by John Rawls—justice as fairness.<sup>103</sup> If so, Rawls's blindfolded law-giver would not likely reward profit-driven sociopaths who destroy their own industry and the community economy by unconstrained self-interested behavior.

The community moral structure—strong, middle-class morality—that is neurally implanted in individual brains provides an empirical ref-

---

most likely a poor representation of the moral faculty's output.”). See also *id.* at 299 (“The universal moral grammar is a theory about the suite of principles and parameters that enable humans to build moral systems. It is a toolkit for building a variety of different moral systems as distinct from one in particular. The grammar or set of principles is fixed, but the output is limitless within a range of logical possibilities. Cross-cultural variation is expected.”); Zak, *supra* note 34, at xii (“An important, consistent finding from neuroethics in the past ten years is that the Kantian notion of morality as being learned by rational deduction is generally incorrect. When viewing immoral acts, nearly all human beings have a visceral, emotional, and rapid neural response. In many cases, even children have similar reactions. In other words, one does not need to learn what is right and wrong, most of us know this, or perhaps better, sense this, immediately.”).

99. HAUSER, *supra* note 98, at 37 (“Chomsky's sense . . . refers to the unconscious principles that underlie language use and comprehension. It also refers to the unconscious principles that underlie certain aspects of mathematics, music, object perception, and, I suggest, morality.”).

100. *Id.* at 423 (“[M]any of the principles underlying our moral judgments are inaccessible to conscious reflection.”).

101. *Id.* at 156 (“When people attempt to explain their moral judgments, they are often dumbfounded, appealing to hunches or conflicting accounts.”).

102. *Id.* at 224 (describing mirror neurons).

103. *Id.* at 156 (“The Rawlsian creature may be the essential system for generating the moral verdict . . .” (referring to JOHN RAWLS, A THEORY OF JUSTICE 12 (1971) (“Among the essential features of this situation is that no one knows his place in society, his class position, or social status. . . . The principles of justice are chosen behind a veil of ignorance.”))).

erence for defining “integrity,” both for students coming to university and for the rest of us.<sup>104</sup> Applying this standard, what student or ordinarily competent member of the community would have approved of the joyful banter of Enron traders as they rigged the price of California electricity in the 1990s?<sup>105</sup> Who would approve the bailed-out firms paying billions in bonuses to executives whose behavior brought the firm and the economy down,<sup>106</sup> or executives flying company jets to beg for bailout money for their auto companies?<sup>107</sup> Who would have approved a major insurance company’s acting like a Las Vegas casino, selling mortgage fund guarantees as bets to all comers?<sup>108</sup> Students coming to university could answer the questions easily. The people who don’t know the answer are the functional sociopaths who laughed, rode company planes to get their handout, and manipulated institutions and individuals without respecting the community’s moral boundaries,<sup>109</sup> and the neoclassical economists who refuse to look beyond cold description and implicit approval.

The bottom line is that morality, justice, fairness, and integrity have physical, neural existence, in the brains of the members of the community, and they cannot be summarily dismissed as “subjective and contro-

104. Peter J. Richerson & Robert Boyd, *The Evolution of Free Enterprise Values*, in *MORAL MARKETS*, *supra* note 4, at 116 (“Conditional cooperation and the existence of social rules, to which we more or less readily conform, constitute a moral hidden hand. One can depend on most people, most of the time, to be spontaneously helpful and honest—even to strangers.”).

105. See Richard A. Oppel, Jr., *Enron Traders on Grandma Millie and Making Out Like Bandits*, N.Y. TIMES, June 13, 2004, § 4, at 7 (“[F]rom Aug. 5, 2000, two traders . . . gleefully discuss how a wildfire in California has reduced the ability of a transmission line to carry electricity, boosting the value of power in parts of the state and the profits on electricity trades they have made. Person 2: The magical word of the day is ‘Burn, Baby, Burn’—Person 1: What’s happening? Person 2: There’s a fire under the core line it’s been de-rated from 45 to 2,100 . . . Together: Burn, baby, burn. Person 1: That’s a beautiful saying.”).

106. See Jackie Calmes & Louise Story, *418 Got A.I.G. Bonuses; Outcry Grows in Capital*, N.Y. TIMES, Mar. 18, 2009, at A1 (“The company paid the bonuses, including more than \$1 million each to 73 people, to almost all of the employees in the financial products unit responsible for creating the exotic derivatives that caused A.I.G.’s near collapse . . .”). In fairness, the bonuses in many circumstances are treated as ordinary salary, and not as rewards.

107. See The Board: A Blog by the Editorial Writers of The New York Times, *Taking a Private Jet to Hold Out a Tin Cup* (Nov. 19, 2009), <http://theboard.blogs.nytimes.com/2008/11/19/taking-a-private-jet-to-hold-out-a-tin-cup> (“The CEO’s of GM, Ford, and Chrysler . . . flew to Washington in luxurious private jets.”).

108. Morgenson, *A.I.G.*, *supra* note 89, at BU1 (“When A.I.G. couldn’t meet the wave of obligations it owed on the swaps last fall as Wall Street went into a tailspin, the Federal Reserve stepped in with an \$85 billion loan to keep the hobbled insurer from going bankrupt; over all, the government has pledged a total of \$160 billion to A.I.G. to help it meet its obligations and restructure operations.”).

109. They were, however, following the sociopathic moral structure of their own business subcommunity.

versial."<sup>110</sup> Loyalty and duty to the common interest have strong evolutionary grounding—traitors everywhere are condemned and punished.

B. *The Economic Model that Is Taught as Science  
May Be Absorbed as Religion*

Most graduates who use their economic training as professionals will work for producer firms, not as consumer advocates. Their economics professor knows that the classroom's perfect market is incomplete and hypothetical, but graduates are likely to remember only the memes<sup>111</sup> of economics, not the caveats. They remember the goal is profit,<sup>112</sup> competition and the free market are good, government screws things up, and the impersonal law of supply and demand sets the right prices.<sup>113</sup> The market works on asymmetric information, so it's everybody for him/her/itself, the winner gets the gold, and nobody shares good information.<sup>114</sup> There is money to be made in dumping the costs of production on

110. See *supra* note 67.

111. See DON EDWARD BECK, *SPIRALS OF COMPLEXITY: CULTURES AND CIVILIZATIONS IN THE 21ST CENTURY* ("A 'meme' is a contagious idea that replicates like a virus, passed on from mind to mind. Memes function in the same way genes and viruses do, propagating through communication networks and face-to-face contact between people."). The expression "meme" was originally coined by Richard Dawkins. RICHARD DAWKINS, *THE SELFISH GENE* 192 (1976) ("We need a name for the new replicator, a noun that conveys the idea of a unit of cultural transmission, or a unit of *imitation*. 'Mimeme' comes from a suitable Greek root, but I want a monosyllable that sounds a bit like 'gene'. I hope my classicist friends will forgive if I abbreviate mimeme to *meme*. . . . Examples of memes are tunes, ideas, catch-phrases, clothes fashions, ways of making pots or of building arches. Just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation.").

112. SALVATORE, *supra* note 49, at 191 ("Just as consumers seek to maximize utility or satisfaction, firms generally seek to maximize profits. Both consumers and firms can be regarded as maximizing entities. Profits refer to the revenue of the firm from the sale of the output after all costs have been deducted.").

113. *Id.* at 11 ("In the United States and other free-enterprise or mixed economies, the price system operates so smoothly that people are not even aware of it. Only on rare occasions (usually as a result of government interference) do we become aware that something is wrong. The long lines at most gas stations during the petroleum crisis in 1979 were the result of the U.S. government's attempt to keep gasoline prices below the market or equilibrium level. When price controls were eliminated and the price of gasoline was allowed to rise to the market level, gasoline lines disappeared. When bad weather sharply reduced the output of Florida oranges in 1977 and 1981 and that of fresh fruits and vegetables in 1984, no waiting lines were seen outside food stores in the United States. The prices of oranges and vegetables simply rose, and this rationed available supplies to match the amounts that consumers wanted to purchase at the higher prices.").

114. *Id.* at 622 ("Often one party to a transaction (i.e., the seller or the buyer of a product or service) has more information than the other party regarding the quality of the product or service. This is a case of asymmetric information. . . . The problem of adverse

bystanders.<sup>115</sup> And if a critic disagrees, it's only his/her opinion. These simple memes may not be enough to pass the final exam, but they can justify an entirely new array of self-interest options, now that the newly privileged university graduate is freed from moral constraint and ready to join the executive ranks.

Once a new (a)moral structure is fixed in the brain, all new information is processed through that filter. Ideas that conform are accepted; nonconforming ideas are rejected.<sup>116</sup> Using economic theory to justify bad behavior, of course, subverts the discipline's avowed purposes of explaining and predicting.

### C. *A Well-Taught Neoclassical Economics Course May Produce Sociopaths*

Competent economics professors know that students who mistakenly adopt the idealized model<sup>117</sup> as a description of the real world and as moral cover for bad behavior should have flunked the course. Unfortunately, what is important is what is learned, not what is taught.<sup>118</sup> Consider the following:

---

selection that arises from asymmetric information can be overcome or reduced by the acquisition of more information by the party lacking it . . . .").

115. BROWNING & ZUPAN, *supra* note 51, at 543 ("Suppose that firms in a constant-cost competitive industry produce some type of waste materials as a by-product of their activities. They dispose of these wastes by dumping them in a nearby river. From the firms' point of view, this method of disposal is the least costly. People living downstream, however, suffer, because the river no longer serves recreational purposes. The firms in the industry impose external cost on those living downstream. Because these external costs are not taken into account by the firms, the allocation of resources is inefficient.").

116. GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT 17 (2004) ("People think in frames. The strict father and nurturing parent frames each force a certain logic. To be accepted, the truth must fit people's frames. If the facts do not fit a frame, the frame stays and the facts bounce off.").

117. See SALVATORE, *supra* note 49, at 19 ("According to the Nobel Laureate Milton Friedman, a model is not tested by the realism or lack of realism of its assumptions, but rather by its ability to predict accurately and explain."); *id.* at 18 ("In microeconomic theory, we seek to predict and explain the economic behavior of individual consumers, resource owners, and business firms and the operation of individual markets. For this purpose we use models. A model abstracts from the many details surrounding an event and identifies a few of the most important determinants of the event. . . .").

118. See Robert H. Frank, *The Status of Moral Emotions in Consequentialist Moral Reasoning*, in MORAL MARKETS, *supra* note 4, at 42, 54 ("[E]conomics training—both its duration and content—affects the likelihood that undergraduate students will defect in prisoner's dilemma games."). Some of the most prestigious business schools have acknowledged this hazard and are expanding courses in ethics. Twenty percent of MBA students at Harvard Business School are even taking a voluntary pledge to "serve the greater good." Leslie Wayne, *A Promise to Be Ethical in an Era of Temptation*, N.Y. TIMES, May 30, 2009, at B1. See also Robert A. Giacalone & Kenneth R. Thompson, *Business Ethics and Social Responsibility Education: Shifting the Worldview*, 5 ACAD. OF



Our personal identities are socially situated. We are where we live, eat, work, or make love . . . . Our sense of identity is in large measure conferred on us by others in the ways they treat or mistreat us, recognize or ignore us, praise us or punish us. . . . We come to live up to or down to the expectations others have of us. . . . We often become who other people think we are, in their eyes and in our behavior.<sup>119</sup>

These words appear in a book endeavoring to explain not Wall Street behavior, but prison guards at Abu Ghraib prison. The observations apply to everyone, everywhere. The guards at Abu Ghraib started out as good soldiers, but they assumed the role of abusive uniformed guards—as their group narratives implied and as their peers expected.<sup>120</sup> The guards' behavior could have been predicted from a 1970s Stanford experiment in which student volunteers were assigned roles as either guards or prisoners.<sup>121</sup> The role-playing guards became abusive, the prisoners increasingly distressed. They played their respective roles so well that the two -week-long experiment had to be called off after a devastating six days to avoid inflicting further psychological damage on the volunteers.<sup>122</sup> As part of the game, guards wore reflective sunglasses and

---

MGMT. LEARNING & EDUC. 266–77 (2006) (discussing ethical problems raised by the organization-centered worldview).

119. PHILIP ZIMBARDO, *THE LUCIFER EFFECT* 321–323 (2007). Zimbardo describes how Stanford University students became authoritarian brutes during a social science experiment that arbitrarily assigned some to be prisoners and others guards. Zimbardo applied that experience to the American soldiers' behavior at Abu Ghraib, concluding that strong situational forces, including group pressures and group identity, the diffusion of responsibility for the action, a temporal focus on the immediate moment without concern for consequences stemming from the act in the future, presence of social models, and commitment to an ideology, combine to increase the probability of one's acting to harm others or acting to help others. *Id.* at 380–444; Herbert Gintis & Rakesh Khurana, *supra* note 4, at 300–01 (implying that business schools participate in creating the warped view of market behavior).

120. ZIMBARDO, *supra* note 119, at 403–15 (detailing tacit approval of abuse by military high command and the George W. Bush administration). Stanley Milgram's experiment in obedience is described in LIPMAN-BLUMEN, *supra* note 12, at 16 (“Milgram was exploring obedience to a toxic leader. Here, the toxic leader appeared in the guise of a ‘scientist’ clad in a white lab coat, who instructed participants to administer what they believed to be electric shocks—some presumably ‘very dangerous’—to other ‘volunteers’ engaged in the experiment. Milgram’s research demonstrated that a surprisingly large percentage of individuals can be intimidated into obeying a malevolent authority, even when all the so-called authority does is wear scientific garb and intone, ‘The experiment must go on.’”).

121. ZIMBARDO, *supra* note 119, at 23–257 (describing the experiment).

122. *Id.* at 171. Zimbardo's girlfriend states, “Phil . . . realized what had been gradually happening to him and everyone else in the study: that they had all internalized a set of destructive prison values that distanced them from their own humanitarian values. And at that point, he owned up to his responsibility as creator of this prison and made the decision to call the experiment to a halt. By then it was well past midnight, so he decided to end it the next morning, after contacting all the previously released prisoners,

formed a subculture of abusers.<sup>123</sup> Their uniforms brought cohesion and cult-like acceptance of bad behavior. Wall Street players wear a different uniform, and they speak a different fraternal language, but their cult identification defines and determines their conduct.<sup>124</sup>

### 1. Moral Disengagement Can Produce Cult Behavior

Jim Jones,<sup>125</sup> David Koresh,<sup>126</sup> and Warren Jeffs<sup>127</sup> are familiar reminders that charismatic leaders can supplant conventional norms of behavior in the neural patterns of their followers, introducing bizarre beliefs that, reinforced by peers, make perfectly logical sense within the cult. The implanted beliefs play out in behaviors that, in extreme cases, led to mass suicide and fiery death. What does this have to do with bad behavior in the mortgage market? Maybe nothing. Maybe a lot.

---

and calling all the guard shifts for a full round of debriefing of guards, prisoners, and then everyone together. A great weight was lifted from him, from me, and from our personal relationship.”

123. *Id.* at 33–34 (“Just before [the policeman] started the siren on his all-white squad car, he put on his silver reflecting sunglasses, the kind the guard wore in the movie *Cool Hand Luke*, the kind that prevents anyone from seeing your eyes. I grinned . . . knowing that all our guards would also be donning the same anonymity-inducing goggles as part of our attempt to create a sense of deindividuation. Art, life, and research were beginning to merge.”).

124. See MICHAEL L. LEWIS, *LIAR’S POKER* 98 (1989) (“Salomon Brothers began to resemble the rest of Wall Street. It recruited the same M.B.A.’s as Goldman Sachs and Morgan Stanley. The effect was as much social as it was intellectual. Like the Goldmans, the Sachses, the Lehmans, the Kuhns, and the Loebes before them, the Salomons were feeling the pull of what the writer Stephen Birmingham called ‘our crowd,’ though we weren’t quite to the state of building new wings onto the Metropolitan Museum. The firm had always been run by Jews. It came to be controlled by a contingent of WASPs, wannabe WASPs, and social climbers.”).

125. On November 18, 1978, Jones and 900 cult followers died in a mass suicide/homicide. Jones developed a belief called Translation in which he and his followers would all die together, and would move to another planet for a life of bliss. Mass suicides were practiced in which his followers pretended to drink poison and fell to the ground. See Religious Tolerance, Jim Jones’ People’s Temple, [http://www.religioustolerance.org/dc\\_jones.htm](http://www.religioustolerance.org/dc_jones.htm) (last visited May 25, 2010).

126. Rick Ross, Rick A. Ross Inst., The Waco Davidian Standoff, <http://www.culteducation.com/waco.html> (last visited May 25, 2009) (“On April 19th 1993 David Koresh (born Vernon Howell) claimed the lives of 80 of his Branch Davidian followers, including 25 children, in what seemed to be their final trial by fire. The 33-year-old self-proclaimed ‘Lamb of God’ thus ended a 51-day-standoff with federal law enforcement.”).

127. *Polygamist “Prophet” to Serve at least 10 Years in Prison*, CNN.COM, Nov. 20, 2007, available at <http://www.cnn.com/2007/US/law/11/20/jeffs.sentence> (“Members of the FLDS, based in the side-by-side border towns of Hildale, Utah, and Colorado City, Arizona, openly practice polygamy. Jeffs, who is considered a prophet by his followers, has led the 10,000-member sect since his father’s death in 2002. The FLDS is not affiliated with the mainstream Mormon church, the Church of Jesus Christ of Latter-day Saints. He has drawn critical attention to the FLDS by allegedly arranging marriages to girls as young as 13, exiling male teens and young men to reduce competition for brides, and reassigning the wives and children of excommunicated male followers.”).

The moral practices that are internalized during an individual's upbringing become personal neural guides for prosocial behavior and deterrents of antisocial behavior as defined by their family and social community.<sup>128</sup> But this self-regulatory mechanism can be disengaged and corrupted. Disengagement occurs and aberrant behavior seems normal when we do the following:

- 1) Define our harmful behavior as honorable.<sup>129</sup> Supply-side economics texts define unregulated market behavior as not only honorable, but as socially beneficial.<sup>130</sup>
- 2) Minimize our sense of a direct link between our actions and harmful outcomes by diffusing personal responsibility.<sup>131</sup> The texts imply that market forces, not individual actors, bestow gains and impose losses.<sup>132</sup>
- 3) Ignore, distort, minimize, or disbelieve negative consequences of our behavior.<sup>133</sup> Economics texts minimize and neutralize, for

128. ZIMBARDO, *supra* note 119, at 310–311.

129. *Id.* at 310.

130. See SALVATORE, *supra* note 49, at 588 (“[P]erfect competition leads to maximum economic efficiency and Pareto optimum.”); MANKIW (4th ed.), *supra* note 51, at 25 (“An outcome is said to be *efficient* if the economy is getting all it can from the scarce resources it has available.”). There is evidence that economics students do come to view the narrow self-interest model as a correct description of others. See Robert H. Frank, *supra* note 118, at 42, 54 (“The self-interest model of rational choice predicts that people will defect in one-shot prisoner’s dilemmas. Does working with that model over the course of many years, as professional economists do, alter their expectations about what others will do in social dilemmas? And, if so, does this alter how economists themselves behave when confronted with such dilemmas? [We] found that economics training—both its duration and content—affects the likelihood that undergraduate students will defect in prisoner’s dilemma games. In one version . . . economics majors were almost twice as likely to defect as non-economics majors. . . . Even more troubling, the narrow self-interest model, which encourages us to expect the worst in others, may bring out the worst in us as well.”).

131. ZIMBARDO, *supra* note 119, at 311.

132. MANKIW (3d ed.), *supra* note 51, at 23 (“To understand how the economy works, we must find some way to simplify our thinking about all these activities. In other words, we need a model that explains, in general terms, how the economy is organized and how participants in the economy interact with one another. . . . [By the circular flow diagram] the economy is simplified to include only two types of decision-makers—households and firms. Firms produce goods and services using inputs, such as labor, land, and capital (building and machines). These inputs are called the factors of production. Households own the factors of production and consume all the goods and services that the firms produce . . . .”); SALVATORE, *supra* note 49, at 6: “Faced with the pervasiveness of scarcity, all societies, from the most primitive to the most advanced, must somehow determine (1) what to produce, (2) how to produce, (3) for whom to produce, (4) how to provide for the growth of the system, and (5) how to ration a given quantity of a commodity over time. Let us see how the price system performs each of these functions under a free enterprise system (such as our own).”).

133. ZIMBARDO, *supra* note 119, at 311.

example, environmental harm, assigning responsibility for preservation to government.<sup>134</sup>

- 4) Reconstruct our perception of the victims as deserving their punishment, by blaming them or dehumanizing them.<sup>135</sup> One text denies the possibility of shoppers' ignorance,<sup>136</sup> thereby framing victims as responsible for their own losses.<sup>137</sup> Defining people as two-dimensional (rational and self-interested) creatures dehumanizes the students' view of real people by removing those aspects of human personality we deem deserving of concern and empathy.<sup>138</sup> Even the extensive use of graphic and mathematical models instead of textual narrative depersonalizes economic activity by emphasizing formulae instead of people.<sup>139</sup> The special language of economics (e.g., *curve of indifference*, *information asymmetry*) encourages an impersonal view of human behavior

134. MANKIW (3d ed.), *supra* note 51, at 86.

135. ZIMBARDO, *supra* note 119, at 311.

136. SALVATORE, *supra* note 49, at 149 ("Trading on shoppers' ignorance is no longer possible. Today, window shopping takes place online. Shoppers compare products, prices, and reputations by finding out what previous buyers of the product have to say.").

137. *Id.* at 176 ("Individuals and decision makers can often make better predictions and sharply reduce the risk or uncertainty surrounding a particular strategy or event by collecting more information. For example . . . investors can obtain information about the riskiness of a bond by checking Moody's, Standard & Poor's, or other rating agencies' reports. Gathering information is costly, however, and the individual or manager should treat it as any other investment. That is, he or she could continue to gather information until the marginal benefit (return) from it is equal to the marginal cost. The value of complete information is the difference between the expected income or value of a choice with complete information and the expected value without complete information."). As noted, Salvatore expresses skepticism that there can be an information problem. See *supra* note 136; *id.* at 622 ("Often one party to a transaction (i.e., the seller or the buyer of a product or service) has more information than the other party regarding the quality of the product or service. This is a case of asymmetric information. . . . The problem of adverse selection that arises from asymmetric information can be overcome or reduced by the acquisition of more information by the party lacking it. For example, in the used-car market, a prospective buyer can have the car evaluated at an independent automotive service center, or the used-car dealer can provide guarantees for the cars they sell. . . . Travelers are often willing to pay higher prices for nationally advertised products and services than for competitive local products, because they do not know the quality of local products and services. This is why tourists often pay more for products and services than residents. Sometimes, higher prices are themselves taken as an indication of higher quality.").

138. *Id.* at 178–80 ("Traditional economic theory assumes that individuals and other economic agents always behave and act rationally. That is, it assumes they make logical, rational, and self-interested decisions that weigh benefits against costs so as to maximize utility, value, or profit. The 'economic man' is analytic, calculating, unemotional, and selfish.").

139. ROBERT H. FRANK, *THE ECONOMIC NATURALIST* 8 (2007) criticizes excessive emphasis on equations and graphs. Frank is co-author of one of the "consumer-oriented" texts reviewed.

and hides the reality that economic activity can and often does cause individual and personal pain without producing compensating societal benefits.

Economists deny that their positive model advances any normative positions, claiming that as scientists they seek only to describe, explain, and predict. But by lionizing the market, by minimizing the social cost of externalities,<sup>140</sup> and by ignoring the systemic damage that deceit and criminality impose on the market itself, the textbooks imply that the world is made up of self-seeking avatars trying to fleece each other—and that this is the way the world should be.

## 2. Good Teaching Can Produce Bad Results

Is it possible for a single course to change students' moral structure so completely? Maybe. In a University of Hawaii psychology class, a presentation highlighting the rapidly increasing population of physically and mentally unfit people convinced 91% of the students to agree that "under extreme circumstances it is entirely just to eliminate those judged most dangerous to the general welfare. . . . [Twenty-nine] percent supported this 'final solution' even if applied to their own families."<sup>141</sup> Students in a Palo Alto high school world history class responded too convincingly to role-playing as make-believe Nazis.<sup>142</sup> A third-grade teacher in Riceville, Iowa, undertook to teach her students the pain of discrimination. She told them that blue-eyed students were superior and brown-eyed students were inferior. Within one day, the brown-eyed students began to do poorly on their schoolwork and became depressed, sullen, and angry. The next day, the roles were reversed, and the behavior switched.<sup>143</sup>

A recent study of Yale Law students found that those who had been randomly assigned to sections with professors committed to economic

---

140. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase can be read as declaring that in the absence of transaction costs, it is irrelevant from the standpoint of efficiency whether industries pay for external costs. The parties are expected to bargain to an efficient outcome. Mankiw and Salvatore deal with the Coase theorem, noting only the problem of transaction costs. MANKIW (4th ed.), *supra* note 51, at 210; SALVATORE, *supra* note 49, at 590 ("The Coase theorem postulates that when property rights are clearly defined, perfect competition results in the internalization of externalities, regardless of how property rights are assigned among the parties. . . .").

141. ZIMBARDO, *supra* note 119, at 284–85.

142. *Id.* at 281–82 ("He began by telling the class that they would simulate some aspects of the German experience in the coming week. Despite this forewarning, the role-playing 'experiment' that took place over the next five days was a serious matter for the students and a shock for the teacher, not to mention the principal and the students' parents. Simulation and reality merged as these students created a totalitarian system of beliefs and coercive control that was all too much like that fashioned by Hitler's Nazi regime.").

143. *Id.* at 283–84.

analysis of law were changed by the experience, becoming more selfish and accepting of efficiency as a normative standard.<sup>144</sup> Apparently, professors can convince students—sometimes too well.

Good economics teachers (and law and economics teachers) get excited about their subject.<sup>145</sup> Many teach it well. The best and brightest students learn it well. The university carries both prestige and authority when it offers, even requires, the course as a condition for graduation.<sup>146</sup> The better the teacher and university, the greater danger of producing sociopathic behavior.

### 3. Most Students Do Not Turn Out To Be Sociopaths

It is easy to overstate the point, and substantial qualifications are in order. Students who use consumer-oriented economics texts may get useful information with no risk to personal morality. Most students who study supply-side books are probably unaffected by them. Without an inspiring teacher, it is an easy course to sleep through. One noted economist pessimistically observes that economics courses do not even convey basic principles, bemoaning that students who took the course scored below non-students in a test on opportunity cost.<sup>147</sup>

Before rejoicing that average students are unaffected, it is worth remembering that (1) economists emphasize the importance of measure-

144. Raymond Fisman, Shachar Kariv & Daniel Markovits, *Exposure to Ideology and Distributional Preferences* (July 19, 2009) (unpublished manuscript), *available at* [http://emlab.berkeley.edu/~kariv/FKM\\_II.pdf](http://emlab.berkeley.edu/~kariv/FKM_II.pdf).

145. MANKIW (3d ed.), *supra* note 51, at vii (“During my 20-year career as a student, the course that excited me most was the two-semester sequence on the principles of economics that I took during my freshman year in college. It is no exaggeration to say that it changed my life. . . . Economics combines the virtues of politics and science. It is, truly, a social science. Its subject is society—how people choose to lead their lives and how they interact with one another. But it approaches the subject with the dispassion of a science. By bringing the methods of science to the questions of politics, economics tries to make progress on the challenges that all societies face. . . .”). See also FUKUYAMA, *supra* note 28, at 17 (“Not being content to rest on their laurels, many neoclassical economists have come to believe that the economic method they have discovered provides them with the tools for constructing something approaching a universal science of man.”).

146. See ZIMBARDO, *supra* note 119, at 275 (“[In the Milgram experiment] the subjects conferred authority status on the person conducting the experiment because he was in an institutional setting . . .”).

147. FRANK, *supra* note 139, at 4–6 (“Opportunity cost is, by consensus, one of the two or three most important ideas in introductory economics. Yet we have persuasive evidence that most students do not master this concept in any fundamental way. . . . [Researchers] posed [an opportunity cost question] to 270 undergraduates who had previously taken a course in economics, only 7.4 percent of them answered it correctly. Since there were only four choices, students who picked at random would have had a correct response rate of 25 percent. . . . When [they] posed the same question to eighty-eight students who had never taken an economics course, 17.2 percent answered it correctly—more than twice the correct response rate as for former economics students, but still less than chance.”).

ment at the margin, not the average,<sup>148</sup> and students who are at the moral margin may be the most easily persuaded; and (2) the Army uses computer games to train its recruits to overcome their reluctance to kill another human being—with strong positive results.<sup>149</sup>

D. *An Outraged Public Does Not Think Moral Evaluations  
Are “Controversial and Individual”*

Public reaction to recent events has been instructive. The moral judgments that taxpayers and private investors make are not as “subjective and controversial,” as economics texts suggest. Outrage at excessive salaries and bonuses paid to CEOs, brokers, and other functionaries who guided their industries to failure reveals a strong and identifiable public morality that has been grievously offended. The only people who saw nothing wrong were the CEOs who flew company jets to Washington to ask for money, and the inept analysts who lined up to collect their bonuses out of taxpayer money.

The focus on pure profit, not product, was endemic in the behavior of individuals and institutions during and after the meltdown. The pursuit of maximum profit destroyed any inclinations participants may otherwise have had to act with restraint in a market ripe for the picking, or to protect the community by blowing the whistle on what was, inside the industry, well-known and obviously destructive behavior.

Even Judge Posner admits that Wall Street players were “responsible” for the crash as a statement of cause and effect.<sup>150</sup> He acknowledges that the crash was a bad thing. What is missing in his assessment is that market players should follow a standard of behavior defined by both general and special communities, and step back from behavior that carries great social risk. There may be no smoking gun and no proof of individual wrongdoing, but the inquiry should not start by predetermining purity just because the players acted rationally.

148. MANKIW (3d ed.), *supra* note 51, at 6 (“Economists use the term marginal changes to describe small incremental adjustments to an existing plan of action. . . . A rational decisionmaker takes an action if and only if the marginal benefit of the action exceeds the marginal.”).

149. Seth Robson, *Not Playing Around: Army to Invest \$50M in Combat Training Games*, STARS & STRIPES, Nov. 23, 2008, available at <http://www.stripes.com/article.asp?section=104&article=59009> (“Soldiers will be able to drive virtual vehicles, fire virtual weapons, pilot virtual unmanned aerial vehicles and do ‘most anything a soldier does’ in a virtual battle space as large as 100 kilometers by 100 kilometers, [project director for gaming Leslie Duvow] said. [Col. Mark] McManigal said the game will replicate what soldiers encounter on today’s battlefield—from fighting in urban terrain and convoy operations to reacting to contact and ambush operations. ‘Your imagination will be your only limiting factor,’ he said. The new game will also be able to interact with the Army’s battle command systems that soldiers use in the real world to track equipment, enemy and friendly forces using computerized maps, he said.” *Id.*

150. See generally POSNER, A FAILURE OF CAPITALISM, *supra* note 24.

## V. NEOCLASSICAL THEORY OF PERSON PERVADES THE LAW SCHOOL CURRICULUM

Concerted efforts by Henry Manne and other neoclassical enthusiasts have left their mark on law and legal education.<sup>151</sup> As a rite of passage to respectability, today's law schools appear to require at least one economist on their faculty.<sup>152</sup> Neoclassical analysis and criticism have affected both law practice and legal education, most notably (perhaps with justification) eviscerating antitrust law.<sup>153</sup> Although some of the ardor has cooled, economic analysis in law appears securely entrenched for the foreseeable future. Republican judicial appointments have injected neoclassical attitudes along with some technical expertise into the federal judiciary.<sup>154</sup> The same politics and judicial policies work at a less intellectual level in states where voters, politicians, and wannabe judges share those inclinations.<sup>155</sup>

Whatever its advantages, neoclassical influence in legal education may produce as much mischief in law as in business. That influence deserves examination and attention.

---

151. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 101–18 (2008) (describing the efforts by Henry Manne to promote economics in legal education).

152. See ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE AALS DIRECTORY OF LAW TEACHERS* 1354–56 (2007–2008 ed.) (listing more than 260 professors who teach or have taught law and economics).

153. See Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 847 (2009) (“[T]here is no doubt that the Supreme Court has since the mid-1970s swung sharply toward a ‘Chicago [S]chool’ conception of antitrust law, but it is unclear to what extent the swing is due to the influence of the economists and law professors of the Chicago [S]chool rather than to the appointment, beginning in the Nixon Administration, of politically conservative [j]ustices and judges who were naturally inclined to skepticism about aggressive antitrust enforcement. But the work of the Chicago [S]chool did help to give the Supreme Court opinions an intellectual structure that in turn have influenced the lower-court judges.”).

154. See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (“[The Roberts] court’s overall approach to business cases left many in the business community gleeful. ‘It’s our best Supreme Court term ever,’ said Robin S. Conrad, executive vice president of the National Chamber Litigation Center, which handles Supreme Court cases for the United States Chamber of Commerce.”).

155. See William Glaberson, *DAMAGE CONTROL: A special report; Some Plaintiffs Losing Out in Texas’ War on Lawsuits*, N.Y. TIMES, June 7, 1999, at A20 (describing the political activity behind Texas’ legislative and judicial action restricting plaintiffs’ recoveries in suits against business entities).



A. *Homo Economicus Is a Pernicious Model for  
Defining "Person" in Law*

F. S. C. Northrop was a philosopher of the sciences at Yale University for almost forty years.<sup>156</sup> While holding a concurrent position as Sterling Professor of Law at Yale Law School,<sup>157</sup> he undertook to develop a coherent philosophy of American law. At the end of his last course, in 1962, he summarized his academic life's conclusion: *we cannot construct an adequate jurisprudence without first formulating a correct theory of person.*<sup>158</sup> Northrop's own theory of person combined Eastern intuitive understanding of reality with Western science's universal constructs to describe an intuitively caring person who is, at one and the same time, a universally defined legal construct.<sup>159</sup>

One need not buy into Northrop's particular theory of person to get his point. Law that is, for example, based on a fundamentalist religion's theory of person begins with the proposition that an all-knowing god created people and provided them with absolute truths that are accessible through revelation and reason.<sup>160</sup> This theory of person frames the current debate on Supreme Court nominees,<sup>161</sup> and engenders deadly

156. Anthony DePalma, *Prof. F. S. C. Northrop, 98, Dies; Saw Conflict Resolution in Science*, N.Y. TIMES, July 23, 1992, at B9.

157. *Id.*

158. F.S.C. Northrop, Professor, Yale Law School, Course Offered at Yale Law School: The Complexities of Modern Legal and Ethical Relationship (Spring 1962) (author's recollection as a member of that class).

159. F. S. C. NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 275 (1959) ("Any radically empirically known person is not merely his differentiated immediately experienced self, which varies from one person to another and perishes, but also his all-embracing indeterminate field consciousness self. . . . The scientifically known person, like any other scientifically known individual entity, is also a directly unobservable, theoretically known individual which is an instance of an imageless formal and constitutively constructed and procedurally defined determinate universal law.").

160. See Peter Fitzpatrick, *Legal Theology: Law, Modernity and the Sacred*, 32 SEATTLE U. L. REV. 321, 325 (Winter 2009) ("The bestowing god here was, in Vitoria's Thomistic terms, a god who was the source of law, of natural law or the law of nature: '[T]he rules of law are in God as in a thing which is to rule.' That natural law has to be understood in a way infinitely more extensive than the constrained meaning that 'law' often came to take on later. Borrowing from Pagden and Lawrance: 'For Vitoria, as for Aquinas, the law of nature was the efficient cause which underpinned man's relationship with the world about him and governed every practice within human society.'" (quoting FRANCISCO DE VITORIA, *On the Law of War*, in VITORIA: POLITICAL WRITINGS 163 (Anthony Pagden & Jeremy Lawrance eds., Jeremy Lawrance trans., 1991)); Anthony Pagden & Jeremy Lawrance, *Introduction to VITORIA: POLITICAL WRITINGS* xv (Anthony Pagden & Jeremy Lawrance eds., Jeremy Lawrance trans., 1991)).

161. See David D. Kirkpatrick, *Christian Conservatives Will Take Aim at Supreme Court in New Telecast*, N.Y. TIMES, July 15, 2005, at A15 ("Stepping up efforts to rally churchgoers for a Supreme Court confirmation battle, Christian conservatives are organizing a telecast to churches and religious broadcasters denouncing the Supreme Court as hostile to religion and families.").

conflict in the Middle East.<sup>162</sup> A theory of person that is based on Platonic or Kantian faith in universal truths invites an equally dogmatic set of linear and logical propositions that justify their advocates' unwavering particular preferences.<sup>163</sup> Current notions from evolutionary biology,<sup>164</sup> cognitive science,<sup>165</sup> behavioral economics,<sup>166</sup> and even physics,<sup>167</sup> provide a richer and more promising foundation for constructing a model of person for legal and political reasoning than the neoclassical sociopath in survival mode.

Northrop rejected the theory of person that underlies today's neo-classical economics, partly because of its foundation in radical empiricism<sup>168</sup> as expressed in Thomas Hobbes' *Leviathan*<sup>169</sup> and John Locke's *Essay on Human Understanding*.<sup>170</sup> After declaring radical empiricism

162. Andrew Sullivan, *This Is a Religious War*, N.Y. TIMES, Oct. 7, 2001, § 6, at 44–45 (characterizing current conflicts as a war between fundamentalists of all religions against tolerant societies).

163. See Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 232 (2007) ("While it is true that some common notions might be generalized from varied choices of civic order, proponents of public reason offer no defense of their assumption that such distillations could adequately capture and secure the basic conditions necessary for actually bringing about a single determinate view of civic order, much less serving as a framework that would comport with *all* citizens' rational conceptions of public order. As evidenced in common critiques of Plato and Kant, no reason exists to believe that an appropriate account of the determinate conditions of public order can be arrived at by employment of such abstract conceptualizations.").

164. See generally Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 J. CONTEM. HEALTH L. & POL'Y 265 (1994).

165. See generally Symposium, *Cognitive Legal Studies: Categorization and Imagination in the Mind of Law. A Conference in Celebration of the Publication of Steven L. Winter's Book, A Clearing in the Forest: Law, Life, and Mind*, 67 BROOK. L. REV. 941 (2002).

166. See generally Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1495 (1998); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).

167. See generally Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

168. NORTHROP, *supra* note 159, at 283 ("Naïve realism . . . is a self-contradictory theory of conceptual meaning. Furthermore, the radical empiricists themselves . . . have shown unequivocally that if one refers all meaning to factors given with radical immediacy, there is no meaning to the notion of a substantial self or the notion of a Hobbesian materialistic external object. Consequently, the legal positivist's Normative Theory . . . , which combines a radically empirical introspective psychological theory of the meanings of the words 'good' and 'just' with a naïve realistic Hobbesian physical power theory of legal obligation, is a doubly self-contradictory theory.").

169. THOMAS HOBBS, *LEVIATHAN* 25 (The Liberal Arts Press, Inc. 1958) (1660) "[T]here is no conception in a man's mind which has not at first . . . been begotten upon the organs of sense. . . . The cause of sense is the external body or object which presses the organ proper to each sense . . . as in seeing, hearing, and smelling . . . .")

170. JOHN LOCKE, 1 AN ESSAY CONCERNING HUMAN UNDERSTANDING 25 (Pauline Phemister ed., Oxford University Press 2008) (1689) ("All ideas come from

epistemologically unsound,<sup>171</sup> he criticized the Utilitarian base on which economic efficiency stands for committing the naturalistic fallacy of equating the normative standard of “good” with the empirical “is” of personal pleasure.<sup>172</sup> The Hobbesian creature pursues pleasure without self-restraint. So does *Homo economicus*. Hobbes described people antecedent to government as in a constant state of warfare, one against the other.<sup>173</sup> Neoclassical economists postulate a similar warlike struggle by equally endowed combatants to capture scarce resources. Hobbes fantasized that these disagreeable creatures agreed by compact to assign absolute power to a sovereign—the uncommanded commander to restrain them and bring peace and order.<sup>174</sup> This resembles Posner’s assignment of total responsibility to government for regulating market behavior.<sup>175</sup> Hobbes defined “law” as that sovereign’s command, without regard to whether the command (law) was just or unjust.<sup>176</sup> The result-

---

sensation or reflection.—Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished? . . . To this I answer, in one word, from *Experience*. . . . Our Observations, employ’d either about *external sensible Objects*, or about the *internal Operations of our Minds*, perceived and reflected on by ourselves is that which supplies our Understandings with all the materials of thinking.” (emphasis original).

171. NORTHROP, *supra* note 159, at 283.

172. *Id.* at 48 (“This assumption is that values always involve an ‘ought’ which cannot be derived from any ‘is.’ Put positively, this means that the basic norm of a culture cannot be found empirically but must be assumed a priori as the presupposition of any ethical or legal judgment whatever.”). See also *id.* at 53 (“Generalized, this means that the ‘ought’ of a given subject cannot be derived from the ‘is’ of that same subject. But it does not follow from this that the ‘ought’ of positive law cannot be derived from the ‘is’ of something else.”). John Locke also subscribed to the “pleasure or pain” test of good and evil. LOCKE, *supra* note 170, at 137 (“2. Good and evil, what. Things then are Good or Evil, only in reference to Pleasure or Pain. That we call *Good*, which is *apt to cause or increase Pleasure, or diminish Pain in us; or else to procure or preserve us the possession of any other Good or absence of any Evil*. And, on the contrary, we name that *Evil* which is *apt to produce or increase any Pain, or diminish any Pleasure in us: or else to procure us any Evil, or deprive us of any Good*. By Pleasure and Pain, I must be understood to mean of Body or Mind, as they are commonly distinguished; though in truth they be only different Constitutions of the Mind, sometimes occasioned by disorder in the Body, sometimes by Thoughts of the Mind.” (emphasis original)).

173. HOBBS, *supra* note 169, at 105 (“[I]f any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies . . .”). See also *id.* at 106 (“[D]uring the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man.”).

174. *Id.* at 143 (“The attaining to this sovereign power, is by two ways. One [parent-child]; or by war subdues his enemies to his will. . . . The other, is when men agree among themselves, to submit to some man, or assembly of men, voluntarily, on confidence to be protected by him against all others.”).

175. See generally POSNER, A FAILURE OF CAPITALISM, *supra* note 24.

176. HOBBS, *supra* note 169, at 210 (“Civil law is to every subject those rules which the commonwealth has commanded him . . .”). See also *id.* at 271–72 (“By a good law, I mean not a just law: for no law can be unjust. The law is made by the

ing legal system is just as amoral as the economist's science. Hobbes' theory of person is identical to neoclassical economics' theory of person—a sociopath that must be restrained by strict laws. There is no room in either world for civilized self-restraint and community concern.<sup>177</sup> Laws that are based on such a pessimistic view of person are bound to be harsh and punitive, but unconcerned about the welfare of ordinary people who do not play the games of legal and economic war well.

### B. *Legal Formalism Reinforces a Purely Economic Theory of Person*

Law works side-by-side with neoclassical economics to advance the interests of self-interest and extreme individualism. For example, sociopathic economic players thrive on formalist contract law's adoption of the neoclassical fiction that Microsoft and its downloading consumers play as rational bargaining equals on a level field of combat, and that the words preceding the box marked "I accept" really represent considered mutual consent to the lengthy text presented on the screen.<sup>178</sup> Any pretext of true bargain on terms other than (1) consent to download, and (2) agreement to pay the fee, goes beyond legal fiction to become legal fantasy—but it is an important fantasy that empowers Microsoft to set and enforce the terms without any bargaining whatever. The economist is content to justify the outcome as "efficient" since it takes less time to impose it than to engage in true bargaining and competition in the free market will take care of any overreaching.<sup>179</sup> Judges declare the agree-

---

Sovereign power, and all that is done by such power is warranted and owned by every one of the people; and that which every man will have so, no man can say is unjust.").

177. *Id.* at 139 (declaring that the purpose of men in creating government is to place restraint on themselves).

178. See Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOY. L.A. L. REV.* 95, 100 (2006) ("But even though 'Modern Contract Law,' in the narrower sense, represents a significant shift away from the earlier classical vision of Professor Williston and his contemporaries, it retains or even elaborates many aspects of the classical system, which together have serious implications for the law's handling of agreements that result from the application of unequal bargaining power. These would include the following: dominance of the document, dominance of the drafter, and ascendance of the firm.") (citing Charles L. Knapp, *An Offer You Can't Revoke*, 2004 *WIS. L. REV.* 309, 316–17 (2004)).

179. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 41 at 115. ("But there is an innocent explanation for these so called 'contracts of adhesion': the seller is trying to avoid the costs of negotiating and drafting a separate agreement with each purchaser. Those costs . . . are likely to be high for a large company that has many contracts."). See *also id.* at 116 ("[T]he one-sided form contract may be optimal after all. A seller is more likely to be deterred from behaving opportunistically by considerations of reputation than a consumer is."). As a personal note, I have before me a bill for charges by a diagnostic lab, totaling \$1,073.50. My insurance company discounted \$956.10 and paid \$93.94, leaving me with a balance of \$23.46. Economists could produce an analysis of the high charge and the low settlement that operated to my advantage in terms of efficiency. But the fact remains that, either the diagnostic charge was almost 90% excessive, or the reim-

ment a “contract” based on objective manifestation of assent when the subscriber hits the “I accept” box. Fairness is almost always a casualty when it confronts neoclassical economics that is packaged and enforced through legal formalism.<sup>180</sup>

A typical law classroom is a paradigm of amoral combat as students focus on appellate opinions that coldly describe two sociopathic clients arguing over scarce resources. The process, with or without design, socializes students to view dispute resolution as victory or defeat in a battlefield where two rational, self-interested parties are represented by professional champions before a judge who stands ready to apply abstract rules established by legislation or logically implied by precedent. Social policy may be discussed, but discounted as a superficial rhetorical point not to be taken seriously. Justice is not even whispered, lest it provoke classroom laughter and professorial ridicule. Law students are thus socialized into

---

bursement was ten times too little. Whatever the economists’ explanation, if I had been uninsured, I would have been billed for and presumably would have been liable for \$1,073.50. Economists might say the uninsured people as rational, self-interested consumers, would have bargained for a lower fee, but that ignores the fact that patients ordinarily trust the provider to charge a reasonable fee—which probably lies somewhere between \$1,073.50 and the \$117.40 they got from the insurer and my co-pay, and they are victimized by the provider who capitalizes on their docility and ignorance.

180. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 48 (2006) (defining “[c]onceptual formalism” in law as “the idea that legal concepts and principles . . . ha[ve] necessary content and logical interrelations with one another, which could be discerned through reason, constituting a coherent, internally consistent, comprehensive body of law,” and “[r]ule formalism” as “the idea that judges could reason ‘mechanistically’ from this body of law to discover the right answer in every case”). For an example of a judge’s theory of person driving a legal result, see *Erlich v. Menezes*, 981 P.2d 978, 987 (Cal. 1999) (refusing to allow plaintiff damages for emotional distress suffered when a contractor produced an unbelievably defective house). In *Erlich*, Judge Janice Brown noted:

The Erlichs may have hoped to build their dream home and live happily ever after, but there is a reason that tag line belongs only in fairy tales. Building a house may turn out to be a stress-free project; it is much more likely to be the stuff of urban legends—the cause of bankruptcy, marital dissolution, hypertension and fleeting fantasies ranging from homicide to suicide. As Justice Yeagan noted below, ‘No reasonable homeowner can embark on a building project with certainty that the project will be completed to perfection. Indeed, errors are so likely to occur that few if any homeowners would be justified in resting their peace of mind on [its] timely or correct completion . . . .’ The connection between the service sought and the aggravation and distress resulting from incompetence may be somewhat less tenuous than in a malpractice case, but the emotional suffering still derives from an inherently economic concern.

*Id.* (quoting *Erlich v. Menezes*, 71 Cal. Rptr. 2d 137, 145 (Cal. Ct. App. 1998)). This hard-nosed economic attitude qualified Judge Brown for appointment by George W. Bush to the U.S. Court of Appeals for the D.C. Circuit, and for consideration for the U.S. Supreme Court. See Marc Kaufman, *Possible Nominees to the Supreme Court*, THE WASHINGTON POST, July 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100756.html>.

law practice with as much sociopathic promise as if trained for Wall Street.

Law sometimes, but rarely, acknowledges that the Hobbesian field of economic combat is not level. On those few occasions, judges may reject formalist analysis and protect a weaker party from obligations formally incurred in an unequal exchange.<sup>181</sup> A growing judicial conservatism has probably reversed this trend toward fairness and reinstated formalism as the norm.

## VI. COGNITIVE SCIENCE PROVIDES INSIGHT FOR CONSTRUCTING A MORE REALISTIC THEORY OF PERSON

George Lakoff, a cognitive scientist, tells us our brains construct idealized cognitive models—neural schemas—that we use as metaphorical reference points to classify sense data and organize our thoughts.<sup>182</sup> Moreover, Lakoff asserts that we adopt reasonably coherent models of political morality that are based on metaphors of an idealized family, and we consistently refer to those personally held models to guide our personal political decisions.<sup>183</sup> He describes the traditional Republican idealized family model as “strict father”<sup>184</sup> and the traditional Democratic

181. See *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69 (N.J. 1960) (introducing the concept of unconscionability in contract law, which was incorporated in UCC Art. 2, § 2-302); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (same). But see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF CONTRACT LAW* § 3.7 (1972) (defining the issues in ways sympathetic to the sellers, and not even indexing “unconscionability”).

182. GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 4 (2002) (“A conceptual metaphor is a conventional way of conceptualizing one domain of experience in terms of another, often unconsciously. For example, many people may not be aware that we commonly conceptualize morality in terms of financial transactions and accounting. If you do me a big favor, I will be indebted to you, I will owe you one, and I will be concerned about repaying the favor.”). See also *id.* at 162 (“A moral system defines how one views the world, how one comprehends hundreds of events, great and small, every day. . . . Each moral system creates a number of fixed major categories for moral action. Those major categories allow us to classify action instantly into those that are moral and those that are not, with little or no reflection.”).

183. *Id.* at 12 (“Deeply embedded in conservative and liberal politics are different models of the family. Conservatism . . . is based on a Strict Father model, while liberalism is centered around a Nurturant Parent model. These two models of the family give rise to different moral systems and different discourse forms, that is, different choices of words and different modes of reasoning.”).

184. *Id.* at 33 (“At the center of the conservative worldview is a Strict Father Model. This model posits a traditional nuclear family, with the father having primary responsibility for supporting and protecting the family, as well as the authority to set overall policy, to set strict rules for the behavior of children, and to enforce the rules. The mother has the day-to-day responsibility for the care of the house, raising the children, and upholding the father’s authority. Children must respect and obey their parents; by doing so they build character, that is, self-discipline and self-reliance. Love and nurturance are, of course, a vital part of family life but can never outweigh parental author-

model as “nurturant parent.”<sup>185</sup> Strict father morality favors individual interests over communitarian interests and is more likely to lead to purely self-interested behavior.<sup>186</sup> Nurturant parent adherents are likely to value communitarian interests over individual interests and expect individuals to make some personal sacrifice for the benefit of the whole.<sup>187</sup> Middle class morality draws from both models, but a case can be made that middle-class interests are better served by the nurturant parent model.

In Lakoff’s world, as in Northrop’s world, the commonly held mental model of “person” in society provides a point of departure for reasoning about how laws ought to be drafted and applied.<sup>188</sup> We will

---

ity, which is itself an expression of love and nurturance—tough love. Self-discipline, self-reliance, and respect for legitimate authority are the crucial things that children must learn. Once children are mature, they are on their own and must depend on their acquired self-discipline to survive. Their self-reliance gives them authority over their own destinies, and parents are not to meddle in their lives.”).

185. *Id.* at 33–34 (“The liberal worldview centers on a very different ideal of family life, the Nurturant Parent model: Love, empathy, and nurturance are primary, and children become responsible, self-disciplined and self-reliant through being cared for, respected, and caring for others, both in their family and in their community. Support and protection are part of nurturance, and they require strength and courage on the part of parents. The obedience of children comes out of their love and respect for their parents and their community, ‘not out of the fear of punishment. . . . What children need to learn most is empathy for others, the capacity for nurturance, and the maintenance of social ties, which cannot be done without the strength, respect, self-discipline, and self-reliance that comes through being cared for. Raising a child to be fulfilled also requires helping that child develop his or her potential for achievement and enjoyment. That requires respecting the child’s own values and allowing the child to explore the range of ideas and options that the world offers . . .”).

186. *Id.* at 68 (“[T]he world is difficult and people have to be self-disciplined to be able to survive in a difficult world. Rewards and punishments by the parent are thus moral because they help to ensure that the child will be able to survive on its own. Rewards and punishments thus benefit the child, which is why punishment for disobedience is understood as a form of love. . . . Competition is a crucial ingredient in such a moral system. It is through competition that we discover who is moral, that is, who has been properly self-disciplined and therefore deserves success, and who is fit enough to survive and even thrive in a difficult world. . . . Rewards given to those who have not earned them through competition are thus immoral. They violate the entire system. They remove the incentive to become self-disciplined and they remove the need for obedience to authority.”).

187. *Id.* at 112 (“What does the world have to be like if people like this are to develop and thrive? The world must be as nurturant as possible and respond positively to nurturance. It must be a world that encourages people to develop their potential and provides help when necessary. And correspondingly, it must be a place where those who are helped feel a responsibility to help others and carry out that responsibility. It must be a world governed maximally by empathy, where the weak who need help get it from the strong. It must be a world governed as much as possible by bonds of affection, respect, and interdependence. Finally, it must be a world in which the nurturance provided to us by the natural environment is recognized, appreciated, and returned. In short, the natural world must be sustained, and we must do everything we can to sustain it.”).

188. See Frank, *supra* note 118, at 55 (“[T]he narrow self-interest model, which encourages us to expect the worst in others, may bring out the worst in us as well.”).

believe information that is consistent with the model, and we will reject information that is not consistent. If, for example, we believe that people are rational and purely self-interested, we will enact rules of engagement for warlike bargaining equals, and we will reject evidence that the unseen hand does not work as prophesied. We will refuse to believe that a large number of people cannot compete as equals against industry giants, and we will blame poverty on moral shortcoming. In short, we will be neo-classical economists and formalist lawyers.

In contract cases, judges will apply formalist rules and try to glean an objectivist “intent” from complex, unilaterally drafted writings without considering whether the apparent agreement was consensual or coerced, fair or overbearing. They will interpret softening doctrines (such as unconscionability) narrowly because they honestly believe the free market works fairly, and that rational, self-interested people should be held to their economic choices, which judges treat as freely made. Tort law will continue to pretend that financial responsibility is allocated on the basis of personal fault and that potential liability discourages bad behavior. Assuming the truth of the fictional construct encourages law to ignore the reality that tort practice has become a Hobbesian battle over insurance awards and lawyers’ fees, punctuated by delay to maximize the time value of money and coerce settlement, and decided by raw power of plaintiffs’ lawyers and insurance companies. Criminal law continues to assume that every actor is equally intelligent, culpable, and capable of making moral and legal choices in a world where jails take the place of mental health facilities, and prevention is too easily replaced by punishment. All of these assumptions operate to the disadvantage of the less powerful, mostly middle-class members of society.

If, on the other hand, our theory of person assumes that all people, including economic players, are indivisibly linked with their community in an empathic relationship of mutual support, we will welcome the positive contributions of economic actors, but reject their sociopathic deprivations. Most judges inject personal values into their decisions, but they pretend that precedent and rules left them no choice. If simple justice were legitimated as a decisive factor in decisions, judges would not have to hide behind the façade of objectivity. Even between purely economic actors, some contract relationships cry out for judicial intervention.<sup>189</sup> If, instead of crabbed application of “unconscionability,” judges routinely required basic “fairness” in strong/weak adhesion contracts, trust (which, remember, is a good thing) might be protected from sociopathic behavior (which is a bad thing). Efficiency might be better served if parties trusted judges to make reasonable decisions after events play out instead of drafting hundreds of pages of contract text to anticipate and assign all risks by

---

189. See Stout, *supra* note 4, at 162 (“[U]niversal moral rules generally have to do with helping, or at least not harming, other people in one’s in-group.”).



formalistic agreement. Accident and malpractice losses might better be covered by public health care and meaningful insurance against lost earnings. A large percent of prison inhabitants might be removed to mental health facilities so those with brain disorders who cannot follow the rules can be isolated humanely from society and from its truly bad actors.

Sociopathic economic actors who are deprived of a formalistic bargaining advantage in a contract may complain that the judge abandoned the “rule of law,” but at least they should not be surprised. Most of them came from middle-class backgrounds, with strong grounding in morality and integrity. Their pre-university, pre-law school brain contained a neural understanding of fundamental community morality that is still accessible by modest contemplation. Courts will seldom have occasion to apply the fairness requirement in “sociopath dealing with sociopath” contracts, but the possibility should not be totally dismissed.<sup>190</sup>

#### VII. THE HONEST SERVICES LAW OFFERS A CONTROVERSIAL, BUT APPROPRIATE, RESPONSE TO BAD BUSINESS BEHAVIOR

In 1872, Congress noted that unscrupulous operators were using the U. S. mails to defraud distant customers<sup>191</sup> and adopted Legislation making a scheme or artifice to commit mail fraud a federal crime.<sup>192</sup> Over time, the law’s reach extended to a large set of bad business behavior and of defaults by government officials.<sup>193</sup> In 1987, the expansion

---

190. See, e.g., *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) (excusing Alcoa from performing a long-term aluminum supply contract on ground that both parties mistakenly thought price index term would sufficiently protect Alcoa).

191. See *McNally v. United States*, 483 U.S. 350, 356 (1987) (“As first enacted in 1872 . . . [18 U.S.C. § 1341] contained a general proscription against using the mails to initiate correspondence in furtherance of ‘any scheme or artifice to defraud.’ The sponsor of the recodification stated . . . that measures were needed ‘to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people in the country.’” (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth))).

192. 18 U.S.C. § 1341 (2006). See *McNally*, 483 U.S. at 352 (paraphrasing the statute: “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used], shall be fined not more than \$1,000 or imprisoned not more than five years, or both.”).

193. See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1549–50 (2008) (“The federal mail fraud statute, enacted in 1889, might have been interpreted as a measure exclusively for punishing those who prey upon victims with mail-based scams. Early in the statute’s history, however, the Supreme Court rejected this limited reading and sent the statute off on a broadening course. The Court’s only significant effort to limit the statute’s scope—a 1987 ruling that rejected the idea that a fraud can consist of an effort to deprive a person of her ‘intangible right’ to honest services of the defendant—was quickly reversed by Congress.”).

temporarily halted when the Supreme Court held the criminal statute did not cover schemes to defraud citizens of their intangible rights to honest and impartial government.<sup>194</sup> The Court declared that “[i]f Congress desires to go further, it must speak more clearly than it has.”<sup>195</sup> Congress accepted the invitation and immediately redefined “scheme or artifice to defraud” to include depriving another of “the intangible right of honest services.”<sup>196</sup> The “honest services” provisions were recently employed to convict, among others, Enron’s Jeffrey Skilling, whose false statements were designed to benefit, not himself directly, but his company.<sup>197</sup> The “honest services” law was also used to convict a corporate official, Conrad Black, who misused \$5.5 million in corporate funds to buy a valueless covenant not to compete from an associate.<sup>198</sup> His lawyer, who drafted the documents but received no part of the misspent money, was also convicted.<sup>199</sup>

As would be expected, claims are made that the lack of precise definition of the “honest services” crime deprives those accused of procedural due process. In the statute’s defense stands the fact that some behaviors that are obvious crimes cannot be so precisely defined in advance of their occurrence. In this respect, it reinforces a broad commitment to protect the community and individuals from destructive behavior, though at some admitted cost to due process.

The Supreme Court will review both Skilling’s<sup>200</sup> and Black’s<sup>201</sup> convictions. Justice Scalia has already signaled that “[w]ithout some

194. *McNally*, 483 U.S. at 355 (“In affirming the substantive mail fraud conviction [for awarding state insurance contracts to entities in which the official had an interest] the [Court of Appeal] relied on a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government.”).

195. *Id.* at 360.

196. 18 U.S.C. § 1346 (2006).

197. *United States v. Skilling*, 554 F.3d 529, 545 (5th Cir. 2009) (“Skilling . . . contends that his conduct did not breach that (honest services) duty . . . because his fraud was in the corporate interest and therefore was not self-dealing.”). Moreover, “Skilling’s conviction must stand. First, Enron created a goal of meeting certain earnings projections. Second, Enron aligned its interests with Skilling’s personal interests, e.g., through his compensation structure, leading Skilling to undertake fraudulent means to achieve the goal.” *Id.* at 556.

198. *United States v. Conrad M. Black*, 530 F.3d 596 (7th Cir. 2008).

199. *Id.* at 605–06 (“Defendant Kipnis . . . complains that he should have been acquitted because he . . . had nothing to gain from the fraud. The last point has no merit. . . . It was Kipnis who prepared the agreement that purported to grant covenants not to compete in exchange for \$5.5 million. He knew that the covenants made no sense. . . . The jury was entitled to infer that Kipnis suspected a fraud, which he facilitated by his preparation of the agreement, but asked no questions lest his suspicion rise to a certainty. He buried his head in the sand.”).

200. *Skilling*, cert. granted, 130 S. Ct. 393 (2009). *But see* Jess Bravin, *Court Backs Skilling Appeal; Justices Narrow Reach of Fraud Statute in Several High-Profile Convictions*, WALL ST. J., June 25, 2010, at A1.

coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."<sup>202</sup>

Justice Scalia may be right so far as he goes. In many respects, the open-ended and undefined admonition against bad behavior runs counter to traditional criminal law theory.<sup>203</sup> But that does not mean criminality is inappropriate. Within its area of application, the broad admonition warns both business and government actors that they should behave by the standards set by a moral community.<sup>204</sup> Judge Posner notwithstanding, the public deserves protection from intentional or reckless behavior that severely damages or destroys a corporation, betrays government trust, or disrupts the entire economic or legal system. A broad definition may provide deterrence that is more effective than narrowly proscriptions of behavior. It is no great loss if an occasional rational, sociopathic business operative goes to jail for reckless violation of ordinary norms of honesty and integrity, even if the law did not spell out the precise parameters of criminality in advance.

A divergence between two theories of person lies at the heart of the controversy. If the middle-class theory of person is adopted, the defendants are guilty of having damaged the community by their bad behavior, and punishment is appropriate. If, on the other hand, the neoclassical theory of selfish and individualistic person is applied, then the Posnerian and Scalian observations are apt. From a middle-class perspective, it is legitimate to hold business and government operatives criminally liable for inflicting intentional or careless injury on vital community interests. Contrary to Judge Posner's position, there is more reason to blame a self-seeking businessman for destroying the economic system than to blame a lion for eating a zebra.

## VIII. CONCLUDING THOUGHTS

Bad behavior is bad behavior in a Hobbesian world as well as in a postmodern world, and it should not be dismissed as rational and acceptable conduct. When it operates to the disadvantage of the greater community, particularly those people who depend on societal structure for

---

201. *Black, cert. granted*, 129 S. Ct. 2379 (2009). *But see* Bravin, *supra* note 200.

202. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

203. *See* Amicus Curiae Brief of National Association of Criminal Defense Lawyers in Support of Petition for a Writ of Certiorari, *Skilling v. United States*, 130 S. Ct. 393 (2009) (No. 08-1394), 2009 WL 1931228.

204. Business interests have taken account of the message. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *Skilling v. United States*, 130 S. Ct. 393 (2009), 2009 WL 4759118.

support, it must be curbed by popular sentiment as well as law. Corporations have neither souls nor conscience. Corporations can, however, be held to the same behavior standards as people, though they can't be put in jail for violations. Real humans sit behind the corporate veil and tell the corporation what to do. Those executives, directors, and other players can be held responsible for their own acts, and when appropriate they can be tried for crimes committed by their corporation. Is it not manslaughter (or murder) if a corporate executive knowingly puts salmonella-laced peanut butter into the consumer market through the instrumentality of a corporation?<sup>205</sup> Isn't that like shooting into a crowd?

The current environmental emphasis on sustainability provides a useful metaphor: market participants should act in a way that sustains their industry and the economy in which it operates, not destroy it. The Golden Rule is not a bad heuristic.<sup>206</sup> The publicity rule is another—would I like the full details of my conduct spread on the front page of the *New York Times*?<sup>207</sup> The less powerful members of society cannot make treaties and influence legislation by lobbying. They must depend to a large extent on the honesty and integrity of rich and powerful players to act in a way that respects their interests and provides a stable economic and governmental environment in which they can realize their personal ambitions.

The American middle class encompasses a broad range of talent, wealth, and disability. It is the source of the nation's strength, but it cannot thrive in a Hobbesian world. Imagine for a moment the legal/social product of analysis that begins with a theory of person postulating that "people are equally endowed, rational, purely self-interested, unconnected individuals who compete for goods in the free market." If there is money to be made by an otherwise legal scheme that destroys the entire banking system, what would a rational sociopath do? Would the answer be different if the beginning premise were "People are moral beings who

---

205. See Miriam Falco, *FDA: Peanut plant knew product was tainted with salmonella*, Cnn.com, Jan. 28, 2009, available at <http://www.cnn.com/2009/HEALTH/01/28/salmonella.outbreak/index.html>. Peanut butter joins cigarettes as examples of knowing, conscious homicide from defective products. Murder may be a rational strategy in some cases. See also David Kocieniewski, *Lawyer's Ways Spelled Murder, U.S. is Charging*, N.Y. TIMES, May 21, 2009, at A1 (reporting allegations that a defense lawyer arranged killing of prosecution witnesses.).

206. Contrast this notion with "tit-for-tat," described as the best strategy for winning a game. SALVATORE, *supra* note 49, at 399. ("Do to your opponent what he or she has just done to you.")

207. See, e.g., Andrew Martin and Michelle Maynard, *For Bankers, Saying 'Sorry' Has Its Perils*, N.Y. TIMES, January 12, 2010, at A1 ("American culture does not put a premium on apology," said Michael Useem, professor of management at the Wharton School at the University of Pennsylvania. "The level of anger in this public in general is extremely high against those who led Wall Street into the abyss, in part because they never stepped forward to apologize for the mess they made.").

are members of, and who are largely defined by, mutually supportive communities?”

For the middle class to thrive, those who exercise economic and political power must care about the effects of their actions on the total community. Hobbesian creatures, *Homo economici*, and sociopaths really don't care.