

## The Farcical Samaritan's Dilemma

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## THE FARCICAL SAMARITAN'S DILEMMA

andré douglas pond cummings\*

### INTRODUCTION

*“[T]he hypothesis is that modern man has become incapable of making the choices that are required to prevent his exploitation by predators of his own species[.]”<sup>1</sup>*

This article explores one of the foundational pillar theories of Law and Economics and specifically Public Choice Theory<sup>2</sup> as espoused by Nobel Laureate James M. Buchanan: the “Samaritan’s Dilemma.” Using the Biblical parable of the Good Samaritan, Buchanan imagines a “dilemma” faced by the Good Samaritan when encountering a beaten and bloodied man left to die on the road to

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<sup>1</sup> JAMES BUCHANAN, *THE SAMARITAN’S DILEMMA*, IN *ALTRUISM, MORALITY, AND ECONOMIC THEORY* 74 (Edmund S. Phelps ed., 1975) (emphasis added).

<sup>2</sup> See William A. Niskanen, *Public Choice Economics*, LIBERTARIANISM.ORG (Aug. 15, 2008), <https://www.libertarianism.org/encyclopedia/public-choice-economics> (defining public choice as “that area of economics devoted to the study of politics using the methods supplied by economic science. As in other applications of economics, a representative individual is the basic building block of public choice analysis—in this case, a representative voter, politician, bureaucrat, regulator, or lobbyist. The individual is assumed to face a choice among alternatives, to have a preference among those alternatives, and to choose the alternative that is most consistent with his (or her) preference. Thus, the objective of public choice analysis is to explain the aggregate outcomes of individuals making choices in specific political settings.”).

Jericho.<sup>3</sup> Using Game Theory, Buchanan constructs a moral quandary that the man from Samaria must necessarily resolve within himself in deciding ultimately whether to lend aid to the beaten man left to die.<sup>4</sup>

Law and Economics, born in the twentieth century, theoretically establishes “efficiency” as its baseline.<sup>5</sup> In evaluating the law from this efficiency perspective, neoclassical Law and Economics economists’ primary hypothesis is that individuals are rational and respond to incentives in a rational fashion.<sup>6</sup> Law and Economics is built on the fundamental belief that markets, particularly free markets, are “more efficient than courts.”<sup>7</sup> Undergirding this theorizing is the presumption that incentives are the primary motivators of individual behavior; how individuals respond to incentives provides a laser-like focus for Law and Economics.<sup>8</sup> If human actors are “rational and respond to incentives” in a rational manner, then how rationality is defined becomes important for Law and Economics hypothesizing.<sup>9</sup> Bottom line rationality for the Law and Economics economist is that individuals are motivated by self-interest and that the rational reaction to an incentive will be to act in a self-interested, wealth-maximizing way.<sup>10</sup> Put simply, a Law and Economics economist would consider a legal situation efficient where rights are allocated “to the party who is willing to pay the most for [them].”<sup>11</sup> Conversely, when an incentive generates an action that results in a penalty, individuals will perform that action less to avoid the penalty.<sup>12</sup>

Law and Economics employs Game Theory to mathematically predict how individuals will react in given scenarios based on incentives provided and rationalities defined.<sup>13</sup> In determining

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<sup>3</sup> See BUCHANAN, *supra* note 1, at 75–76.

<sup>4</sup> See *id.* at 76.

<sup>5</sup> See Paul H. Rubin, *Law and Economics*, THE LIBRARY OF ECON & LIBERTY (Nov. 20, 2019), <https://www.econlib.org/library/Enc/LawandEconomics.html>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *id.* (discussing how human beings respond to incentives and how Law and Economics measures these responses).

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Avinash Dixit & Barry Nalebuff, *Game Theory*, THE LIBRARY OF ECON. & LIBERTY, <https://www.econlib.org/library/Enc/GameTheory.html> (last visited Nov. 7, 2021) (“Each player should figure out how the other players will respond to his current move, how

mathematically and logically actions that “players” should take to secure the best outcomes for themselves in a wide array of “games,” Game Theory considers itself the “science of strategy.”<sup>14</sup> Perhaps the greatest overriding consideration when employing Game Theory is the interdependence of all choices employed by all players/participants.<sup>15</sup> Or, stated another way, the ultimate outcome for each participant is dependent on the choices or strategies of all participants, requiring players to think about their own strategies while considering the strategies of all other players in coming to their own conclusions.<sup>16</sup> Working through strategies to likely predicted outcomes, based on rational reaction to incentives, is the game or puzzle in Game Theory.

With that brief introduction to Law and Economics and Game Theory, this article begins by reconstructing the parable of the Good Samaritan. Next, the article will provide a fundamental description of the Samaritan’s Dilemma, as espoused by Public Choice economist James Buchanan, explaining how Buchanan’s theory turns the Christian parable upon its head. Next, the article will describe the reasons that the Samaritan’s Dilemma is a farce – a theory best left conceptualized rather than instrumentalized. In describing the farcical Samaritan’s Dilemma, the article will focus on racial capitalism and its historical evolution as a means of understanding the hollow siren’s call of this concocted “Dilemma.” Finally, the article will introduce the reasons that the Samaritan’s Dilemma together with much of law and economics theorizing is intellectually bankrupt. Thereafter, the article will call for a deeper intellectual critique of Law and Economics than has been marshaled to date. First then, the parable of the Good Samaritan will be summarized and interpreted.

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he will respond in turn, and so on. The player anticipates where his initial decision will ultimately lead, and uses this information to calculate his current best choice.”).

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

## I. THE GOOD SAMARITAN

The famed New Testament parable of the Good Samaritan is found in the book of Luke.<sup>17</sup> Therein, Jesus Christ, while responding to a lawyer's question as to how one might attain eternal life, queries the lawyer "[w]hat is written in the law?"<sup>18</sup> The lawyer responds "Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbor as thyself."<sup>19</sup> Jesus, recognizing the lawyer's attempt to tempt him, answers "[T]his do, and thou shalt live."<sup>20</sup> In response, the lawyer inquires "And who is my neighbor?"<sup>21</sup> At this point, Jesus narrates the tale of a Judean man venturing from Jerusalem to Jericho who is fallen upon by thieves that badly beat him, rob him, and leave him bloodied and near death.<sup>22</sup> As the victim lays bleeding and dying, several fellow travelers wander by including a priest and a Levite, each beholding the bloodied man and eschewing the opportunity to provide assistance by passing "on the other side."<sup>23</sup> Thereafter, Jesus describes a "Samaritan"<sup>24</sup> happening by that sees the man lying near death and who takes

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<sup>17</sup> See generally Luke 10 (King James).

<sup>18</sup> Luke 10:26 (King James).

<sup>19</sup> Luke 10:27 (King James).

<sup>20</sup> Luke 10:28 (King James).

<sup>21</sup> Luke 10:29 (King James).

<sup>22</sup> See Luke 10:30–10:36 (King James).

<sup>23</sup> Luke 10:32 (King James).

<sup>24</sup> Luke 10:33 (King James). A commonly held view at the time of Christ was that great antipathy existed between the Judeans and the Samaritans. See RICHARD A. HORSLEY, JESUS AND THE POLITICS OF ROMAN PALESTINE 61–62 (Univ. of S.C. Press 2014) (2013). The imperial violence of the Roman Empire often stoked the flames of religious and other differences into full-fledged "fratricidal violence" amongst and between the occupied peoples. *Id.* at 61. "The best-known case in Roman Palestine is the conflict between Judeans and Samaritans[] . . . [and the] parable of 'the Good Samaritan' illustrates the underlying hostility between these two groups." *Id.* The two groups' divergent views as to Jewish tradition and places of worship created a constant source of deep tension, promising to eventually explode due to the omnipresent imperial subjugation of their Holy Land. See *id.* at 61–62. Any time these hostilities erupted into violence, the imperial crackdown was deadly, which furthered the cycle of blaming the associated oppressed group rather than the Empire, which continued to fan the flames of violence. See *id.* The provocation of this parable towards its Judean audience cannot be understated: a "low-life" Samaritan is held up as a "morally exemplary." See TERRY EAGLETON, REASON, FAITH AND REVOLUTION: REFLECTIONS ON THE GOD DEBATE 29 (2009); see also TERRY EAGLETON, RADICAL SACRIFICE 24 (2018). On the other hand, Judean religious leaders are painted as hypocritical and, perhaps worse, completely apathetic toward their fellow's suffering. See JENS SCHRÖTER, JESUS OF NAZARETH: JEW FROM GALILEE, SAVIOR OF THE WORLD 60 (Wayne Coppins trans., 2014).

“compassion on him,” stopping to personally tend to the wounded man’s injuries.<sup>25</sup> The Samaritan, after binding the injured man’s wounds, places him upon his “own beast” and takes the badly beaten man “to an inn” to take “care of him.”<sup>26</sup> Before departing, the Good Samaritan pays the innkeeper to care for this distressed man, with a promise to deliver additional payment in a future visit if such caretaking exceeds the monies provided.<sup>27</sup>

After delivering this parable, Jesus asks the inquisitive lawyer “Which now of these three . . . was neighbour unto him that fell among the thieves?”<sup>28</sup> The humbled lawyer responds, “He that shewed mercy on him.”<sup>29</sup> Jesus concludes his lesson by stating to the lawyer and all of his followers, “Go, and do thou likewise.”<sup>30</sup>

In the parable of the Good Samaritan, Jesus Christ delivers a message of mercy and compassion. Extrapolating from this message, followers of Christ are to assist those less fortunate than themselves by giving of their gifts and talents to those who suffer tragedy and hardship in their lives. Most biblical scholars agree that the Good Samaritan is cemented in Christian lore as a lesson on how to treat fellow human beings with compassion, mercy, and grace.<sup>31</sup>

Yet, in a surprising twist, leading libertarian and Public Choice scholar James Buchanan finds a nettling dilemma in this parable. Perhaps unbeknownst to even Jesus himself, apparently the Good Samaritan was faced with a very difficult decision when encountering a fellow traveler who had been beaten down and bloodied.

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<sup>25</sup> See *Luke* 10:33 (King James).

<sup>26</sup> *Luke* 10:34 (King James).

<sup>27</sup> See *Luke* 10:35 (King James).

<sup>28</sup> *Luke* 10:36 (King James).

<sup>29</sup> *Luke* 10:37 (King James).

<sup>30</sup> *Id.*

<sup>31</sup> See generally Dr. Martin Luther King, Jr., *I’ve Been to the Mountaintop*, in *THE RADICAL KING* 271–73 (Cornel West, ed., 2015); see also N.T. WRIGHT, *JESUS AND THE VICTORY OF GOD* 127 (1996); *RADICAL SACRIFICE*, *supra* note 24, at 24; see also SCHRÖTER, *supra* note 24, at 60; Barbara Cassin, Emily Apter, Jacques Lezra, Michael Wood eds., *Neighbor*, in *DICTIONARY OF UNTRANSLATABLES: A PHILOSOPHICAL LEXICON* (2014); Billy Graham, *A Good Samaritan*, YOUTUBE (July 22, 2016) <https://www.youtube.com/watch?v=xUKdGeKweGk> (demonstrating that the story of the Good Samaritan illustrates an individual’s display of grace, love, and mercy); PAMELA COOPER-WHITE, *THE CRY OF TAMAR: VIOLENCE AGAINST WOMEN AND THE CHURCH’S RESPONSE* 210 (2012) (“The parable of the Good Samaritan, which teaches the importance of caring—even extravagantly—for a victim of violence, surely stands beside the parable of the lost sheep in importance.”).

## II. THE SAMARITAN'S DILEMMA

Turning Jesus Christ's parable of compassion upside-down, James Buchanan describes the "difficult" decision the Good Samaritan must make when deciding whether to bestow charity upon the beaten and bloodied victim: If I give charity to this unfortunate, will I engender in him a desire to become an exploiter, a taker, not willing to work for life's necessities?<sup>32</sup> A parasite. In fact, to begin his Game Theory hypothesis into the Good Samaritan, Buchanan within his game names the Good Samaritan "Samaritan," and tellingly names the beaten and near-death victim as "parasite."<sup>33</sup> Buchanan describes this dilemma by hypothesizing, as emphasized in this paper's opening quote, that the victimized traveler on Jericho's road will receive the beneficence and compassion shown him and thereafter become a "predator of his own species."<sup>34</sup> Such predator being one that the Good Samaritan must "prevent his exploitation by."<sup>35</sup>

With this interpretation, Buchanan effectively casts the unfortunate Judean traveler, upon whom great hardship has fallen, as the exploiter, predator, taker, and parasite, thereby casting the Good Samaritan into the role of true victim in this game outcome.<sup>36</sup> The Samaritan's Dilemma, then, grows darker still in Buchanan's mind.

The problem with America, according to Buchanan, and the root of its social problems (which were quite prevalent in the 1960s and 1970s), was that individuals are simply too compassionate.<sup>37</sup> As Samaritans, it hurts us to watch people suffer; we cannot abide the pain of others, so we help.<sup>38</sup> As a result, parasites exploit us and ultimately drain and weaken society by siphoning wealth and

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<sup>32</sup> See BUCHANAN, *supra* note 1, at 76.

<sup>33</sup> *Id.* at 75.

<sup>34</sup> *Id.* at 74.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 76; see also DEBORAH STONE, THE SAMARITAN'S DILEMMA: SHOULD GOVERNMENT HELP YOUR NEIGHBOR? 77-79 (2008).

<sup>37</sup> See BUCHANAN, *supra* note 1, at 71, 74.

<sup>38</sup> See STONE, *supra* note 36, at 79.

prosperity from the wealthy and propertied.<sup>39</sup> From this fiction, Buchanan proposes government policies, including welfare policies that thwart this “human weakness of natural compassion.”<sup>40</sup> A dim view of the victimized Judean indeed.

Further, in propounding his Dilemma, Buchanan also violates one of the foundational tenants of Game Theory itself, which is “[w]hen thinking about how others will respond, he must put himself in their shoes and think as they would; he should not impose his own reasoning on them.”<sup>41</sup> Assumedly, Buchanan had never suffered as the Judean had, was never beaten nor bloodied, never truly discriminated against, never unsure of where the next meal would come from, and yet, rather than place himself in the victim’s shoes, he imposed his own reasoning upon the victim that he named an exploiter. Buchanan’s bleak view of those that need assistance seems to be more about Buchanan and his particular foibles and less about the victimized.

### III. THE FARCE OF THE SAMARITAN’S DILEMMA

To Jesus, the bruised and broken stranger lying bloodied and nearly dead on the dangerous road to Jericho represents a less fortunate, even tragic victim and an individual worthy of charity and benevolence. The parable teaches that Christians are to show compassion to those upon whom tragedy has fallen. Further, Christians are to “impart of their substance” in caretaking those less fortunate.<sup>42</sup> Indeed, Jesus likely intended even deeper compassion in this teaching.<sup>43</sup> Buchanan’s Dilemma turns this parable

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<sup>39</sup> See BUCHANAN, *supra* note 1, at 75; see also STONE, *supra* note 36, at 80.

<sup>40</sup> STONE, *supra* note 36, at 80.

<sup>41</sup> Dixit & Nalebuff, *supra* note 13.

<sup>42</sup> *Mosiah* 4:26 (Book of Mormon) (“I would that ye should impart of your substance to the poor, every man according to that which he hath, such as feeding the hungry, clothing the naked, visiting the sick, and administering to their relief, both spiritually and temporally, according to their wants.”). See *Matthew* 25:40 (King James) (“And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.”); see also *Luke* 3:11 (King James) (“He answereth and saith unto them, He that hath two coats, let him impart to him that hath none; and he that hath meat, let him do likewise.”).

<sup>43</sup> See WRIGHT, *supra* note 31, at 305–06. The parable of the Good Samaritan acts to thoroughly redefine its audience’s anticipated category of “neighbour” and widen that definition into uncomfortable realms. *Luke* 10:25–37 (King James). To its initial audience, the character of the Man from Samaria was synonymous with the Other, the Black Hat, the

upon its head, instead casting the bloodied and beaten victim as an exploiter, or in Buchanan's own words, a "parasite."<sup>44</sup> The farce of the Samaritan's Dilemma is that Buchanan, and those who venerate him, cast all of those upon whom hardship falls as "predators," exploiters, or even "parasite[s][,]" thus recasting those who give charity, or are pressed to give to the poor through taxes, as the true "victims" in this exchange of precious resources.<sup>45</sup> The propertied, wealthy, and fortunate are thusly victimized by the bloodied and beaten because rather than rise up, bind his own wounds, and find his own way by crawling to the innkeeper, and, after he is healed, work to pay off the caretaking debt to the keeper of the inn, the victim, in receiving charity from the Samaritan, has become nothing more than one who exploits the wealthy. The Good Samaritan has done little else than teach the beaten man how to become a predatory exploiter of the privileged and propertied, one who is ready to ask for a second, third, and so-on handout. Buchanan declares as much: "We may be simply too compassionate for our own well-being or for that of an orderly and productive . . . society[,]"<sup>46</sup> and "[u]nless an equilibrium is established which imposes self-selected limits on [S]amaritan-like behavior, the rush toward species destruction may accelerate rather than diminish."<sup>47</sup>

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perennial villain in all such stories. See *Luke* 10:30–32 (King James) (discussing how a priest and a Levite saw a beaten man and did not help, so one may assume the Samaritan, who was mentioned next, also did not help the beaten man). The fact that this particular Samaritan not only does something good and compassionate by caring for a dying man, but that the dying man was an individual who the audience would have identified most strongly with, and that others from the in-group (the Levite and the priest) are cast in such negative relief against the actions of the despised Other, would have shocked its audiences. See *Luke* 10:31–34 (Kings James). In this way, the parable does not so much transgress social and political boundaries between who is in and who is out, but rather says: there are no inherent or God-made divisions or boundaries between people, only man-made divisions, and therefore we are all "neighbors." *Luke* 10:25–37 (King James). In the words of the apostle Paul, "There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye all are one in Christ Jesus." *Galatians*, 3:28 (King James).

<sup>44</sup> See BUCHANAN, *supra* note 1, at 75.

<sup>45</sup> See STONE, *supra* note 36, at 78.

<sup>46</sup> BUCHANAN, *supra* note 1, at 71.

<sup>47</sup> *Id.* at 84.

The true dilemma, then, for the Samaritan in the world of libertarianism and Law & Economics, is to decide whether to rebuff the opportunity to assist the less fortunate and downtrodden because such action fills the community and world with parasites, takers, and exploiters who will only subsist with a handout and desire only to live off of the largesse of the victimized property owner.

In contemplating this Samaritan's Dilemma as dreamed up by Buchanan, one cannot help but wonder whether Buchanan ever got out and mingled with those who were less fortunate than he. Ironically, Buchanan cast himself throughout his career as a humble educator, one that was not privileged and not elite.<sup>48</sup> The farce of this Samaritan's Dilemma is readily identifiable in numerous contexts.

#### A. *Gaming in a Vacuum*

Perhaps the most dangerous oversight of this conjured Dilemma is its failure to acknowledge the fundamental truth that many of those modern beaten and bloodied human beings that fall victim to the world's thieves are rather victims of discrimination, race hatred, and governmental policies that situate these humans in broken life circumstances.<sup>49</sup> Game Theory, the Samaritan's Dilemma, and neoclassical Law and Economics, in focusing on efficiency, incentives, and rational decision-making, place all players on an equal plane devoid of backgrounds, life circumstances, and hardships—many of which are based on discrimination and lack of opportunity.<sup>50</sup> This vacuum requires that rational choice is grounded in “self-interested wealth maximization in a world of subjective

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<sup>48</sup> See NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICAN* xvi (2017).

<sup>49</sup> See generally Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 100 (2009) (describing neoclassical Law and Economics “as potentially dangerous if its postulates are taken as truths”).

<sup>50</sup> See generally ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* 91–92 (2015); David Kairys, *Introduction*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11 (David Kairys ed., 1998); PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 43 (1997).

value[.]”<sup>51</sup> In applying Game Theory in a vacuum, “there is no need to leave one’s desk to venture into the world and investigate. Neoclassical Law and Economics uses formal logic . . . and goal-positing . . . to develop optimal rules (or a lack of rules) in the name of rational, self-correcting, and self-enforcing private orders.”<sup>52</sup>

The problem of course, in stripping down “players” to colorless, expressionless pawns to be imbued with incentives and rational choices that focus singularly on wealth maximization, is that this unreal and unknowable postulation is then extrapolated by Law and Economics economists to explain “much of the behavior that we observe in the modern world.”<sup>53</sup> The victim that becomes a parasite in the Samaritan’s Dilemma is merely “a parasite by assumption.”<sup>54</sup> This simple and uninvestigated assumption is then used to explain worldwide human behavior.

### B. Racial Capitalism

The difficulty in concocting economic theory in a vacuum, sans empirical proof, is that it necessarily ignores this vacuum approach’s most formidable foe: history. Capitalism possesses a long, storied, and oftentimes sordid history. Indeed, capitalism’s sixteenth and seventeenth-century origin story is often clouded and mystified when recounted, typically favoring expansive generalizations describing “innovations,” “markets,” “invention,” “credit,” “trade,” money systems, interchangeable parts, steam power, and the like.<sup>55</sup> What is often ignored historically, and is brazenly disregarded in the farcical Samaritan’s Dilemma, is the millions of

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<sup>51</sup> Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 48 (David Kairys ed., 1998). See Nourse & Shaffer, *supra* note 49, at 111 (“Neoclassical law and economics proceeded by positing one or more assumptions (such as rational individual behavior and self-correcting markets) and a single principle (efficiency) and then reasoning deductively to reach specific legal prescriptions.”).

<sup>52</sup> Nourse & Shaffer, *supra* note 49, at 112.

<sup>53</sup> BUCHANAN, *supra* note 1, at 74 (“[Buchanan is] attempting to develop a hypothesis that is generalizable to much of the behavior that we observe in the modern world”).

<sup>54</sup> STONE, *supra* note 36, at 79.

<sup>55</sup> See generally DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 22–28 (2d ed. 2012); see also ELLEN MEIKSINS WOOD, *THE ORIGIN OF CAPITALISM: A LONGER VIEW* 11–33 (Verso 3d ed. 2017) (discussing differing theories on the emergence of capitalism).

lives that were shattered in service of innovation, markets, invention, trade, interchangeable parts, and the like, as the transition from feudalism to early capitalism literally crushed millions of human lives, with many of those effects still felt and relevant today.<sup>56</sup>

Scholars of late, in attempting to colorize the sanitized version of capitalism's history, have taken to referring to this shattering of human life as "racial capitalism."<sup>57</sup> Racial capitalism cuts through the clouded mystification of capitalism's evolution story by linking the story to its most indispensable component: exploitation. Particularly, racial capitalism highlights the human exploitation of those deemed most exploitable—the non-white.<sup>58</sup> To founding theorist Cedric Robinson, racial capitalism necessarily implicates the fact that "[t]he development, organization, and expansion of capitalist society pursued essentially racial directions"<sup>59</sup> and that "[t]he historical development of world capitalism was influenced in a most fundamental way by the particularistic forces of racism and nationalism."<sup>60</sup> Further developing Robinson's framework, scholars and activists today are defining racial capitalism as a "conceptual framework to understand the mutually constitutive nature of racialization and capitalist exploitation,

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<sup>56</sup> See generally GERALD HORNE, *THE APOCALYPSE OF SETTLER COLONIALISM: THE ROOTS OF SLAVERY, WHITE SUPREMACY, AND CAPITALISM IN SEVENTEENTH-CENTURY NORTH AMERICA AND THE CARIBBEAN* 7–30 (2017) (discussing the emergence of capitalism and its connection to the enslavement and genocide of African and Native American people by the English and their American descendants) [hereinafter *APOCALYPSE OF SETTLER COLONIALISM*]; GERALD HORNE, *THE DAWNING OF THE APOCALYPSE: THE ROOTS OF SLAVERY, WHITE SUPREMACY, SETTLER COLONIALISM AND CAPITALISM IN THE LONG SIXTEENTH CENTURY* 7–33 (2020) (discussing the slavery and genocide of natives in the Americas, Australia, and Africa that emerged in the sixteenth century for the benefit of those in England and eventually the United States); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 35–44 (Beacon Press 2d ed. 2001) (suggesting that the establishment of a market economy led to the exploitation of the poor in the name of profit); CLYDE WOODS, *DEVELOPMENT ARRESTED: THE BLUES AND PLANTATION POWER IN THE MISSISSIPPI DELTA* 1–24 (3d. ed. 2017) (discussing how plantation relations contribute to the continued oppression of African Americans in the Mississippi Delta region and exploring the blues as a critique to plantation relations); CLYDE WOODS, *DEVELOPMENT DROWNED AND REBORN: THE BLUES AND BOURBON RESTORATIONS IN POST-KATRINA NEW ORLEANS* 1–2 (Jordan T. Camp & Laura Pulido eds., 2017); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 15–34 (2018) (discussing Europe's exploitation of Africa, leading to its modern state of "underdevelopment").

<sup>57</sup> See Charisse Burden-Stelly, *Modern U.S. Racial Capitalism: Some Theoretical Insights*, *MONTHLY REV.* 8, 8 (July–Aug. 2020), [https://monthlyreviewarchives.org/index.php/mr/article/view/MR-072-03-2020-07\\_2/7415](https://monthlyreviewarchives.org/index.php/mr/article/view/MR-072-03-2020-07_2/7415).

<sup>58</sup> See *id.* at 8–9.

<sup>59</sup> CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 2 (1983).

<sup>60</sup> *Id.* at 9.

*inter alia*, on a global scale, in specific localities, in discrete historical moments, in the entrenchment of the carceral state, and in the era of neoliberalization and permanent war.”<sup>61</sup> Racial capitalism makes manifest that capitalistic success—white-owned wealth and property—was built on the backs of those exploited minority populations through slavery and oppression.<sup>62</sup> If racial capitalism involves “the process of deriving economic and social value from the racial identity of another[.]”<sup>63</sup> then historian Gerald Horne demonstrates the exploitative utility of this framework.

London was a prime beneficiary of this systemic cruelty. England had a thirty-three percent share of the slave trade in 1673 and seventy-four percent by 1683. Of that dreadful total, the Royal African Company, under the thumb of the Crown, held a hefty ninety percent share in 1690, but with deregulation and the entrance into this sinfully profitable market by freelance merchants, this total had shrunk to eight percent by 1701. . . . As scholar William Pettigrew has argued forcefully, the African Slave Trade rested at the heart of what is still held dear in capitalist societies: free trade, anti-monarchism, and a racially sharpened and class-based democracy.<sup>64</sup>

Like a seesaw, as London rose Africa and the Americas fell. As one scholar put it, “the industrial revolution in England and the cotton plantation in the South were part of the same set of facts.” . . . More to the point[,] . . . “without English capitalism[,] there probably would have been no capitalist system

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<sup>61</sup> Burden-Stelly, *supra* note 57, at 8; *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2190 (2013).

<sup>62</sup> *See* Leong, *supra* note 61, at 2154–55 (“This Article . . . describe[s] the way the white people and predominantly white institutions derive value from nonwhiteness.”); *see also* ROBINSON, *supra* note 59, at 117 (noting that the profitable cultivation of sugar led to a significant increase in the English importation of African slaves to the Americas).

<sup>63</sup> Leong, *supra* note 61, at 2152.

<sup>64</sup> APOCALYPSE OF SETTLER COLONIALISM, *supra* note 56, at 9.

of any kind.” As early as 1663, an observer in Surinam noticed that “Negroes [are] the strength and sinews of [the] Western world.” The enslaved, a peculiar form of capital encased in labor, represented simultaneously the barbarism of the emerging capitalism, along with its productive force.<sup>65</sup>

Recognizing that “the barbarism of” capitalism emerged from the “labor” of the “enslaved” challenges the process by which a Law and Economics enthusiast theorizes in a vacuum. Meticulously whitewashing the exploitation of the African slave trade and the oppression of millions and ignoring the continuing vestiges of today’s exploitation and slavery remains a bedrock principle in Law and Economics theorizing, particularly in the farcical Samaritan’s Dilemma.<sup>66</sup> Buchanan’s Samaritan’s Dilemma engages in such sophistry when he embraces historical inaccuracy and demonstrates moral bankruptcy by ignoring that the “Good Samaritan” in his version of the parable ascended to his place of prominent wealth and power not organically but through flagrantly exploiting and oppressing the beaten and bloodied sojourner on the road to Jericho.<sup>67</sup> Stated another way, Buchanan’s Samaritan is less of the mythical small business owner who desires to be charitable and pay a fair wage but is “exploited” by regulations which force him to respect workers and pay taxes that support social programs, but is more of a slaveholder figure whose primary business

<sup>65</sup> *Id.* at 11. (first quoting EDGAR T. THOMPSON, *THE PLANTATION AS A SOCIAL SYSTEM* 25 (Sidney W. Mintz & George Baca eds., 2010); then quoting ELLEN M. WOOD, *THE ORIGIN OF CAPITALISM: A LONGER VIEW* 142 (2017); and then quoting L. H. ROPER, *ADVANCING EMPIRE: ENGLISH INTERESTS AND OVERSEAS EXPANSION*, 1613–88 (2017)).

<sup>66</sup> See generally Martin Luther King, Jr. *The World House*, in *THE RADICAL KING* 91–94, 272–73 (Cornel West ed., 2015) (discussing the shortcomings of mainstream capitalism, specifically that it “fails to see the truth in collectivism,” claiming that “[a] true revolution of values will soon look uneasily on the glaring contrast of poverty and wealth,” and later discussing the Good Samaritan parable as an example of the importance of collectivism); see also *APOCALYPSE OF SETTLER COLONIALISM*, *supra* note 56, at 9 (discussing the use of “euphemis[ms]” to describe the modern American economy, which ignores “systematic cruelty” which enriched, for example, members of the English economic elite); WALTER RODNEY, *supra* note 56, at 88–91 (explaining how Europe’s capitalist class used their control over international trade to establish the European slave trade).

<sup>67</sup> See *APOCALYPSE OF SETTLER COLONIALISM*, *supra* note 56, at 7–11, 16, 26–30 (discussing the “indelible stain” of “[s]lavery, [w]hite [s]upremacy, and [c]apitalism” on the current socioeconomic makeup of the United States, specifically arguing that “reducing the present” socioeconomic circumstances to a neutral ideal of “capitalism” ignores the historical underpinnings of American history).

was usurping land from exploited indigenous populations and working that land by forced slave labor through exploited African populations.<sup>68</sup> Buchanan's Samaritan's Dilemma ignores the historical exploitation of the victimized unfortunate that fell among thieves and concomitantly ignores the role that such exploitation played in the Samaritan's rise to his propertied and wealthy status. The Samaritan's Dilemma, then, as orchestrated by Buchanan, simply perpetuates and justifies racial capitalism.

In his "dilemma," Buchanan argues that the beaten and bloodied Judean on the road to Jericho may very well be unworthy of charity because, if bestowed, this "parasite" may become a future exploiter unwilling to work for his benefits, only ever to sup at the table of the beneficent Samaritan. Buchanan disregards the circumstances, the *history*, of the victimized Judaeen/parasite. He refuses to account for any oppression or exploitation encountered by the beaten Judaeen/parasite.

As for the Samaritan, Buchanan argues that this wealthy and propertied individual, when encountering the victimized man on the road to Jericho, is faced with a conundrum as he considers the gifting of charity that may ultimately prove to be a costly mistake. If the powerful and wealthy Samaritan gives his hard-earned wealth to the bloodied traveler, then he will ultimately become a victim of the parasite, who will seek the Samaritan's property and improperly commandeer the Samaritan's wealth in the future. The Samaritan is placed in the position of victim, while the poor, beaten Judaeen is positioned as the exploiter, a parasite. Here again, Buchanan disregards the circumstances, the *history*, of the wealthy Samaritan. He refuses to account for how the wealth and property was acquired by the now "victimized" Samaritan.

And therein lies the intellectual bankruptcy of the Samaritan's Dilemma: Buchanan's casuistry refuses to account for the reality that the very wealth and property that is secured in the hands of the Samaritan exists primarily because of the exploitation and oppression visited upon the beaten and bloodied Judaeen by the Samaritan himself. Stated differently, the position of the wealthy Samaritan has been bestowed upon him, not by nature of his hard work, determination, or good fortune, but rather has come

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<sup>68</sup> See *id.* at 15–17 (discussing the English exploitation of Native Americans and African slaves as part of its economic growth model).

purchased through the slavery, bondage, and oppression of particular races from which capitalism itself sprang. Buchanan would have the world believe that the wealthy and propertied arrived at their place purely by virtue of wisdom, hard work, and providence while cynically refusing to acknowledge that those that have been oppressed and bloodied by the wealthy and propertied are the very reason that the wealthy garnered those riches. And tragically, Buchanan implies that the oppressed and exploited, the slaves and the indentured, are unworthy of reparation, charity, welfare, even assistance, because providing such makes them “predators of their own species.”<sup>69</sup>

Thus, in Buchanan’s Samaritan’s Dilemma, both parties, the bloodied Judaeon and the charitable Samaritan, float into the game with no discernible history, personal characteristic, or story—just parasite and exploited, but not in the historically truthful sense of who has acted as parasite (the wealthy and propertied) and who has been exploited (the beaten and bloodied).

### C. Repeated Failures

Public Choice theory and Law and Economics libertarianism, since inception in the 1960s, have struggled mightily to find popular traction.<sup>70</sup> Despite this struggle, some political bodies have been influenced enough by these principles to implement legislative policies that favor free-market ideology centered on theories like Law and Economics, the Samaritan’s Dilemma, and Game Theory. In nearly every instance where these policies have been adopted wholesale, the outcome has been failure, and in some

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<sup>69</sup> See BUCHANAN, *supra* note 1, at 72–75 (suggesting that providing financial support to those with limited means “influences their choice behavior,” resulting in the recipients of financial support depending on the help of the Samaritan and becoming “predators of their own species”).

<sup>70</sup> See MACLEAN, *supra* note 48, at 79–81 (discussing Public Choice advocates’ attempts to, for example, associate themselves with well-known founders in order to make their “radical vision” more broadly appealing).

cases, epic failure.<sup>71</sup> Two such epic failures occurred in General Augusto Pinochet's Chile and Governor Rick Snyder's Flint, Michigan.

When General Augusto Pinochet was successful in his military coup that overthrew the popularly elected socialist government of Salvador Allende in 1973 Chile, Pinochet was quick to bring in U.S. and global Law and Economics and Public Choice economists James Buchanan, F.A. Hayek, and Milton Friedman to assist him in establishing his fledgling government.<sup>72</sup> Once Public Choice and Law and Economics policies were instituted in Chile writ large, chaos ensued.<sup>73</sup> Pinochet's rule "became one of the most notorious authoritarian regimes in recent history."<sup>74</sup> Emblematic of Pinochet's Law and Economics government were "mass killings, widespread torture, and systematic intimidation" with Pinochet's military forces routing the "trade union movement, vanquish[ing] rural farmers seeking land reform, stif[ling] student activism, and imposing radical and unpopular changes in schooling, health care, and social security . . ."<sup>75</sup> Buchanan's influence over Chilean politics, guided by his tough medicine-inspired by Samaritan's Dilemma-type hypothesizing, remains in place today as Pinochet permanently entrenched the capitalist class in power by "lock[ing] and bolt[ing]" Chile's constitution to favor the propertied few and disfavor the non-propertied masses.<sup>76</sup>

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<sup>71</sup> See *id.* at 154–55, 162–63, 167–68, 214–15 (discussing several examples of situations where government entities adopted Law and Economics theories for their policies, often resulting in failures with significant consequences).

<sup>72</sup> See *id.* at 155.

<sup>73</sup> See *id.* at 155–160 (detailing the political "reforms" made under the guise of "economic liberty" in Chile that resulted in widespread political corruption, the paralyzing of Chile's legislative branch, an increase in authoritarian activities like jailing opponents and activists, and the banning of most labor unions).

<sup>74</sup> *Id.* at 154.

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 155–56 (highlighting how Buchanan "guided Pinochet's team in how to arrange things so that . . . its capitalist class would be all but permanently entrenched in power") (quoting Bruno S. Catalan, *Chile's Journey Towards a Constituent Assembly*, EQUAL TIMES (Nov. 14, 2014)).

The result has been massive economic inequality where more than forty-five percent of the nation is now classified as indigent or poor, and wealth has become concentrated among the very rich.<sup>77</sup> Political and private corporate corruption has roiled the nation as bankers and privatized pension fund leaders have defrauded the nation and its people repeatedly.<sup>78</sup> Epic failure.<sup>79</sup>

Similarly, in 2011 Michigan, Law and Economics-backed legislation was enacted that allowed the state governor to “take over” all aspects of local government in any statewide community facing a “financial emergency.”<sup>80</sup> Unsurprisingly, soon thereafter, majority African American cities in Michigan, including Flint, Benton Harbor, and Detroit, were taken over by the state for “financial emergency” purposes and then placed under the control of a “city manager.”<sup>81</sup> In 2014, Flint, Michigan was placed under city manager control and, in order to save money, the city’s water supply was switched from the pure Lake Huron to the polluted Flint River. “For [eighteen] months, 100,000 residents were exposed to toxic water,” making the crisis “the worst public health disaster in state history.”<sup>82</sup> After exposure to lead, bacteria and other contaminants in the water source caused Flint residents to lose hair, develop untreatable rashes, and suffer severe abdominal pain, attention was brought to Governor Rick Snyder, and it still took the state one year to redirect the water supply back to a non-polluted source.<sup>83</sup> Flint today continues to suffer.<sup>84</sup>

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<sup>77</sup> See *id.* at 165–67 (discussing how poverty levels increased from twenty-three percent in 1970 to forty-five percent in 1987 while “wealth . . . bec[ame] more concentrated among the richest.”).

<sup>78</sup> See *id.* at 164–67.

<sup>79</sup> Despite what most consider utter failure, Chile is still held up to this day as a “beacon” by the bankrolled Law and Economics machine. See *id.* at 166 (“It is deeply troubling, then, that Chile is held up today as an exemplary ‘economic miracle’ by the Cato Institute, the Heritage Foundation, and others on the U.S. right.”).

<sup>80</sup> See *id.* at 214–15.

<sup>81</sup> *Id.* at 215.

<sup>82</sup> *Id.* at 214; see also Amy Keller, *Flint Water Crisis*, CONSUMERNOTICE.ORG, <https://www.consumernotice.org/environmental/water-contamination/flint-michigan/> (last modified Aug. 18, 2021) (discussing the negative effects of lead poisoning).

<sup>83</sup> See Keller, *supra* note 82.

<sup>84</sup> See Mitch Smith, Julie Bosman & Monica Davey, *Flint’s Water Crisis Started 5 Years Ago. It’s Not Over.*, N.Y. TIMES (Ap. 25, 2019), <https://www.nytimes.com/2019/04/25/us/flint-water-crisis.html>.

Once again, Public Choice economics dictated that the exploiters, in this case, African American residents of Flint, Michigan, be treated harshly—inhumanely, even—by the propertied and privileged governor and city manager. Deemed unable to properly govern themselves in Flint, the Law and Economics crew appointed a city manager, who poisoned children in the name of economic cost savings. The predator class must be taught that they may not exploit the Samaritan, even if it means forcing toxic drinking water onto the parasite's children. The now-former Governor Snyder has since been charged in Michigan with criminal willful neglect of duty,<sup>85</sup> as has Gerald Ambrose, the former Flint city manager.<sup>86</sup> Epic failure.

#### *D. Wrong-Headed and Unforgiving Legislation*

The influence of Law and Economics principles and the harsh application of the Samaritan's Dilemma have influenced legislative enactments in the United States. Mass incarceration is one product of the Samaritan's Dilemma. Welfare reform during the Bill Clinton presidency is a byproduct of the Samaritan's Dilemma. The 2018 Trump tax cuts are emblematic of Public Choice economics and the Samaritan's Dilemma. Privatized for-profit prisons and immigrant family separation policies at the border find their roots in free-market fundamentalism and the Samaritan's Dilemma. The Gramm-Leach-Bliley Act was funded and introduced by politicians influenced by free-market fundamentalists and Law and Economics economists. Each of these legislative enactments were and remain deeply unpopular with a majority of U.S. residents,<sup>87</sup> yet, like Pinochet's Chile, one fundamental

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<sup>85</sup> Julie Bosman, *Ex-Governor of Michigan Charged With Neglect in Flint Water Crisis*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/flint-water-crisis-rick-snyder-charges.html> ("Fifteen state and local officials, including emergency managers who ran the city and a member of the governor's cabinet, had been accused by state prosecutors of crimes as serious as involuntary manslaughter. Seven had already taken plea deals. Eight more, including most of the highest-ranking officials, were awaiting trial.")

<sup>86</sup> See Dakin Andone, *Former Michigan Governor and 8 Others Face Charges in the Flint Water Crisis That Left 12 People Dead*, CNN (Jan. 14, 2021), <https://www.cnn.com/2021/01/14/us/michigan-flint-water-former-governor-charges-thursday/index.html>.

<sup>87</sup> See Abby Vesoulis, *Republicans Were the Only Group in This Poll to Support Trump's Family Separation Policy*, TIME (June 18, 2018, 3:07 PM), <https://time.com/5315110/family->

evolution of libertarian and Public Choice doctrine is no longer to seek popular support but rather to enact policies that promote the propertied while concomitantly diminishing the power of the popular vote and the principle of majority rules.<sup>88</sup> After all, if the non-propertied and poor are exploiting the propertied and wealthy, then the exploiters' influence should be minimized and the influence of the propertied and wealthy should be outsized.

In each legislative enactment above, the "victim" on the road to Jericho (i.e., the oppressed and downtrodden in the U.S.), is dealt with harshly and unfairly, while the propertied and wealthy are privileged by the law. The beaten and bloodied "predator" is treated to cruel outcomes based on their poverty, while the "exploited," well-heeled wealth maximizers are treated to advantageous legal status.

#### *E. Rule of Law Index*

As Public Choice economics has taken root, legislative enactments as described above have peppered the United States Congress. As a result of these laws, scholars posit that the Financial Market Crisis of 2008 and the Enron/WorldCom Accounting Scandals of the early 2000s were directly caused by deregulatory fervor and legislation propounded by Law and Economics proponents and free-market fundamentalists.<sup>89</sup> While a pernicious narrative about minority borrowers caused many to blame people of color for

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separation-policy-polling-republicans/ ("Two-thirds of Americans oppose a policy that has led to more than 2,000 children being separated from their parents at the U.S. border, and Republicans were the only group polled who support it."); see also Ben White, *On Tax Day, Trump Tax Cuts Remain Deeply Unpopular*, POLITICO (Apr. 15, 2019, 5:04 AM), <https://www.politico.com/story/2019/04/15/donald-trump-tax-cuts-unpopular-1273469>.

<sup>88</sup> See MACLEAN, *supra* note 48, at xxxiv (discussing how the libertarian and Public Choice doctrines "seeks [] a return to oligarchy, to a world in which both economic and effective political power are to be concentrated in the hands of a few.>").

<sup>89</sup> See generally STEVEN A. RAMIREZ and MARY KREINER RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET* (2017); see also andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 151–57 (2011).

the 2008 meltdown, the corrupted bankers and Wall Street executives who fueled the crisis generally did not face severe consequences for their actions and, in the eyes of many Americans, appeared to be above the law.<sup>90</sup> Meanwhile, poor people of color are targeted for ruthless treatment by law enforcement officials across the nation.<sup>91</sup> As such, U.S. residents have begun doubting whether all people are treated fairly and equally under the law. Enter the Rule of Law Index created by the World Justice Project.

The 2019 World Justice Project Rule of Law Index ranked 126 nations worldwide based on how well the nation respects and implements the Rule of Law.<sup>92</sup> The Index measures how the Rule of Law is experienced and perceived by the general public through “more than 120,000 household and 3,800 expert surveys.”<sup>93</sup> The Rule of Law Index measures a country’s rule of law performance “across eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.”<sup>94</sup> How highly rated a country is in each of these eight categories determines the Rule of Law ranking received by such nation.<sup>95</sup>

The uninitiated might expect that the United States would rank first in the world in respecting and implementing the Rule of Law, based on our founding documents and the founding fathers’ vision for the nation. However, due in part to the legislative enactments influenced by the Samaritan’s Dilemma and Law and Economics

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<sup>90</sup> See RAMIREZ & RAMIREZ, *supra* note 89, at 145. “During the tensest moments surrounding the mortgage crisis in September and October 2008 . . . many pundits on the right named racial ‘minorities’ and lending to ‘poor minorities’ as a root cause for the market collapse.” *Id.* Ultimately, “a stunning portion of the nation’s citizenry pointed the finger of blame at minority Americans.” *Id.* at 215. Meanwhile, in part due to regulatory capture, the Securities and Exchange Commission largely failed to aggressively prosecute the Wall Street actors who helped cause the crisis. *See id.* at 196–98.

<sup>91</sup> See generally andré douglas pond cummings & Steven Ramirez, *Roadmap for Anti-racism: First Unwind the War on Drugs Now*, 96 TULANE L. REV. (forthcoming 2022) (describing how U.S. law enforcement targeted black families and urban communities in the War on Drugs leading to wildly disproportionate incarceration rates of people of color for drug “crimes.”).

<sup>92</sup> See *Rule of Law Index 2019*, WORLD JUSTICE PROJECT, 5 (2019), <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

proponents described above, in 2019 the United States ranked twentieth in the world in the Rule of Law index, falling far short of peer countries like Denmark (ranked first) and Singapore (ranked thirteenth).<sup>96</sup>

The United States ranked particularly poorly in the category of “Absence of Corruption” in the executive branch and in the legislature.<sup>97</sup> This ranking is a direct reflection of the legislative enactments and executive signatures onto grossly unfair legislation that favors the wealthy and harshly disfavors those in poverty, as described above.<sup>98</sup> In addition, the United States ranked very poorly in “No discrimination,” particularly when rated in the categories of “Criminal Justice,” “Civil Justice,” and “Fundamental Rights.”<sup>99</sup> Once again, when U.S. citizens are queried as to whether they believe there is “no discrimination” in the criminal and civil justice systems, more than fifty percent of the time, respondents report that “no discrimination” is false.<sup>100</sup> When policy implementation discriminates against the non-propertied and the downtrodden, U.S. citizens notice and report as much when queried.

#### *F. Billionaire’s Outrage*

The Samaritan’s Dilemma perforce favors the propertied, powerful, and wealthy. In casting the victim in the parable as a parasite, the Samaritan then is motivated to avoid exploitation by the parasite seeking unearned charity. United States’ billionaires are thereby protected and favored by free-market ideology propounded by Public Choice and Law and Economics. Yet, when Public Choice seeks to place greater decision-making and electoral power into the hands of the extraordinarily wealthy,<sup>101</sup> it is into the following hands that this power is being delivered:

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<sup>96</sup> *See id.* at 6-7.

<sup>97</sup> *Id.* at 152.

<sup>98</sup> *See id.* at 13.

<sup>99</sup> *See id.* at 152.

<sup>100</sup> *See id.*

<sup>101</sup> *See* MACLEAN, *supra* note 48, at xxxii.

Stephen A Schwarzman is the chairperson and chief executive of the Blackstone Group, a private equity firm.<sup>102</sup> When hearing that the Obama Administration intended to possibly eliminate a favorable hedge fund tax policy, Schwarzman likened it to “when Hitler invaded Poland.”<sup>103</sup>

When now-deceased billionaire venture capitalist Tom Perkins wrote an Op-Ed for the Wall Street Journal in 2014, he opined, “I would call attention to the parallels of fascist Nazi Germany to its war on its ‘one-percent,’ namely its Jews, to the progressive war on the American one-percent, namely the ‘rich.’”<sup>104</sup>

When Wall Street titans invoke the Holocaust to battle against minor regulatory reforms and when billionaires claim that a war has been declared against them that is similar to the Jewish experience in Nazi Germany, then the very wisdom of the capitalist class is called into question. From this question flows the answer that perhaps turning outsized electoral power and influence over to the propertied and powerful may quite likely lead to inequality, unfairness, and greater poverty for the less powerful. Which leads to the next query: Does Law and Economics really work?

#### IV. THE INTELLECTUAL BANKRUPTCY OF LAW & ECONOMICS

Buchanan’s brand of libertarianism and the Law and Economics propagated by the Chicago School and the George Mason law school is, at its core, a school of thought that knows little scientific or empirical proof. So many espoused theories in law and economics, including Game Theory, the Samaritan’s Dilemma, the Prisoner’s Dilemma, and so many more, are simply ideas, thoughts, concoctions, that are initially delivered as if truth, but were not scientifically or empirically proven before introduction. Nearly every supportive study and paper after introduction that purports

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<sup>102</sup> See *Our People: Stephen A. Schwarzman*, BLACKSTONE, <https://www.blackstone.com/people/stephen-a-schwarzman-2/> (last visited Oct. 2, 2021).

<sup>103</sup> See Michael J. de la Merced, *Schwarzman’s Unfortunate War Analogy*, N.Y. TIMES: DEALBOOK (Aug. 17, 2010, 5:16 PM), <https://dealbook.nytimes.com/2010/08/16/schwarzmans-unfortunate-war-analogy/?mtrref=undefined&assetType=REGIWALL&mtrref=dealbook.nytimes.com&gwh=8D7E766B1775830C46AE00D767F2B01E&gwt=pay&assetType=REGIWALL>.

<sup>104</sup> Tom Perkins, *Progressive Kristallnacht Coming?*, WALL ST. J. (Jan. 24, 2014, 4:49 PM), <https://www.wsj.com/articles/SB10001424052702304549504579316913982034286>.

to “prove” such theorizing has been bankrolled by committed insiders.<sup>105</sup> Rather than create a scientific or empirical study to test whether the beaten victim in the tale of the Good Samaritan ever rose from his hospital bed after his tragic beating to then go out and become a hard-working contributor to society, rather than a perpetual parasite, Buchanan preferred instead to weave his theories in accepted thought rather than scientific proof.<sup>106</sup> And the subsequent “proof” of this theory has been mostly purchased.<sup>107</sup> The Law and Economics Public Choice machine financially incentivizes sycophants to intellectualize the theories.

Additional to the intellectual bankruptcy in the initial theorizing and subsequent empirical support is the dramatic change of tactics that Law and Economics has undergone since inception in the 1960s and 1970s. As originally conceptualized by Coase and other thought leaders, the idea of free-market fundamentalism and rational decision-making driven by incentives was believed to be a winning theory.<sup>108</sup> Early leaders like Hayek, Buchanan, and others trusted that if delivered to the public, their ideas would prevail and that general populations would sign on and support

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<sup>105</sup> See generally Philippe Fontaine, *Beyond Altruism? Economics and the Minimization of Unselfish Behavior, 1975–93*, 44 HIST. POL. ECON. 195 (2012) (arguing economists theorizing in the area of unselfish behavior failed to establish a workable economic model); Peter Boettke & Adam Martin, *Exchange, Production, and Samaritan Dilemmas*, MUNICH PERS. REPEC ARCHIVE NO. 33199 (2010) <https://mpra.ub.uni-muenchen.de/33199/> (finding a comparative analysis of the basic income policy supported by Hayek and other libertarians raises several issues with the policy); Emily C. Skarbek, *Aid, Ethics, and the Samaritan’s Dilemma: Strategic Courage in Constitutional Entrepreneurship*, 12 J. INST. ECON. 371 (2015) (arguing the private sector can successfully mitigate failures associated with the Samaritan’s Dilemma); David S. Lucas, *Federal Homelessness Policy: A Robust Political Economy Approach*, 30 REV. AUSTRIAN ECON. 277 (2016) (arguing Samaritan’s Dilemma failures associated with federal homelessness policy would be mitigated by localizing programs that address homelessness); Charles Cohen & Eric D. Werker, *The Political Economy of “Natural” Disasters*, 52 J. CONFLICT RESOL. 795 (2008) (finding that investing in natural disaster prevention can reduce moral hazard issues associated with providing free relief for disaster assistance); Neil Bruce & Michael Waldman, *The Rotten-Kid Theorem Meets the Samaritan’s Dilemma*, 105 Q. J. ECON. 155 (1990) (Describing incentives within the “rotten-kid theorem” that may preempt a potential Samaritan’s Dilemma); Ritsuko Futagami, Kimiyoshi Kamada, & Takashi Sato, *Government Transfers and the Samaritan’s Dilemma in the Family*, 118 PUB. CHOICE 77 (2004) (finding that governments can strategically resolve inefficiencies caused by the Samaritan’s Dilemma in the context of money transfers); Jean-Baptiste Fleury & Alain Marciano, *The Making of a Constitutionalist: James Buchanan on Education*, 50 HIST. POL. ECON. 511 (2018) (suggesting Buchanan’s writings on the Samaritan’s Dilemma were largely driven by his opposition to college student protests).

<sup>106</sup> See, e.g., MACLEAN, *supra* note 48, at 79 (stating that Buchanan’s conclusions on his Public Choice theory were based on abstract thought experiments rather than research).

<sup>107</sup> See *id.* at xxi-xxii (describing Charles Koch’s interest in funding Buchanan’s ideas).

<sup>108</sup> See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 16 (2002) (describing how many international bodies coalesced around free-market economics).

legislation that propounded their theories.<sup>109</sup> In this, the libertarian and Law and Economics proponents were quite badly mistaken. Generally speaking, the policies put forward by nearly every libertarian and Law and Economics economist are deeply unpopular and place this school of thought and theory in a distinct minority.<sup>110</sup>

Realizing this, Public Choice Law and Economics leaders have taken to an organized, powerfully funded covert plan to instrumentalize their policies behind the backs and out of view of voting citizens and through clear disinformation campaigns.<sup>111</sup> Scare tactics and untruths have become a go-to strategy for legislators, lobbyists, and economists that purport to believe that rational choice and free-market fundamentalism is the way forward.<sup>112</sup> If theories and policies must be delivered by stealth, if misinformation is a necessary strategy, then indeed, that movement must necessarily be intellectually and morally bankrupt.

#### CONCLUSION

The Good Samaritan remains a timeless biblical parable that instructs its hearers to treat all humans with compassion and mercy. In 1971, the parable was bastardized by an economist entrenched in the thinking that wealth and property imbue its holders with important economic liberty rights that are not to be bestowed on all people equally. In order to spread his gospel of “unique and special” democratic rights based on property ownership and money, James Buchanan and his school of Law and Economics propounded the Samaritan’s Dilemma to justify racial capitalism and its harsh and unforgiving treatment of those less fortunate, less propertied and less monied. In a moment of evil

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<sup>109</sup> See MACLEAN, *supra* note 48, at 116-17.

<sup>110</sup> See *e.g. id.* at xxv-xxvi (discussing the “mounting despair” Buchanan encountered throughout his many “attempts to win passage of radical proposals”).

<sup>111</sup> See *id.* at xxii.

<sup>112</sup> See *id.* at xxii-xxiii.

genius, Buchanan theorized that individuals that are beaten down and bloodied are simply wolves in sheep's clothing<sup>113</sup> trolling for an unsuspecting Samaritan to exploit.

And therein lies the farce. Many, if not most, human beings that are downtrodden, discriminated against, and bloodied by law and policies, including those enslaved, lynched, and terrorized by U.S. law, would much rather work for a living wage than simply lurch about looking for Samaritans to exploit.<sup>114</sup> But of course, this truth does not fit the narrative or justification for ensuring that the Haves continue to Have. Perhaps Public Choice scholars can instrumentalize a study that examines how hard the "exploiters" and "takers" work and how willing these "predator parasites" are to provide for themselves if given opportunity and a level playing field. Of course, this study will never be purchased by libertarian Law and Economics proponents.

The Samaritan's Dilemma and Law and Economics generally must be forcefully rebutted, for all of the reasons introduced above, despite the fact that no equivalent bankroll exists to support such important work.

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<sup>113</sup> *Mathew 7:15* (King James) ("Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves.").

<sup>114</sup> See David Lauter, *How do Americans View Poverty? Many Blue-Collar Whites, Key to Trump, Criticize Poor People as Lazy and Content to Stay on Welfare*, L.A. TIMES (Aug. 14, 2016), <https://www.latimes.com/projects/la-na-pol-poverty-poll/>.