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INSTITUTE FOR GLOBAL LAW & POLICY
HARVARD LAW SCHOOL, CAMBRIDGE, MA 02138
+ 1.617.495.3145 ■ IGLP@LAW.HARVARD.EDU

WHERE DOES THE CRITIQUE OF CONSUMER-BASED ECONOMIC GOVERNANCE STAND TODAY?

JOHN D. HASKELL[§] & LUIGI RUSSI^{*}

ABSTRACT

This paper addresses the increasing importance of the ‘consumer society’ paradigm in the shaping of economic policy and legislation, explores its foundational ideas and disputes, and introduces seven critiques that have surfaced with new currency among scholars and civil society in the wake of the ongoing financial crisis. The developments and critiques surrounding the consumer-based model of governance intimate a much broader story of shifting economic thought and socio-political contestation around the globe. This paper seeks both to capture the larger story and harness its complexity to a specific set of dynamics by using the European Union as a case in point. In the face of a growing feeling of impending crisis within domestic and international governance, the question confronted in this paper is three-fold. First, what are the salient ideas and

[§] Fulbright Fellow 2011-2012, Erik Castrens Institute of International Law and Human Rights (ECI), University of Helsinki; Assistant Director, Institute for the study of Political Economy and Law (IPEL); PhD Candidate in Philosophy of Law, School of Oriental and African Studies (SOAS), University of London; Visiting Assistant Professor (VAP) 2010-2011, International University College of Turin (IUC); Visiting Researcher 2010, Institute for Global Law and Policy (IGLP), Harvard Law School; JD 2006, University of California, Hastings (UC Hastings); LLM (2005), SOAS. I am grateful to the support of the Institute for the study of Political Economy and Law (IPEL) and the International University College of Turin (IUC), the Institute for Global Law and Policy (IGLP), and the Centre for the study of Colonialism, Empire, and International Law (CCEIL). I would also like to particularly thank David Kennedy, Ugo Mattei and Gunther Teubner, for their generous encouragement and pedagogy, as well as Saki Bailey, Jose Maria Beneyto, Matthew Craven, Peter Fitzpatrick, Boris Mamlyuk, Scott Newton, Ignacio de la Rasilla del Moral, Akbar Rasulov, and Mai Taha.

^{*} Research Associate, Institute for the study of Political Economy and Law, International University College of Turin (IUC); M.Sc. Candidate in Comparative Law, Economics & Finance, IUC; Grad. Cert., Mathematics, University of Essex, 2010; M.Jur., University of Oxford (St. Hugh’s College), 2009; Dott. & Dott. Mag., Università Bocconi, 2007 & 2009. Luigi Russi’s research for this paper has been made possible thanks to the generous financial support of the Fondazione Gorla and the Fondazione CRT through the “Master dei Talenti della Società Civile” project. This author would also like to thank Gunther Teubner, for discussing some of the ideas presented in this paper, as well as Ugo Mattei, Giuseppe Mastruzzo and Saki Bailey for their terrific support and guidance throughout. The usual disclaimer applies. Finally, although this work is the result of joint research and analysis and the authors share the views therein expressed; sections II.A., III.D, F, G, and H are specifically attributable to Luigi Russi, and to a more significant extent, sections III.B, E and F, the remaining ones being equally attributable.

disputes developed within the consumer model and how have these traits shaped the contemporary economic landscape? Second, beyond any ‘empirical’ circumstances, what are the specific intellectual and ethical challenges to the consumer model today? And third, through this study of developments and challenges to the consumer model, what sort of new approaches and understandings might be formulated to address the increasing distress within the economy and civil society of Western Europe and the United States, if not more broadly, global populations?

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I. INTRODUCTION

This paper addresses the increasing importance of the ‘consumer society’ paradigm in the shaping of economic policy and legislation, and introduces seven critiques that have surfaced with new currency among scholars and civil society in the wake of the ongoing financial crisis. The developments and critiques surrounding the consumer-based model of governance intimate a much broader story of shifting economic thought and socio-political contestation around the globe. This paper seeks both to capture the larger story and harness its complexity to a specific set of dynamics by using the European Union as a case in point. In the face of a growing feeling of impending crisis within domestic and international governance, the question confronted in this paper is three-fold.

First, what is the function of the consumer model in the contemporary economic landscape of the European Union (as a lens to the broader global economic environment)? Second, beyond any ‘empirical’ circumstances, what are the specific intellectual and ethical challenges to the consumer model today? And third, through this study of developments and challenges to the consumer model, what sort of new approaches and understandings might be formulated to address the increasing distress within the economy and civil society of Western Europe, and more generally, the majority of global populations?

In the first section, *The Consumer and Her Society*, the paper firstly provides an overview of its development and where consumer law stands today within the European Union, and secondly, unpacks some of the foundational ideas and disputes at stake that bear upon the broader terrain of global economic thought. Here, the paper analyzes case materials, legislation, and treaty provisions, and highlights some of the salient economic disputes that surround the implementation of ‘consumer’ law. The consumer paradigm is situated in both a microeconomic perspective of consumer theory and from the Keynesian macroeconomic perspective as a source of aggregate spending. Focusing on its economic fundamentals, our inquiry also seeks to address the consumer society paradigm from legal and political perspectives. In law, the evolution of European consumer law is traced in its various stages, with a focus on the relationship between consumer policy and the attainment and development of a common market in the European Community/European Union. In politics, the paper analyzes the transition from ‘ordoliberal foundations’ (e.g., freedom of competition for producers) to neoclassical developments (e.g., market citizenship of consumers). The paper seeks here to provide a wide range of perspectives to understand the development and contours of the contemporary consumer-society paradigm, addressing the European Union as a means to shed light on what is a pervasive phenomenon throughout industrialized and former colonized countries alike.

The second section of the paper, *Critiques of Consumer Society*, explores a range of critiques that have challenged the efficiency of consumer-centric economic policy. In particular, seven traditions of critique are enlisted, including Marxism, Institutional Economics, Baudrillardian structuralism, Critical Legal Studies, Luhmannian/Teubnerian social theory, Buddhist economics, Deep Ecology and Critical Religion. In the Marxist critique, we have attempted to illustrate the link between the alienation of labor in the capitalist economy and the fetishism of commodities, whereby workers are unable to identify the scope of their agency. The Institutional Economy critique is illustrated through the works of Veblen, Galbraith and Sheehan, focusing in particular on the institutional constraints and “nudges” that make consumer spending dependent upon production rather than on the satisfaction of exogenous needs. The structural critique of Baudrillard in turn focuses on the role of needs-based discourse in consumer society, showing how the very idea of individual “needs” (to be catered through market choice) is constitutive of the consumer paradigm, and does not offer a “benchmark” to determine a hierarchy of needs. The paper’s treatment of Critical Legal Studies (and by analogy, the Culture Jamming movement) then highlights the ubiquity of “technical” categories and procedures, like efficiency and cost-benefit analyses, and their inevitably political nature. In relation to Social Systems theory, the paper focuses on the critique of consumer society through the prism of Niklas Luhmann’s and Gunther Teubner’s social systems theory.

In the remaining critiques, the paper transitions from elaborating “intellectual” blind spots in consumer theory to instead focus on the dimension of “personal wisdom”. These critiques are united by their focus on the experiential dimension, as they attempt to articulate consumerism more as a “malaise” felt at the individual level than as an intellectual construct, taking in turn Buddhist economics, Deep Ecology, and the Critical Religion movement. In the section focusing on Buddhist economics, we explore the idea of moderation and the possibility that “needs” may also be satisfied through non-consumption. In addressing deep ecology, especially in reference to Jungian archetypal

psychology, the paper analyzes arguments for the attainment of a more symbiotic relation with nature, less focused on domination, and more on reverence. In the last critique, the paper unpacks the Critical Religion movement to stress the fuzziness of the boundary between the religious and the secular, and more generally, its criticism of the deployment of money as a ‘mystic’ device to transition consumers from a state of tension (need) to release (expenditure).

In the concluding section, *The Black Swan of Consumerism*, the paper seeks to provide an agnostic reading of the ‘orthodox’ and ‘critical’ perspectives concerning consumer legislation and economic policy. While various themes within the ‘critical’ literature provide useful interventions when reflecting on consumer society and the inefficiencies and dangers inherent in a ‘consumer’-centric policy outlook, these critiques themselves suffer from their own mosaics of contradictions and shortcomings. Resisting the impulse to provide a set of normative proposals, we argue instead for the dual importance of ‘waking up’ (e.g., highlighting new questions, re-engaging with short and long-term challenges not sufficiently addressed to date) and resisting the ‘urge to change’. At most, the paper concludes its comparative study with a call for a future legislative policy towards the economic foundations of the European Union and beyond, which may account for the present shortcomings of the consumer model through a (experimentally-attuned) recognition that these immanent and external critiques have as much a right of citizenship in consumer society as does the “orthodox” consumer paradigm.

II. THE CONSUMER AND HER SOCIETY

A. *The Development of Contemporary Consumer Law*

Within law, the centrality of the consumer within a theory of market economy is generally equated to the framing of the consumer as a ‘subject of rights’, usually in conjunction with the stated

legislative goal of ensuring a commercial pursuit of a competitive ‘level playing field’.¹ This subsection analyzes the underlying logic of this legal picture by charting out the evolution of European consumer law as illustrative of the salient dynamics of the consumer model that enjoys substantial currency in contemporary governance around much of the globe. While, of course, no such limited account can ever do justice to the full complexity of the subject, the ambition here is to provide a bird’s eye view of the main lines of development and, most importantly, of the emerging legal conception of the consumer.

It is of fundamental importance, in order to understand the evolution of European consumer law, to bear in mind the historic task of the European Community, as enshrined in Article 3(c) of the Treaty establishing the European Community² - namely, the building of an “internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.”³ The centrality of ‘open markets’ has been retained in the new architecture of the European Union after the Lisbon Treaty,⁴ where the establishment of an internal market is now mentioned by Article 3(3) of the Treaty on European Union.⁵ In the evolution of European treaty law, however, it was only with the Maastricht Treaty⁶ that a provision was introduced devoted exclusively to consumer protection, and which was subsequently carried over

¹ See John D. Ho, *In Search of the Level Playing Field: Asymmetries and Consumer Protection in Hong Kong*, 36 HONG KONG L.J. 61, 82 (2006) (illustrating this point in relation to Hong Kong consumer legislation).

² Consolidated Version of the Treaty Establishing the European Community, Apr. 16, 2003, 2006 O.J. (C 321) 37 [hereinafter EC Treaty]. Since December 1, 2009, the EC Treaty has been renamed into “Treaty on the Functioning of the European Union” (Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2010 O.J. (C 83) 47 [hereinafter TFEU]). Despite having more or less the same structure as the EC Treaty, some of the articles quoted here have not been carried over into the TFEU, which is why separate referencing to the latest available consolidated version of the EC Treaty has been retained for clarity in this work.

³ EC Treaty art. 3(c).

⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

⁵ Consolidated Version of the Treaty on European Union art. 3(3), Dec. 13, 2007, 2010 O.J. (C 83) 1 [hereinafter TEU].

⁶ Treaty on European Union, Nov. 1, 1993, 1992 O.J. (C 192) 1 [hereinafter Maastricht Treaty].

into Article 169 TFEU.⁷ Until the Maastricht Treaty, there was no self-standing mention of the consumer, and only scattered references were made to an understanding of consumer protection, usually depicted as a positive externality flowing primarily from “the process of integration through . . . a more efficient market, which will yield more competition allowing wider choice, lower prices and higher-quality products and services.”⁸ Though authors tend to read these facts within a ‘progress’, or ‘development’ narrative of European Union economic policy, we believe this divergence between the historic and more recent character of economic legislation within the European Union illuminates a far more interesting dynamic – what is, in fact, a significant dilemma at the heart of European consumer policy: that of the policy conflict between a protective regime centered on the consumer proper (option one) and a regime centered on the development of the internal market, with the consumer as a fringe beneficiary (option two).

The tension between these two alternatives can be spotted already in the Council Resolution of 14 April, 1975, on a preliminary programme of the European Economic Community for a consumer protection and information policy.⁹ The Annex to such resolution defines the consumer in a manner that seems to imply that “the consumer interest transcends a purely economic, open-border focus,”¹⁰ as “no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which may affect him either directly or indirectly.”¹¹ For this purpose, paragraph 3 of the programme even goes so far as to enumerate a set of rights aimed at protecting a) the consumers’ health, safety, and

⁷ Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2010 O.J. (C 83) 47 [hereinafter TFEU]

⁸ STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* 4 (2006).

⁹ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C 92) 2, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425%2801%29:EN:NOT>.

¹⁰ WEATHERILL, *supra* note 8, at 6.

¹¹ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, Annex, 1975 O.J. (C 92) 2, ¶3, at 2, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425%2802%29:EN:HTML>.

economic interests, b) ensuring redress against “strongly organized production and distribution groups,”¹² and c) allowing the possibility to inform and educate themselves, and to be heard in relevant decision-making processes. And yet, when it comes to identifying the concrete means to implement such rights, paragraph 4 states that:

All these rights should be given greater substance by action under specific Community policies such as the economic, common agricultural, social, environment, transport and energy policies as well as by the approximation of laws, all of which affect the consumer’s position.¹³

As Weatherill observes,¹⁴ the provision is tantamount to admitting that the powers of the European Community fell short of enabling the pursuit of a specific consumer-centered policy (option one). From these beginnings, in which a tension is clearly visible, the coupling between consumer protection and market integration (option two) has only grown stronger, to the point that eleven years after the 1975 programme, the Council Resolution of 23 June, 1986 displayed¹⁵ a “diminution in assertion of consumer ‘rights.’ The discussion treated the consumer as the beneficiary of the process of market integration whereby consumer choice, rather than consumer rights, emerged as the dominant theme.”¹⁶

As a consequence of the enactment of the provision currently found in Article 114 TFEU (formerly Article 95 EC), which introduced qualified majority voting within the Council for the approval of harmonization measures that “have as their object the establishment and functioning of

¹² *Id.* ¶ 6, at 3.

¹³ *Id.* ¶ 4, at 2.

¹⁴ WEATHERILL, *supra* note 8, at 7.

¹⁵ Council Resolution of 23 June 1986 on a New Impetus for Consumer Protection Policy, 1986 O.J. (C 167) 1.

¹⁶ WEATHERILL, *supra* note 8, at 9.

the internal market”¹⁷, the pursuit of an integrated European market acquired even more centrality as a tool to further consumer policy, albeit in an indirect manner.¹⁸ In this respect, the European Court of Justice made it clear, at paragraph 84 of its “Tobacco Advertising” decision,¹⁹ that “a measure adopted on the basis of Article 100a of the Treaty [now Article 114 TFEU] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market,”²⁰ and cannot simply focus on the consumer independently of the goal of furthering market integration.

The “market-complementarity” of European consumer policy²¹ has not changed dramatically even after the enactment of a provision - Article 153 EC (now Article 169 TFEU) - devoted exclusively to consumer protection.²² At first sight, the enduring influence of an approach to consumer protection subservient to the needs of market-making seems at odds with the legislative history of the above provision. So, for instance, Article 153 EC was amended in 1999 so as to affirm the cross-sectoral relevance of consumer protection, namely that it “be taken into account in defining and implementing other Union policies and activities.”²³ Moreover, Article 153 EC also established a separate normative power to adopt “measures which support, supplement and monitor the policy pursued by the Member States.”²⁴ However, beneath the bold characterizations of the amendments, the narrow formulation of this power has practically made it so that:

[T]he principal motor of legislation affecting the consumer interest remains the long-standing competence to harmonize laws in pursuit

¹⁷ EC Treaty art. 95(1) (now TFEU art. 114(1)).

¹⁸ WEATHERILL, *supra* note 8, at 11.

¹⁹ Case C-376/98, *Germany v. European Parliament and Council of the European Union*, 2000 ECR I-8419.

²⁰ *Id.* ¶ 84.

²¹ Norbert Reich, *Protection of Consumers' Economic Interests by the EC*, 14 SYDNEY L. REV. 23, 26 (1992).

²² Article 153 EC (now Article 169 TFEU) was initially introduced in 1993 by the Maastricht Treaty, and was later amended by the Treaty of Amsterdam (Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1) in 1999

²³ EC Treaty art. 153(2) (now TFEU art. 12).

²⁴ EC Treaty art. 153(3)(b) (now TFEU art. 169(2)(b)).

of market integration, found in Article 95 and the subject of cross-reference in Article 153(3)(a). The Maastricht Treaty's elevation of consumer protection to an explicit competence with effect from 1993 has not altered the central role of harmonization in giving shape to EC consumer policy.²⁵

The tight coupling between consumer interests and market development thereby endured after Maastricht, and more recently blossomed into the idea of “consumer confidence” so that “[c]onsumer protection must be developed throughout the internal market, as in this way one can stimulate the consumers to shop across the borders and this will in turn activate the internal market.”²⁶ Consumer confidence can, in other words, be understood as the definitive fashioning of consumer protection requirements purely from an internal-market perspective. In particular, consumer confidence appears to be the point of convergence of business and consumer interests. This is evident, for instance, in the European Commissions' recent Proposal for a Directive on Consumer Rights whose aim is stated to be “to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence and reducing business reluctance to trade cross-border.”²⁷ In other words, the proper functioning of the internal market needs to value both vendors and consumers as “impetuses to the market,” thereby making it necessary:

[T]o protect consumers only insofar as it would not restrict the economic activity of vendors. Excessively strict provisions, which would be conformable with the “protection of the consumer,” would not always be conformable with “consumer welfare,” because such measures could in the end lead to a rise in prices.²⁸

²⁵ WEATHERILL, *supra* note 8, at 19.

²⁶ Thomas Wilhelmsson, *The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law*, 27 J. CONS. POL'Y 317, 320 (2004).

²⁷ Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, at 2, COM(2008) 614 final (Oct. 8, 2008) [hereinafter *Consumer Rights Directive Proposal*].

²⁸ Lenka Froňková, *The New Directive on Consumer Protection: Objectives From the Perspective of the EU and the Member States*, in *PERSPECTIVES FOR EUROPEAN CONSUMER LAW: TOWARDS A DIRECTIVE ON CONSUMER RIGHTS AND BEYOND 91*, 91 (Hans Schulte-Nölke & Luboš Tichý eds., 2010).

Consumption, in other words, is depicted as the means rather than the ends of economic policy – its ultimate goal the routinization of markets to a unified set of language, principle, and production. The paradox here is that the market itself can only be conceived on the basis of constant consumption, the two conceptions (market / consumer) disciplining and reifying one another in an unending dialectic towards an already identified end goal of welfare being equated with consumer purchasing power, and which importantly is largely dismissive of any state role (e.g., protection) beyond facilitating the absolute sovereignty of the market within the EU. As the ECJ ruling in “Tobacco Advertising” suggests, the consumer is not simply the individual at large across various markets, who exists as an ‘end’ to him- or herself, but rather the subject, or symptom, of a still to be fully realized ideal – the ‘universal’ market which exists as both the aspiration and possibility of market life, as well as the gatekeeper of legislative recognition.

B. *Economic Contest over the ‘Social’ in Utility*

There is at present no shortage of “pop” literature heralding the virtues of an economic system centered on the consumer. This can well be regarded as a token to the enduring fascination exerted on contemporary global society by a progress narrative in which markets satisfy the wants and needs of consumers to an ever-increasing extent.²⁹ The basis for such grand claims about unparalleled consumer satisfaction lays in neoclassical economic theory, and its simple model of consumer choice, which this section briefly outlines.

The neoclassical model of consumer choice, in particular, “identifies options with commodity bundles and implies that choices are based on nothing but essentially greed,”³⁰ making “material

²⁹ See MATT RIDLEY, *THE RATIONAL OPTIMIST: HOW PROSPERITY EVOLVES* 46 (2010)

³⁰ DANIEL M. HAUSMAN, *THE INEXACT AND SEPARATE SCIENCE OF ECONOMICS* 32 (1992)

acquisitiveness”³¹ the prime driving force of consumer choice. Goodwin elaborates further on this aspect:

In the neoclassical economic paradigm, the single overt value . . . is efficiency, but efficiency is only a means. When pressed to name the end to which efficiency is a means, neoclassical economists offer “the maximization of utility.” However, in practice, most economic writings admit that utility is undefinable, and therefore use as a proxy goal the maximization of consumption (and therefore of production) within feasibility constraints. Thus the dominant economic paradigm has accepted a goal of increasing consumption, with no built-in concept of “enough.”³²

This model of consumer choice traces its origins to the application of utility theory as a means of determining economic behavior (e.g., behavior concerned with the problem of resource allocation).³³ The logic here is that utility theory offers a normative notion of how people “ought rationally to prefer and to choose”³⁴ that is claimed to be grounded around the drive for utility. The difficulty, which the tradition itself has identified, is that while utility indicates an ‘index of preferences’, by which is meant simply that an individual (as utility maximizer) does what he or she most prefers, the concept does not allow for any assertion about the nature of these preferences.³⁵ For this reason, ‘utility’ is not a comprehensive explanation of behavior or an outright denial of the fact that people are making (whether themselves or as symptoms of a system) value judgments when they decide things, but must be re-politicized as a site of analytic, empirical and historical investigation that itself demands explanation.

It is precisely to overcome the problem of defining utility (and by extension, ‘efficiency’) that progressive scholarship grappled with in the wake of the marginalist revolution. For instance, the

³¹ *Id.*

³² Neva R. Goodwin, *Volume Introduction*, in *THE CONSUMER SOCIETY* xxvii, xxxi (Neva R. Goodwin et al. eds., 1997).

³³ HAUSMAN, *supra* note 30, at 31.

³⁴ *Id.* at 19.

³⁵ *Id.* at 18.

economist Paul Samuelson introduced the concept of ‘revealed preference’ in the 1930s³⁶ better to approximate the specific contours of what was meant by ‘individual utilities’ through a methodological stance that privileged close observation of consumers within markets.³⁷ By focusing on the specific behavior of actual market-participants, Samuelson sought to give substantive content to what would otherwise remain an abstract rationale for economic motivation of limited practical use. In Samuelson’s theory, individual utility only made economic sense if such individuals preferences could be ascertained in their particularity, and thus subject to calculation and scrutiny.³⁸

For Keynes, the problem was not the abstract character of ‘individual utility’ per se, but the tendency of economists to privilege economic analysis from the standpoint of the individual decision-maker rather than the economy as a whole. Since the time lag between the acquisition of money through the sale of a commodity and its reuse could cause shortages of liquidity that prevented markets from clearing, the ‘decision to spend money’ held a ‘kind of positive externality for the economic system as a whole’, argued Keynes, whereby the spender obtained ‘the private advantage of purchasing the commodity she wants’, but at the same time increased the money balances of other agents, thereby permitting that agent ‘to make a desired purchase that was previously impossible because of financial constraints.’³⁹ The Keynesian paradigm of aggregate consumer demand thus complicated the (microeconomic) theory of efficient utility maximization by contributing the additional (macroeconomic) stabilization function with respect to the economic system as a whole. Utility, for Keynes, was not simply reducible in theory or practice to the realm of the ‘individual’, rather it required a more systemic and relational understanding of the factors that constrained and motivated economic actors.

³⁶ Paul A. Samuelson, *A Note on the Pure Theory of Consumer’s Behaviour*, 5 *ECONOMICA* 61 (1938)

³⁷ See JOHN B. DAVIS, *THE THEORY OF THE INDIVIDUAL IN ECONOMICS: IDENTITY AND VALUE* 30-31 (2003)

³⁸ Of course, one could then argue against this narrowing down of preferences to those that can be expressed through market behavior as bringing a methodological bias whereby *only* those preferences end up being those that matter, disregarding those that are satisfied through means other than consumption. On the “blind spot” cast on non-consumption by neoclassical consumer theory, see *infra* Sect. III.F.

³⁹ DUNCAN K. FOLEY, *ADAM’S FALLACY: A GUIDE TO ECONOMIC THEOLOGY* 186 (2008)

The sociologist Pierre Bourdieu further complicated the use of ‘utility’ by arguing that while individuals followed perceived self-interest, their motivations were determined not simply by some general appreciation of ‘utility’ or the economy at large, but instead by the specific micro-environments within which they operated. The market, for Bourdieu, was itself comprised of diverse, and often divergent, economic arrangements that contained overlapping but also distinct rules, the most important of which were oftentimes unstated (what he develops in the concept of ‘habitus’).⁴⁰ What constituted ‘utility’, therefore, was determined by the distinctive parameters of the given socio-economic regime that an actor participated in, and could not be necessarily reduced to the ‘maximization of wealth’. What instead mattered in an actor’s calculation, argued Bourdieu, was the social capital at stake in economic decision-making. The social, rather than purely ‘economic’, ramifications of choice exercised a predominant role in mapping out and strategizing individual consumer preference: consumption is not simply material, but also social acquisition. Like Samuelson and Keynes, Bourdieu problematizes the notion of ‘individuality’ in the determination of ‘utility’, but preserves the core neo-classical assumption of ‘interest’ (and more generally, the ‘consumer’) as the meta-drive of economic activity.⁴¹ Though these and other theorists have demonstrated the social is constitutive of the economic, as we will now turn to see, it is the economic through the formal medium of the abstract consumer, which increasingly imperializes itself across the legal and political regimes of the European Union.

⁴⁰ See e.g., Pierre Bourdieu, *Structures, habitus, practices*, in PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 52 (1990)(discussing the concepts of *habitus* and *doxa*). The subjectivity of the individual, for Bourdieu, is configured by and through participation in the objective, external structures and relations of its environment.

⁴¹ See e.g., PIERRE BOURDIEU AND LOÏC J. D. WACQUANT, *AN INVITATION TO REFLECTIVE SOCIOLOGY* 119 (1992); see also BEN FINE, *SOCIAL CAPITAL VERSUS SOCIAL THEORY: POLITICAL ECONOMY AND SOCIAL SCIENCE AT THE TURN OF THE MILLENNIUM* 52-64 (2002).

C. *Consumer Democracy*

The law is not the only social sphere to have been affected by the centrality of consumer choice in prevailing theories of the market economy. The latter's prominence, in fact, appears also to have shaped contemporary conceptions of democracy and democratic governance. This has occurred in at least two stages: first, through the strengthening of the conceptual association between economic freedom and democracy (Freiburg school); and secondly, by re-defining the role of the citizen within a democratic state around the neo-classical paradigm of consumer choice. This sub-section briefly examines the two in turn.

The ordoliberal Freiburg school⁴² enjoyed wide currency after World War II, and features – amongst its founding fathers – lawyer Franz Böhm and economist Walter Eucken. In seeking to provide a satisfactory response to the circumstances that had led to the consolidation of the national socialist regime in Germany, ordoliberals had in mind “a society in which individuals were as free as possible from state interference and in which democratic institutions dispersed political power within society by maximizing participation in public decision-making.”⁴³ For this reason, while accepting “the two basic starting points of classical liberalism – that competition is necessary for economic well-being and that economic freedom is an essential concomitant of political freedom,”⁴⁴ they were equally attuned to the dangers that arise when economic power goes unchecked:⁴⁵

⁴² See David Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe*, 42 AM. J. COMP. L. 25, 32 (1994).

⁴³ *Id.* at 36.

⁴⁴ *Id.*

⁴⁵ Economic historians and theorists have debated the reasons for the lead-up to fascism, as well as the tensions at play in post WW2 economic legislation. For instance, Dani Rodrik and Karl Polanyi argue it was not so much how to protect ‘individuals’ from the state that framed the postwar debates, but rather the urgency of quelling the revolutionary potential of the labor class to overthrow the economic / financial order, which it saw (perhaps, in part, correctly) to be implicit in the failure of the Weimar Republic and the rise of fascism. See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944); see also DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011). The freedom, in other words, was that of capitalist producers and financiers from radicalized labor, capitalist ideology from communist ideology, and vice versa, the appreciation on all sides that labor would be granted significant concessions by ‘market forces’ through the mediating role of the state. Social democratic governments, therefore, were not fashioned to navigate individual-state tensions, but rather labor-market antagonisms. Competition was, in this sense, indeed to be

[T]he emergence from the company or firm, as an expression of the fundamental freedom of individuals, of the opposite phenomenon of private power; a power devoid of legitimation and dangerously capable of infringing not just the economic freedom of other private individuals, but also the balance of public decisions exposed to its domineering strength.⁴⁶

For this reason, they argued for the adoption of an economic constitution that would preserve competition – which they understood as “complete competition”⁴⁷ – with the goal of preventing the excessive accumulation of economic power upon any one market actor, which was fresh in the memory of post-WW2 Germany by virtue of the close association between the national socialist regime and the great industrial cartels that had developed in the German corporatist economic culture.⁴⁸ In the ordoliberal view, therefore, competition was necessary to tackle the risk of capture of state institutions on the part of powerful economic actors.⁴⁹ At the same time as they argued for a government independent of economic interests, however, the ordoliberals were clearly not arguing for “big government.” Quite on the contrary, they argued for limited government, one whose intervention would never depart from “liberty- and market compatible means.”⁵⁰ This could be achieved through a political constitution establishing a set of checks and balances to prevent the arbitrary exercise of political power in a manner that might otherwise result in unjustified privileges accruing to undeserving economic actors, which would in turn stimulate the growth of private

preserved, but not between ‘individuals’ or ‘firms’, but the decision between, on the one hand, ideological antagonisms (market versus non-market), and on the other hand, institutionalized political antagonists (labor unions and left wing political parties versus capitalist enterprise and more centrist political persuasions).

⁴⁶ GIULIANO AMATO, *ANTITRUST AND THE BOUNDS OF POWER 2* (1997).

⁴⁷ Meaning “competition in which no firm in a market has power to coerce other firms in that market” (Gerber, *supra* note 42, at 43).

⁴⁸ AMATO, *supra* note 46, at 39-40.

⁴⁹ This logic mimicked the classic Scottish Enlightenment thought of authors such as Adam Smith. The 18th century movement, however, was responding to autocratic despotism, post-feudal socio-political relations, and an increasingly centralized bureaucracy dependent on inter-state warfare and outright domestic coercion. The ordoliberal view, in this respect, seemed to abstract this principle from any particular context and hold it up as a universal condition of political freedom. For a history of 18th century politico-economic thought, *see* ISTVAN HONT, *JEALOUSY OF TRADE* (2010).

⁵⁰ Manfred E. Streit & Michael Wohlgemuht, *The Market Economy and the State: Hayekian and Ordoliberal Conceptions*, in *THE THEORY OF CAPITALISM IN THE GERMAN ECONOMIC TRADITION* 224, 233 (Peter Koslowski ed., 2000)

power and frustrate the goal of competition policy from the back door.⁵¹ Achieving a balance between economic and political power was hence the foremost concern of ordoliberal thought, under the overarching goal to further individual economic freedom.⁵² In this setting, while efficiency would normally ensue as a positive spillover effect from the presence of competition, thereby enhancing consumer welfare as well,⁵³ this need not always occur: in choosing between consumer welfare and individual economic freedom (in a market where no actor can affect the others in a significant way), ordoliberals would favor the latter.⁵⁴

This position is turned on its head by the exclusive neoclassical focus on consumer welfare. In this framework, individual economic freedom is not so much interpreted as “freedom to compete” – as in the ordoliberal paradigm – but rather as “freedom to choose.”⁵⁵ The relationship between the economic and political systems, therefore, appears to have shifted away from a “constitutional” focus on enacting a set of rules to provide the framework for “a society of essentially self-reliant decision makers whose actions are controlled and coordinated through market competition.”⁵⁶ This relationship is now recalibrated – in a neoclassical consumer welfare framework – in light of the principle of enabling individual choice, which has resulted in the conflation of the choice paradigm

⁵¹ See *id.* at 233; Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism* 14, 16-17 (Freiburg Discussion Papers on Constitutional Economics, Paper No. 04/11, 2011), available at http://www.walter-eucken-institut.de/fileadmin/bilder/Publikationen/Diskussionspapiere/04_11bw.pdf. Of course, the distaste for ‘government intrusion’ was, in many respects, canceled the moment ordoliberal thought called for checks and balances. Not only was regulation from outside the private sector necessary, but the very existence of the market and subsequent actors depended on political agreement over background norms and distribution that would be vigorously enforced. See generally Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *Legal Studies Forum* 327 (1991).

⁵² See Wernhard Möschel, *The Proper Scope of Government Viewed From an Ordoliberal Perspective: The Example of Competition Policy*, 157 *J. THEORETICAL & INSTITUTIONAL ECON.* 3, 4 (2001); Liza Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernization of Article 82 EC*, 3 *EUR. COMP. J.* 329, 332-34 (2007).

⁵³ See Möschel, *supra* note 52.

⁵⁴ See Lovdahl Gormsen, *supra* note 52, 332. The same author provides the example of a business sector where the possibility of economies of scale would allow consumers to benefit from lower prices in the presence of less competing firms, yet the willingness to preserve competition to prevent any one firm from gaining too much economic power could favor the protection of firms whose disappearance would otherwise – by enabling economies of scale – benefit consumers; see *id.* at 331.

⁵⁵ See *id.* (providing a lucid description of this shift in relation to European competition law).

⁵⁶ Streit & Wohlgemuth, *supra* note 50, at 230 (emphasis added).

of consumers in the market and of citizens in the public sphere, to ultimately give birth to the notion of “market citizenship”:

[C]hoice is identified in market citizenship as the key mechanism by which markets can function efficiently. It is also seen as the means by which citizens can exercise power and control important aspects of their lives and, also, more controversially, the tool by which greater equality and social justice can be achieved in the wider society. It is argued that choice, leading to personalized public services, increases equity and social justice more than other allocative mechanisms Following from this, market citizenship involves treating the citizen as a consumer or customer.⁵⁷

The adoption of consumer choice as the reference point for the relationship between individuals and the government, however, has not occurred only with respect to public services (though perhaps the most notable example of the attempt to introduce quasi-market mechanisms in tailoring quantity and quality of supply to citizens’ needs). Needham, for instance, stresses that the “consumerization” of citizenship has affected other realms as well, beyond the way in which goods and services are provided,⁵⁸ and refers to changing patterns of citizen consultation in politics: the way citizens enter the political picture is, nowadays, also through the use of “marketing-type” consultations (like opinion polls), and on issues that are more closely connected to service quality, at the expense of broader policy concerns.⁵⁹

The conflation of consumer and citizen choice is most visible in the “libertarian paternalism” of Thaler and Sunstein.⁶⁰ In libertarian paternalism, individual choice is presented as the central

⁵⁷ AMANDA ROOT, MARKET CITIZENSHIP: EXPERIMENTS IN DEMOCRACY AND GLOBALIZATION 57 (2007)

⁵⁸ See generally Catherine Needham, The Consumerisation of Citizenship in Local Government: Beyond Service Delivery, Paper for presentation at the Political Studies Association Conference, Leicester (Apr. 14-16, 2003), available at <http://www.psa.ac.uk/cps/2003/Catherine%20Needham.pdf>.

⁵⁹ See *id.* at 12. Another example would be the new paradigms of political communication, which are often drawn squarely from corporate marketing strategies, see BENJAMIN R. BARBER, CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS AND SWALLOW CITIZENS WHOLE 205 (2007).

⁶⁰ CASS R. SUNSTEIN & RICHARD H. THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

criterion after which to structure both economic and political intervention⁶¹ by adopting an appropriate “choice architecture”⁶² that, while orienting individual decision-making towards desirable outcomes through what the two authors term “nudges,”⁶³ still allows individuals to opt out of default options in the pursuit of more personalized choices. While ordoliberal thought favors a certain distance between the economic and the political in the name of individual economic freedom, theorists within the liberal paternalist model draw from the neoclassical tradition of consumer welfare maximization, and argue for the “importation” of consumer choice paradigms in the political process. However, what ordoliberalism, market citizenship and libertarian paternalism all have in common is a focus on the tight coupling between market and political processes in practice, while simultaneously (and to varying degrees) substituting the constitutive role of politics in the shaping and maintenance of the ‘market’ (or, more broadly, economic ‘laws’) with a revamped ‘state of nature’ where individuals operate according to a ‘natural’, even ‘pristine’ landscape (to the extent that ‘government’ is seen as an imposing bureaucratic ‘artificiality’) that is in turn equated with the ‘economy’. In other words, while economic policy (no matter how ‘free market’ / ‘deregulatory’ the orientation) is fought out between warring interest groups and ideological positions and enacted through legislative action and politically sanctioned bodies, the last decades have marked the de-politicization (and subsequent de-historicism) of the market in popular and academic discussion.

And yet the rapid spread of consumer choice theory through and beyond the confines of economic theory is not without challenge from more fundamental oppositions. In the following section, we turn to investigate seven sites of resistance.

⁶¹ *See id.* at 13.

⁶² *Id.* at 2, 81 ff.

⁶³ “A nudge . . . is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives”(*id.* at 6).

III. WHERE THE CRITIQUE OF CONSUMER SOCIETY STANDS TODAY

The consumer model enjoys strong currency in the European Union, if not throughout the Anglo-American global order and beyond. In the modern era, the struggle against consumer-centric policy traditionally came from Christian, Marxist and/or localized (e.g., ‘cultural’) practices, whose adherents found their orientations incompatible on various levels. Today, the challenges to consumer society have fragmented into a diverse body of critique and alternative (albeit experimental) models. There are, by our estimate, at least seven provocative traditions that challenge the current trajectory of consumer policy: Marxism, Institutional Economics, Critical Legal Studies, Baudrillardian structuralism, Buddhist economics, Deep Ecology and Critical Religion. In looking at these disparate sites of contestation, our goal is not to advance a particular strand of reasoning, but rather to unpack some of their salient themes and map out their relation to consumption-led policy.

A. *The Marxist Spotlight: Alienation and Commodification*

The Marxist challenge to the consumer paradigm is situated in the critiques of ‘alienation’ and ‘commodification’. The problem of alienation is aptly described by Slater in terms of labor, namely that in a capitalist society, the working person no longer experiences:

[A] qualitatively rich and substantive relation to the world and one’s needs (using one’s skills to make this or that), but rather something entirely abstract and formal: I sell my capacity to labour in general (indeed I sell a quantity of abstract labouring time) for a sum of money. My labour-power has no particular qualities for me and I do not even use it to produce the specific things I need. Rather, I sell my labour-power and produce goods I do not need in order to get the cash to buy goods I need but did not produce. Being unrelated to my

own transformative work on the world, these goods must appear to me as alien and objective, as is my own labour.⁶⁴

For Marx, the essence of the human species lays in the ability to engage in “free conscious activity,”⁶⁵ meaning that – unlike other animals – the productive activity of the laborer is not necessarily compelled by “immediate physical need[s]”⁶⁶ and one is able freely to confront the final product of one’s labour, thereby “contemplat[ing] himself in a world he himself has created.”⁶⁷ The fact that workers in a capitalist economy lose track of the transformative significance of work, and simply discount it as something instrumental to an end (e.g., earning a wage to buy the commodities they need to live) leads Marx to the discomfiting assertion that through this process some part of what makes us human is lost. In fact, if the distinctive character of man, in comparison to other animal species, is that his life activity is not pre-determined by his condition within nature, but is instead self-directed – “an object of [man’s] will and consciousness”⁶⁸ – then it is the very essence of being human that labour within a capitalist economy turns on its head, by making man’s “life activity, his *being* . . . , a mere means for his *existence*.”⁶⁹

Alienation is also intimately connected to the commodification of capitalist labour, for Marx, namely the transformation of labour into a thing – labour-time – that can be bought and sold. The

⁶⁴ DON SLATER, CONSUMER CULTURE & MODERNITY 106 (1997). Of course, what the Marxist theory of alienation typically seems to dismiss is that despite the selling of labor power, the worker may still extract an even significant degree of meaning through his/her albeit sold labor.

⁶⁵ Karl Marx, *Estranged Labour*, in THE CONSUMER SOCIETY READER 3, 8 (Martyn J. Lee ed., Blackwell 2000) (1844). Marx famously criticized Feuerbach for his abstract character of humanity, and argued for the necessity of contextualizing the subject within the modes and relations of production – though, as the quote in the text above demonstrates, Marx assumes that one’s labor is intimately attached to one’s authenticity and sense of self, or at least, that the essential drive of the individual is towards self-determined freedom.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* To be absolutely clear, the claim that Marx did not see people ‘pre-determined’ by nature refers to the potential (and somehow innate desire) of human agency to (radically) change their material reality when oppressed, as he undoubtedly contextualized individual experience within structures and relations of production (and thus, in a sense, ‘determined’ by their material contexts). Indeed, while the Marxist claim may rely too heavily on industrialized-led production, it also perhaps inaugurated the first modern appreciation of the need to contextualize identity in relation to a broad and eclectic array of economic, political and social factors.

moment labour is commodified (e.g., in order to produce other commodities), workers are estranged from a creative, transformative relationship to productive activity, and made to work solely to cater for their survival or to fuel further production and capture of surplus labor value. The only purpose of labour, in other words, becomes consumption. Once again in the words of Slater:

I become a consumer the moment I become a worker, for my subjection to commodities is intrinsically bound up with having myself become a commodity in the form of labour-power. Commodified labour produces commodities, things that are produced for sale and therefore for consumption by someone other than the person whose labour produced it. Instead of being organically and transparently linked within praxis, the relationship between production and consumption is indirect and mediated through markets, money, prices, competition and profit – the whole apparatus of commodity exchange.⁷⁰

It is this indirect nature of the relationship between production and consumption that gives rise to what Marx calls the “fetishism of commodities.” For Slater, this is ultimately an issue of “recognition and distance.”⁷¹ The fact that men and women no longer produce the things they need (use-values) for themselves, but have to rely on the “apparatus of commodity exchange” to get them, introduces a gap between things and the social processes underlying their production. In Marx’s own words, once relative prices (i.e. the price of one commodity in terms of another) “have attained a certain customary stability, they appear to result from the nature of the products”⁷² rather than from “relations of production [between people]: labour, wage-relations, structural class divisions.”⁷³ Drawing these two strands of analysis together (alienation and commodification), the Marxist perspective offers two fundamental critiques of ‘consumer society’ – the first, methodological, the second, what may be described as ‘metabolic imbalance’.

⁷⁰ SLATER, *supra* note 64, at 107.

⁷¹ SLATER, *supra* note 64, at 111.

⁷² Karl Marx, *The Fetishism of the Commodity and Its Secret*, in THE CONSUMER SOCIETY READER, *supra* note 65, at 10, 13 (1867).

⁷³ SLATER, *supra* note 64, at 112.

The methodological strand of Marxist critique is two-part. First, the equation of ‘relative prices’ with ‘the nature of products’ themselves, rather than oscillating relations of production, depoliticizes the process of exchange and production to create an assumption that existing ‘consumer society’ is somehow natural – what Roberto Unger has famously raised in the concept of ‘false necessity’.⁷⁴ Second, as consumer society is now presented as a totalizing field of economic possibility, whatever outcomes do not fit within its strictures appear as either derogations from the established order (to therefore be disciplined), or alternatively, seem to occur through random, or illogical, factors, whether for good or ill. The logic, in other words, is that sometimes things just happen – what we might term the ‘randomness’ hypothesis. If ‘false necessity’ leads to an over-determination of certain economic explanations and maintains the status quo, for scholars such as Susan Marks, this ‘randomness hypothesis’ (or what she describes as ‘false contingency’) too easily leads policy makers to discount anomalies as mere chance occurrences, when in fact they are part and parcel of the existing economic system. Consumer-centric economic policies within EU legislation, therefore, are methodologically flawed within the Marxist critique for both over-determining the existing consumer paradigm in relation to alternative models of economic organization, and distorting information about the causes for various economic outcomes.⁷⁵

The Marxist critique also challenges the consumer society approach of the European level by targeting the naturally ‘excessive’ nature of capitalism itself and how this over-extension creates both subjective and structural imbalances throughout all regimes of modern life. In other words, for Marxist theory in this strain of critique, capitalism appears to be a type of economic organization that vastly transcends the dimensions required to keep human activity within the bounds of a metabolic relationship between man and the world. By “metabolic” relationship between man and

⁷⁴ ROBERTO UNGER, *False Necessity: 1 ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (2004); *see also* ROBERTO UNGER, *2 SOCIAL THEORY: ITS SITUATION AND ITS TASK* 48-79 (2004).

⁷⁵ *See* Susan Marks, *False Contingency*, 62 *CURRENT LEGAL PROBLEMS* 1 (2009).

the world, Marx appears to refer to an understanding of labour as the process mediating the satisfaction of human needs through interaction with the world⁷⁶: in brief, it is through labour that humans draw from an environment the things needed to survive, by transforming raw material into use values. As long as one is able to hold together this intimate, transformative connection between production and consumption, then labour retains the “metabolic” character Marx talks about. In the capitalist economy, however, production and consumption take place on such a grand scale as to kick the activity of the laborer outside of “metabolic” bounds. One no longer feels one is transforming anything through work; instead one is simply expending labour power in exchange for an abstracted wage largely for commodity consumption. The mediated relationship between labour and satisfaction of needs through the exchange of commodities no longer allows people to “recognize as our own the world we have made,”⁷⁷ both because labour is no longer in an immediate relationship to the production of use-values (e.g., the critique of alienation of labour) and because the laborer feels that activity is somehow part of a process bigger than themselves and driven by things, rather than actual social processes (e.g., the critique of commodification). The problem with the economic paradigm at the heart of the notion of “consumer society,” then, lays precisely in that its central figure, the consumer, constitutes the one-sided embodiment of an imbalanced understanding of human activity, in which production and consumption are no longer held together in people’s lives as sides of the same coin.

B. *The Institutional Economics Critique*

The institutional critique of consumer capitalism is presented here through the works of Veblen, Galbraith and Sheehan. The defining feature of these economists’ work is the focus on the presence of institutional and cultural drivers of human action within the economy; arguably one of the

⁷⁶ See JOHN BELLAMY FOSTER, MARX’S ECOLOGY: MATERIALISM AND NATURE 157 (2000).

⁷⁷ SLATER, *supra* note 64, at 111.

defining concerns of institutional economics as such.⁷⁸ More specifically, what the economists whose work will be briefly discussed here all seem to hint at is the presence of a relationship between supply and demand, whereby demand is not simply an exogenous variable, as assumed in the neoclassical theory of consumer choice, but is itself crucially affected by production.

Veblen was one of the first to challenge the idea that consumption is determined purely by a person's individualized needs. For Veblen, in fact, consumption does not only display an individual dimension in which provision for one's needs is the crucial concern, but also a social dimension, which he condensed in the famous concept of *conspicuous consumption*:

Throughout the entire evolution of conspicuous expenditure, whether of goods or of services or human life, runs the obvious implication that in order to effectually mend the consumer's good fame it must be an expenditure of superfluities. In order to be reputable it must be wasteful. No merit would accrue from the consumption of the bare necessities of life, except by comparison with the abjectly poor who fall short even of the subsistence minimum.⁷⁹

For Veblen, in other words, conspicuous consumption is a method of "demonstrating the possession of wealth"⁸⁰ through a "waste of goods."⁸¹ In deciding what amounts to "waste," he suggests that "in order to bring any given item or element under this head it is not necessary that it should be recognised as waste . . . by the person incurring the expenditure."⁸² Instead, it is a test of "impersonal usefulness"⁸³ (that ought to be adopted), whereby usefulness is assessed from the perspective of the "generically human," by inquiring into the presence of an "enhancement of life

⁷⁸ Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. ECON. LIT. 166, 173 (1998).

⁷⁹ Thorstein Veblen, *Conspicuous Consumption*, in *THE CONSUMER SOCIETY READER* 187, 202 (Juliet B. Schor & Douglas B. Holt eds., 2000) (1899).

⁸⁰ *Id.* at 196.

⁸¹ *Id.*

⁸² *Id.* at 203.

⁸³ *Id.*

and well-being on the whole.”⁸⁴ The main consequence of the social aspect of consumption described by Veblen is that emulation of the consumption patterns of the “leisure class” by lower classes eventually leads to obsolescence, thereby increasing demand for new products by the leisure class to establish new differentiations.⁸⁵ Beyond the level of need (or constitutive in the ‘development’ of perceived necessities), consumption is not simply satisfying wants or attaining the ‘good life’ (e.g., comfort, security, etcetera), but is deeply enmeshed in hierarchical political struggles and strategies of control. In other words, consumption is in the first order deeply political.

Galbraith’s critique appears to develop Veblen’s crucial insight that demand for products in a consumer society is not purely exogenous, but rather intimately related to supply. Indeed, Galbraith discussed the merits of an argument made by economist J.S. Dusenberry, which appears related to Veblen’s claim:

Because the society sets great store by the ability to produce a high standard of living, it evaluates people by the products they possess. The urge to consume is fathered by the value system which emphasizes the ability of society to produce. The more that is produced, the more that must be owned in order to maintain the appropriate prestige.⁸⁶

Galbraith, however, was not simply concerned with consumption as a form of status seeking or political leverage, but also attuned to the problem posed by marketing, through which producers were able artificially to stir demand for their products.⁸⁷ The idea that new wants are a consequence

⁸⁴ *Id.*

⁸⁵ See David B. Hamilton, *Institutional Economics and Consumption*, in *THE CONSUMER SOCIETY*, *supra* note 32, at 170, 171.

⁸⁶ John Kenneth Galbraith, *The Dependence Effect*, in *THE CONSUMER SOCIETY READER*, *supra* note 65, at 217, 219 (1987).

⁸⁷ *Id.* Though Veblen does not adequately take into account the ‘marketing’ arm of capitalist economics, his analysis provides an important addition to Galbraith’s ‘dependence effect’: not only does marketing provide a valuable service to production and distribution commodity chains, more specifically, it carries a valuable secondary political function to both preserve existing power relations and ensure that the population at large constantly reinvests in the pursuit of wealth maximization. The effect of marketing, therefore, reifies the neoclassical connection between commodity acquisition and progress, and perhaps as importantly, keeps wage-earners tethered to their existing employment. In what

– not a cause – of increased production has been termed by the American economist the “dependence effect,” and its discussion is worth quoting at length:

As a society becomes increasingly affluent, wants are increasingly created by the process by which they are satisfied. This may operate passively. Increases in consumption, the counterpart of increases in production, act by suggestion or emulation to create wants. Expectation rises with attainment. Or producers may proceed actively to create wants through advertising and salesmanship. Wants thus come to depend on output. In technical terms, it can no longer be assumed that welfare is greater at an all-round higher level of production than at a lower one. It may be the same. The higher level of production has, merely, a higher level of want creation necessitating a higher level of want satisfaction. There will be frequent occasion to refer to the way wants depend on the process by which they are satisfied. It will be convenient to call it the Dependence Effect.⁸⁸

Sheehan has taken up the thread weaved by Galbraith to focus specifically on the role of the institution of marketing in a system (the “system of abundance”) where, as far as the “people of plenty”⁸⁹ are concerned, too many goods are chasing too few consumers:

The system of abundance has solved the production problem and is able to churn out on a daily basis increasingly vast amounts of products of enormous variety. In addition the people of plenty enjoy

looks strikingly similar to a Marxist anxiety about capitalist modes and relations of production, freedom is equated in the consumer model with the formal opportunity to purchase goods above and beyond necessity, but which discounts the costs of such buying power. While Galbraith seems to correctly chart the inherent, and insatiable, escalation of desire fueled in the marriage of capitalist production and marketing, Veblen’s theoretical interest draws out the distributional rewards of this process.

⁸⁸ *Id.* at 221.

⁸⁹ Sheehan argues that the “people of plenty” cannot be described solely by reference to national boundaries. Instead:

The people of plenty stretch across all social classes in the advanced industrialized nations. In addition the people of plenty make up a solid bloc in the Gulf states and form a majority of citizens in Russia and Eastern European nations, apart from Albania. There are also large concentrations in the urban areas of nations located in the Middle East, South Asia, South-East Asia, the eastern seaboard of China and Latin America. This category even incorporates small affluent minorities living in the least-developed nations, amongst them those at the very top of the informal social network pyramid that support the peoples of poverty and adequacy. (BRENDAN SHEEHAN, *THE ECONOMICS OF ABUNDANCE: AFFLUENT CONSUMPTION AND THE GLOBAL ECONOMY* 8 (2010))

unparalleled affluence, with a profusion of possessions and experiences that could only be dreamed of by previous generations. The greatest threat to the system is under-consumption - where spending rises less fast than productive capacity. The dominant problem for this economic system is therefore how to persuade affluent consumers to keep giving priority to consuming on an ever-greater scale. In this sense persuasion replaces production as the economic problem.⁹⁰

To understand the workings of this system, the usual task of economics as the study of the efficient allocation of *scarce* resources has to be turned on its head. Economics, Sheehan argues, ought instead to understand the ways in which needs are inculcated in consumers by the producers in order to allocate the vast cornucopia of goods that are generated by the economic system. This is achieved through the “institution of marketing,” which can be thought of as a loosely bound network of agents – within and without the corporate world (e.g., the marketing industry, governments, and so on) – that generate messages to condition “the people of plenty to feel, think and act in ways consistent with increased spending.”⁹¹

In conclusion, it appears that the progression from Veblen to Sheehan through Galbraith witnesses increasing skepticism towards a fundamental assumption of the consumer society model – namely, that consumers spontaneously flock to the market to satisfy their individually-originated needs. All three thinkers instead bring the social character of consumption out of the shadows of neoclassical economics, and explore ways in which consumption is politically constituted and managed. A society where demand for products is dependent upon, and at least partially steered by, the supply side becomes locked in a “dependence effect” triggering an upward spiral in consumption that keeps spinning for no other reason than it needs to keep spinning, lest facing the prospect of economic stagnation – exactly what stands behind popular expressions in the post-financial crisis of

⁹⁰ *Id.* at 35. Of course, the ‘health’ or potential of production (e.g., returns on investment), and the perceived status of the economy more generally, may be a key factor in persuading (or in contemporary lingo, incentivizing) the ‘people of plenty’ to maintain an increasingly, or at least steady rate of expenditure beyond wealth consolidation.

⁹¹ *Id.* at 10. Of course, this imperative could be read to apply beyond the ‘people of plenty’.

2008, such as ‘too big to fail’, or earlier, with President George W. Bush’s injunction that the American population could best support the Iraqi-invasion by ‘shopping’.⁹² People, for these institutional economists, do not spend only because they “want to,” but because they are somewhat “coerced” into the consumer mold by a set of cultural and institutional influences that promote behavior consistent with both the particular needs of affluent classes maintaining their status, and the system at large.

C. *The Structuralist Perspective of Jean Baudrillard*

The intriguing contradictions elucidated by institutional thinkers, and particularly by Galbraith, were later re-elaborated in the work of the late French critical theorist Jean Baudrillard. In *The Consumer Society*,⁹³ Baudrillard discusses the fundamental problem highlighted by Galbraith: “the contradiction . . . between a potentially unlimited productivity . . . and the need to dispose of the product.”⁹⁴ While agreeing in principle with Galbraith that consumers are unlikely to be in the driver’s seat when it comes to what they “choose” on the market, he nevertheless disagrees with him the moment the American economist centers his critique of consumer capitalism on the notion of “need.” For Baudrillard, in fact, the attempt to separate “natural/spontaneous” and “artificial” needs is off mark when attempting to articulate the uneasy predicament of the consumer. Instead, there is a contradiction at the heart of the needs-discourse, he argues, whereby needs postulate the possibility of satisfaction, followed by “a state of equilibrium and resolution of tensions.”⁹⁵ And yet, the questions arises, the reality described by Galbraith is one of “insatiable” needs⁹⁶ - how does one

⁹² See Amanda Terkel, *With Recession Looming, Bush Tells America to “Go Shopping More”*, THINK PROGRESS (Dec 20, 2006, 12:56 PM), <http://thinkprogress.org/politics/2006/12/20/9281/bush-shopping/>.

⁹³ JEAN BAUDRILLARD, *THE CONSUMER SOCIETY: MYTHS AND STRUCTURES* (Chris Turner trans., SAGE 2000).

⁹⁴ *Id.* at 71.

⁹⁵ *Id.*

⁹⁶ Of course, Baudrillard’s conclusion that ‘needs’ cannot be satisfied, and are thus an undesirable analytical concept, seems questionable. First, while ‘desire’ itself may be ingrained in the human psyche, it is unclear that ‘desire’ is actually incapable of fulfilment on a variety of (at least micro) levels. One may, for instance, desire not to confront a daily struggle for basic life necessities, and if successful may be able to overcome such anxiety (desire) in a relatively

explain this paradox? Baudrillard's answer is that "need is never so much the need for a particular object as the 'need' for difference (*the desire for the social meaning*)"⁹⁷ so that "there can never be any achieved satisfaction, or therefore any definition of need."⁹⁸ Ritzer clarifies this last point:

When looked at from a structural perspective, what we consume is signs (messages, images) rather than commodities. This means that consumers need to be able to "read" the system of consumption in order to know what to consume. Furthermore, because we all know the "code," we know the meaning of the consumption of one commodity rather than another. Commodities are no longer defined by their use, but rather by what they signify. And what they signify is defined not by what they do, but by their relationship to the entire system of commodities and signs. There is an infinite range of difference available in this system and people therefore are never able to satisfy their need for commodities, for difference. It is this that in Baudrillard's view helps account for the seeming insatiability and continual dissatisfaction of consumers. And this, in turn, is one of the reasons for Baudrillard's dissatisfaction with the use of the concept of "needs" – needs can, by definition, be satisfied and therefore cannot account for the insatiability of consumers. What people seek in consumption is not so much a particular object as difference and the search for the latter is unending.⁹⁹

permanent sense. Second, 'needs' can very well be the necessity of a particular object (e.g., access to food, water, air, medicine), which even if required on an ongoing basis and hence never fully achieving satisfaction per se, are nevertheless essential to even a minimum standard of life. Third, there is no empirical proof that subjects pursue 'needs' simply in the name of creating or maintaining 'difference'. The struggle for particular needs can in fact be a rally cry towards solidarity, and unlike Baudrillard's depiction of 'difference' as a site of identity-creation, the effort to form and distinguish oneself or a community of belonging can be guided by radically different ambitions. What is strikingly missing in Baudrillard's account, for all its intriguing possibilities, is the experience of the poor and materially disposed who experience the struggles for 'needs' in very real terms that have little or nothing to do the desire for constructing senses of identities or differences. Moreover, to the extent that 'needs' are posited to create difference, Baudrillard misses the politico-economic stakes attached to the manufacturing of 'needs' and 'wants' as brought out by Veblen. Baudrillard's conception of needs expresses a distinctly post-modern experience of middle-to-upper class (Western) existence, far removed from the daily battles and suffering that 'needs' invokes for much of the world's population.

⁹⁷ For Baudrillard, in fact, "every group or individual experiences a vital pressure to produce themselves meaningfully in a system of exchange and relationships." Jean Baudrillard, *The ideological genesis of needs*, in THE CONSUMER SOCIETY READER, *supra* note 79, at 57, 67 (1969). This postulates the presence of a language acting as an exchange structure through which "the human terms of the exchange [are differentiated] into partners, not individuated, but nevertheless distinct, and bound by the rules of exchange" (*id.*). In addition to that, "[l]anguage cannot be explained by postulating an individual need to speak" (*id.* at 68); it simply is, and it is *within* language that "the individual intention of speech" (*id.*) then comes to be articulated. In light of this, meaning is therefore to be understood, for Baudrillard, as *differentiation* within a communicative structure that is *given*.

⁹⁸ BAUDRILLARD, *supra* note 93, at 78.

⁹⁹ George Ritzer, *Introduction to JEAN BAUDRILLARD*, *supra* note 93, at 1, 7.

“Needs,” therefore, are not something ontologically separate from the system of consumption, but intimately bound up with it. As Baudrillard himself puts it, “consumption does not arise from an objective need of the consumer . . . rather, there is social production, in a system of exchange, of a material of differences, a code of significations.”¹⁰⁰ Consumption stops being a matter of possessing things to instead become a question of communication,¹⁰¹ a code “by comparison with which individual needs and pleasures are merely speech effects.”¹⁰² As Ritzer aptly puts it, consumption:

[I]s above all else a coded system of signs. Individuals are coerced into using that system. The use of that system via consumption is an important way in which people communicate with one another. The ideology associated with the system leads people to believe, falsely in Baudrillard’s view, that they are affluent, fulfilled, happy and liberated.¹⁰³

In other words, Baudrillard’s departure from the institutional critique lays in his acknowledgment of “needs” as a category internal to the system of consumption, which the latter needs in order to reproduce itself and survive, to the point that it is as “essential to the order of production as the capital invested by the capitalist entrepreneur and the labour power invested by a wage laborer.”¹⁰⁴ Using “needs” as the parameter against which to criticize the functioning of the capitalist economy – for instance, by differentiating between genuine and artificial needs – is therefore a fruitless effort, as the category of needs is unable to bite into what really keeps people hooked to consumption, which

¹⁰⁰ Baudrillard, *supra* note 97, at 68.

¹⁰¹ TIM EDWARDS, *CONTRADICTIONS OF CONSUMPTION: CONCEPTS, PRACTICES AND POLITICS IN CONSUMER SOCIETY* 176 (2000).

¹⁰² BAUDRILLARD, *supra* note 93, at 80. The insight that consumption functions within the economic order to (psychologically) satiate its subjects is undoubtedly provocative, but what remains missing in this analysis is the extent to which such communicative / psychological functions are themselves premised on underlying political (or to draw upon the Marxist critique, ‘materialist’) grounds. In other words, Baudrillard’s theory of communication-via-consumption ignores the question of why consumption rather than some other form of vocabulary/activity is chosen as the vehicle of exchange.

¹⁰³ Ritzer, *supra* note 99, at 15.

¹⁰⁴ Baudrillard, *supra* note 97, at 74.

Baudrillard identifies instead with the search for meaning inside a given social and symbolic structure.

The French critical theorist seals off his tranchant analysis of consumer society by articulating what sounds like an epitaph on the economic assumptions behind consumer behavior illustrated in Section II.A. In fact, after contending that consumption does not follow from needs, but that these are instead the currency that the social system offers for people to communicate within it, Baudrillard adds that people are set to be “educated, trained, even tamed”¹⁰⁵ into this language: they are not naturally oriented to consume, it is taught. This may explain a range of maladaptive behavior, which Baudrillard refers to as contemporary instances of *anomie*: “from *destructiveness* (violence, delinquency), through collective escapist behaviour (drugs, hippies, non-violence), to contagious *depressiveness* (fatigue, suicide, neuroses).”¹⁰⁶ These are, in his view, simply the extrinsic manifestation of a fundamental ambiguity at the heart of the social order experienced by the consumer:

Affluence is not . . . a paradise. It is not a leap beyond morality into the ideal immorality of plenty. It is a new objective situation governed by a new morality. Objectively speaking, it is not therefore an advance, but quite simply *something different*. There is, then, this ambiguity about affluence: it is always simultaneously experienced as euphoric myth (of resolution of tensions and conflicts, of happiness beyond history and morality) and endured as a process of more or less enforced adaptation to new types of behaviour, collective constraints and norms. The “Revolution of Affluence” does not usher in the ideal society; it simply leads into a different type of society.¹⁰⁷

Maladaptive behavior that may appear to some as uncalled-for violence then takes on a new dimension. It appears as the shadow of affluence itself, or more precisely, the consequence of the general inability to articulate one’s predicament within the system by openly coming to terms with

¹⁰⁵ BAUDRILLARD, *supra* note 93, at 175.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 175-76.

the constraints which are present, even within an order that predicates itself on the promotion of unbridled freedom. In light of the above, Baudrillard eventually comes to the somewhat dystopian view that “affluence and violence go together.”¹⁰⁸

D. *Indeterminacy, or Critical Legal Studies as Culture Jamming*

The contribution of Critical Legal Studies (CLS) to the debate about the consumer paradigm comes to us indirectly through their structuralist critiques that seek to exploit the internal contradictions embedded within liberal systems of governance – in variations both subjective (e.g., the focus on identity) and objective (e.g., the emphasis on economic distribution of resources) – in order to undermine the logic and relationship of economics and law. In a Foucauldian register, scholars often focus on unpacking texts and embedding them within a socio-political context that seeks to draw out the blind spots and arbitrariness of essentialized concepts, and open the door to both reflection and contestation. Importantly, through an immanent deconstruction of the argumentative logic within various professionalized regimes of law and economics, CLS highlights the political motivations and social character of consumer based economic models that are all too often characterized along individualized, and/or formally neutral lines of reasoning.

This perspective may be particularly useful for giving substance to those voices that have questioned the “subordination” of consumer policy to market integration that has taken place at the

¹⁰⁸ *Id.* at 175. Baudrillard suggests that ‘consumption’ hides the ‘real’ predicaments of modern life, which is closely tied in his theory to the struggle for meaning. The greater ‘affluence’ (defined as the prioritization of certain commodities as the purpose of life and the means of communication), therefore, the greater the disengagement from one’s authentic self. Alienation, through consumerism, in turn is said to breed violence – the act of desperation to break the stranglehold of artificiality and isolation. Yet the linkage between affluence and violence is even more dense than Baudrillard implies, as ‘affluence’ is itself premised on the ability of particular social groups and individuals to capture the surplus labor power of others towards their own individualized ends, which necessarily requires a complex apparatus of both real and suggestive coercion. It is likely, as he suggests, that violence stems from the frustration of meaning, yet this violence is exercised in a more nuanced way that he imagines: on the one hand, violence operates across the spectrum, to those with and without affluence, in an attempt to overcome a variety of concrete and invisible obstacles; on the other hand, violence is institutionalized in the domain of the state to preserve existing segregation patterns of affluence and deprivation. Violence is not only the outcome of meaning denied, but its source, and needs to be carefully delineated to avoid the danger of presenting the terms of exploitation and suffering as perennial to some abstract human condition.

European level, and more generally, to critically reflect on some of the key tenets of the consumer economic model. To illustrate this point, take the polarized commentary following the choice of maximum harmonization¹⁰⁹ in the drafting of the Proposal for a Directive on Consumer Rights.¹¹⁰

At one end of the spectrum, therefore, one finds those that argue in the “neutral” language of cost-benefit analysis that maximum harmonization is a “necessary” arrangement:

[T]o protect consumers only insofar as it would not restrict the economic activity of vendors. Excessively strict provisions, which would be conformable with the “protection of the consumer,” would not always be conformable with “consumer welfare,” because such measures could in the end lead to a rise in prices.¹¹¹

At the other end of the spectrum, however, the question is not settled so easily as there is greater awareness of the need to grapple with the texture of underlying interests:

The perception that it is not only in the commercial but also in the consumer interest to place such a high priority on eliminating the fragmented regulatory framework that follows from preference for a model of minimum harmonization is far from uncontested. Commercial interests seek a common set of rules for the purposes of gearing up for a pan-European market, thereby reducing transactions costs and releasing economies of scale. This is by no means inevitably inconsistent with the consumer interest. But the risk from the consumer perspective is that common rules will – at least for some groups of consumers, in some Member States – result in a depreciation in standards of protection from market failure and/or market inequities.¹¹²

¹⁰⁹ Meaning the setting of consumer protection standards at the EU level without the possibility of raising them further at the national level. Under maximum harmonization, therefore, Member States’ thresholds of protection are set once and for all at the European level.

¹¹⁰ *Consumer Rights Directive Proposal*, *supra* note 27.

¹¹¹ Froňková, *supra* note 28.

¹¹² WEATHERILL, *supra* note 8, at 25.

A journey into Critical Legal Studies can therefore help add theoretical momentum to arguments like that just quoted by Weatherill, by providing an answer to the following question: how do more overtly political considerations stand up to the method of cost-benefit analysis and its underlying concern for efficiency in relation to consumer-driven economic modeling? Here, Duncan Kennedy has attempted to challenge policy justifications couched on grounds of cost-benefit analysis (and the efficiency-maximization rationale underpinning the latter) by stating that efficiency-based decision-making is actually indeterminate¹¹³ and that it is chiefly an apologetic tool for liberal-minded policies.¹¹⁴ The way he goes about doing this is to provide an overview of the many dilemmas a policy-maker encounters when engaging in cost-benefit analysis, for the solution of which the “method” of cost-benefit analysis provides no value-free solution that might be independent of the policy-maker’s peculiar political orientations and value preferences. For Kennedy, the way the framework for decision-making is set up in terms of defining the *status quo* and the “winners” and the “losers” from a policy change crucially affects the determination of the costs and benefits and thereby the outcome of the whole decision-making process, which is therefore never neutral.¹¹⁵ In relation to the notion of “wealth effects”, therefore, Kennedy seeks to elucidate the close tie between the distribution of wealth and the allocation of resources within a given economy:

In an egalitarian society, there is likely to be less demand both for yachts and for bread, and more demand for intermediate consumer goods, than in a society composed of the same people, with the same resources, but with income distributed in an extremely unequal way.¹¹⁶

¹¹³ Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 444.

¹¹⁴ *Id.* at 445.

¹¹⁵ *Id.* at 410.

¹¹⁶ *Id.* at 422.

In this line of argument, “wealth effects” simply refer to the effects that different patterns of wealth distribution will have on consumer demand. In turn, this affects how resources ought to be allocated in order to yield the product mix that matches the resulting pattern of consumer demand. Translated in the field of cost-benefit analysis, this means that the distribution of wealth, which is affected by the way entitlements have been initially arranged between the groups involved in the policy-making process, will also affect the final outcome of the cost-benefit analysis. This occurs because the determination of how much a given group would value a particular policy measure for the purpose of assessing costs and benefits will be relative to the amount of wealth that group possesses to begin with:

[I]f the entitlement background . . . generates an unequal distribution of wealth, the inequality will be reflected in the likelihood that the offering and asking prices [which are a measure of how much they would “value” the policy measure in question] of the rich will exceed those of the poor whenever these two groups are differentially affected by the choice of entitlement setting.¹¹⁷

Kennedy also challenges a common rationale for engaging in cost-benefit analysis, namely to ascertain the outcome the parties involved would have negotiated in the absence of transaction costs, with a view to implement it through a proposed policy measure. In the complete absence of transaction costs, Kennedy argues, when both the initial distribution of wealth as well as the allocation of resources are open to question and bargaining, “the parties (all holders of entitlements) must decide both the issue of allocation and that of distribution ‘simultaneously,’”¹¹⁸ which will lead to an infinite variety of possible outcomes (and therefore non-determinant). In light of this, using cost-benefit analysis to try to bring about the results that would have occurred in the absence of transaction costs is simply misguided: since there is no single definite outcome that would arise in

¹¹⁷ *Id.* at 428.

¹¹⁸ *Id.* at 441.

the absence of all (not just some) transaction costs (because everything would be open for negotiation), cost-benefit analysis must be “simply a language for carrying on political or ethical discussion, rather than a way of discovering facts about the external world that can then be politically or ethically assessed.”¹¹⁹ Since law only facilitates the space of contestation (rather than provide the content of debate), Kennedy’s theory points to the political motivations and ramifications that structure the maintenance of legal, ‘technocratic’ activity and reasoning behind consumer-led economic models.¹²⁰

In this respect, Kennedy’s endeavor to undermine the background assumptions behind consumer-centric economic paradigms may be likened to the *culture jamming*¹²¹ of Kalle Lasn, best known as the founder of *Adbusters* magazine. For both, it appears necessary to pierce the “soft routine”¹²² informing contemporary society in order to demonstrate the irrationality of its received wisdom concerning notions of choice, desire and freedom in relation to market activity:

The spectacle [i.e. life in the contemporary Western world] is an instrument of social control, offering the illusion of unlimited choice, but in fact reducing the field of play to a choice of preselected experiences¹²³

To continue the parallel, Kennedy’s indeterminacy argument may be understood as the production of a moment of *détournement*, a moment when the fragility of an enclosing horizon of meaning is first revealed. For Kennedy, the spectacle of the law (and economics, as a discipline) is its deep emptiness, which must be filled and find expression through political sources. It is the necessary antecedent of political decision, for it enables political decision-making to re-emerge as an

¹¹⁹ *Id.* at 411.

¹²⁰ Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1189 (2001).

¹²¹ Curiously enough, Kennedy’s proposals on how to make law schools a “counterhegemonic enclave” (Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEG. ED. 591, 611-15 (1982)) appear very close to the spirit of “culture jamming” practices proper (see KALLE LASN, *CULTURE JAM* 123 ff., 204-9 (2000)).

¹²² LASN, *supra* note 121, at 106.

¹²³ *Id.* at 104.

option from the ashes of normality where it had been buried. And it is a profoundly romanticized and organic faith in progress, of realizing and creating new promises for the future. In this sense, it is almost theological in its post-millennial aspiration to remake, and even perfect or transcend, the world of endless and inescapable consumption as happiness and freedom:

[This is] how the revolution begins: A few people start slipping out of old patterns, daydreaming, questioning, rebelling. What happens naturally then . . . is a groundswell of support for this new way of being, with more and more people empowered to perform new gestures “unencumbered by history.”¹²⁴

E. *Societal Constitutionalism from a Systems Theory Perspective*

One of the salient features of the “consumer society” paradigm is the importation of models of human agency from economics into other spheres of social interaction, such as law and politics. In recent years, Gunther Teubner has drawn upon social systems theory, in many ways the brainchild of German legal sociologist Niklas Luhmann, to construct one of the more visible critical appraisals of “consumerisation”.¹²⁵ At the center of this perspective is the elusive concept of an autopoietic system, which Luhmann described:

[A]s a self-reproducing network which relies exclusively on self-generated information and is capable of distinguishing internal needs from what it sees as environmental problems.¹²⁶

Moeller (2006) elaborates this further in a crystalline manner, making the passage worth quoting in its entirety:

¹²⁴ *Id.* at 108.

¹²⁵ Gotthard Bechman & Nico Stehr, *Introduction to the Aldine Transaction Edition of NIKLAS LUHMANN, RISK: A SOCIOLOGICAL THEORY* vii, vii (Transaction Publishers 2005).

¹²⁶ Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *CARDOZO L. REV.* 1419, 1420 (1991).

That a system produces itself implies that it produces its own boundary between itself and its environment. It practices a closure by producing – in the case of the biological cell – a membrane. Its autopoietic production consists of producing a boundary or membrane that produces its own operational closure. Once there is a membrane, all operations within the cell happen within the cell, they do not directly connect with operations in the outside environment. There is no literal “input” into the cell. The membrane does not allow for the environment to directly take part in the cell’s biological operations. This idea distinguishes the autopoietic model of operational closure from traditional input-output models, which suppose that operations can transgress systemic boundaries.¹²⁷

An autopoietic system can therefore be understood as a network of elements capable to generate a “membrane” separating it from an outer environment. When this separation occurs, the system becomes capable of observing the external environment which it has “left out” from its operational closure. Any autopoietic system therefore generates its environment through its operational closure, establishing boundaries between those operations it allows to interconnect within itself and those that it leaves out. Hence, there are as many different types of environment as there are operationally closed systems.¹²⁸ And by extension, because a system is operationally closed, the environment at large cannot directly interfere with its internal operations: the system, by virtue of its operational

¹²⁷ HANS-GEORG MOELLER, *LUHMANN EXPLAINED: FROM SOULS TO SYSTEMS* 14 (2006).

¹²⁸ The autopoietic system theory displays a complex mix of post-modern and ‘traditional’ predispositions (and bordering on the theological in the Spinozist sense to the extent that these delineated systems are their own first cause), leading to its ultimate almost claustrophobic perception of hermeneutically sealed environments. This perspective looks at first glance to advance a strikingly traditional reading of global governance, which simply swaps the positivist subject of absolutely sovereign nation-states with, in what is now a post-modern sentiment, a fragmented landscape of environments, each with its own set of behaviors, rituals and languages, much as the depiction of ‘culture’, or the nation, was the popular trope beginning firmly by the second half of the 19th century. What the autopoietic theory discounts here is two sets of possibilities. First, the individualized environments that make up their own constituencies, might nevertheless act within a broader, at least loosely networked, landscape, which itself is marked by political contests. Second, by extension, if there is a broader framework through which the individualized environments realize, or are attributed, themselves as distinct, accountable subjectivities, the question remains over the possibility that the broader logic and structural predispositions might exert a significant force upon the composition of these operationally closed membranes themselves. Minimizing, in some sense, the background norms and structures within which these ‘membranes’ interact and preserve themselves results in generating hidden (political) externalities which influence and frame subjectivity.

separation, can no longer fully participate in its environment as an “insider.”¹²⁹ As Moeller once again aptly puts it:

Every system produces itself and thereby its own reality. The world ceases to be a general “unit” or “oneness.” Reality is not an all-embracing whole of many parts, it is rather a variety of self-producing systemic realities, each of which forms the environment of all the others. There is no common “world” . . . because reality is in each instance an effect of “individual” systemic autopoiesis.¹³⁰

Luhmann partitions autopoietic systems into three main categories: living systems (such as cells, organs and organisms), psychic systems (each individual mind being a psychic system in which thoughts connect to other thoughts) and communicative systems. A communicative system, in particular, is a system whereby its internal operations may be pinned to the common attribute of being communication “events.” For Luhmann, there does not exist only one communicative system, but several autopoietic communicative systems embodying different *functions* of contemporary society: the political system (consisting of political communication), the economic system (consisting of economic communication) and the legal system (consisting of legal communication) being the ones that will be considered here.

There are two main consequences of this way of thinking about society. First of all, society does not consist of individuals but, as Moeller puts it, “of communication ‘events’ such as communication by language, gestures, or money. Communicational sequences can then establish their own

¹²⁹ To elucidate this, it may be useful to reflect on the absence of a “natural” partition of sensory information separately from our own perception of visible, audible, tasteable, smellable and touchable stimuli. That distinction is only present in our brain to the extent that it remains selectively open to perturbation (or “irritation” in Luhmann’s own words) from the outside (so as not to be overwhelmed), and therefore only captures external information by partitioning it between sound, taste, smell, touch and sight. So “sound,” for instance, is only produced in the brain, and not inscribed in the nature of waves, which opens the possibility that there might be aspects of “sound” waves we just might not be able to “hear.”

¹³⁰ MOELLER, *supra* note 127, at 13-14.

‘individuality’¹³¹ and “grow into very specific shapes,”¹³² (e.g., the separate social systems of law, politics and so on) - what is meant by autopoiesis in action. The second consequence is that individuals no longer exist as such: first, they are broken down into clusters of different autopoietic systems such as the organic and the psychic system; and second, they do not communicate between themselves because communication takes place in autopoietic systems, so that “[c]ommunication alone is able to communicate,”¹³³ while living (and more importantly, psychic) systems¹³⁴ are merely the environment, or conduits, of these various communicative systems. This also implies that the various communicative systems can observe and make sense of their environment by developing notions of “‘persons’ or ‘individuals’ so that communication can be properly addressed and can form proper conceptions of ‘entities’ that correspond to ongoing activities of consciousness [i.e. psychic systems] that irritate communication.”¹³⁵ Consequently, when “individuals” become socially active, they acquire different personas in different social systems.¹³⁶ In this setting, the consumer can then be conceptualized as only one type of persona, specifically one that individuals take via the economic system, and that exists along with others, such as the citizen or the rights holder and so on, derived from different communicative systems.

¹³¹ *Id.* at 22.

¹³² *Id.*

¹³³ NIELS ÅKERSTRØM ANDERSEN, DISCURSIVE ANALYTICAL STRATEGIES: UNDERSTANDING FOUCAULT, KOSELLECK, LACLAU, LUHMANN 75 (2003).

¹³⁴ For Luhmann, psychic and communicative systems are “structurally coupled,” in the sense that they mutually shape each other’s environment. As Seidl aptly puts it:

For the autopoiesis of the social system the simultaneous (but separate) autopoieses[sic] of psychic systems is constitutive. Without psychic systems social systems are impossible – and probably vice versa. Every communicative event presupposes “parallel” events in the psychic systems. Already for the perception of utterances the social system depends on the psychic system: the social system cannot hear spoken words, nor read letters. Furthermore psychic systems serve as a memory as they can remember communicative events beyond their momentary point of existence. Because of their structural coupling social systems can expect their communications to cause irritations in the psychic systems and to receive irritations from the psychic systems when necessary. (David Seidl, Luhmann’s Theory of Autopoietic Social Systems 10 (Munich Business Research, Working Paper No. 2004-2, 2004), *available at* <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.127.7674> (follow “Cached” hyperlink))

¹³⁵ MOELLER, *supra* note 127, at 84.

¹³⁶ *Id.* at 92.

Teubner stresses that each social system has its own peculiar internal dynamics, meaning that there are different configurations a social system may acquire as a result of the unfolding of its internal communication. The way these dynamics unfold, however, is not indifferent to the system's environment. In fact, Teubner states that expansionist dynamics are possible, whereby a given social system superimposes membership¹³⁷ over a growing number of communicative events that were previously occurring outside of that system's "membrane." These expansionist tendencies are liable to lead to forms of totalitarianism that may ultimately threaten the continuing survival of the environment in which the communicative system replicates itself.¹³⁸ The example of political totalitarianism in the twentieth century, and the very real human consequences it generated, can be a sad illustration of where the totalitarianism of social systems may lead to.¹³⁹

Political totalitarianism, however, is only one possible example of "totalitarian" system dynamics, which may also arise in other social systems including – but not limited to economics.¹⁴⁰ Looking at the "consumerisation" of non-economic spheres through this lens, it is therefore possible to construe it as an instance of "expansionism," whereby communicative events increasingly take double membership in more than one communicative system, and in the economic system specifically. A few examples of double membership can help elucidate this phenomenon as it is happening, for instance, in connection to consumer law. So, for instance, the assessment of the

¹³⁷ See Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting*, 8 THEORETICAL INQUIRIES IN LAW 51, 54 (2007) (illustrating the idea of multiple membership of identical communicative acts in different social systems in relation to contractual transactions).

¹³⁸ See Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 MOD. L. REV. 327, 336.38 (2006).

¹³⁹ Teubner's analysis suggests, in some regards, an opening to contextualizing Luhmannian 'membrane'-like systems within larger or overlapping systems that are more successful at universalizing their logical parameters. Yet Teubner's approach, particularly in regards to the phenomena of 'totalitarianism', exists upon the assumption that any act of 'totalizing' is antithetical to an authentic freedom rather than considering the possible circumstances when hegemonic acts might be desirable (e.g., imagine a global disarmament of nuclear weapons led by a handful of great state powers); or more generally, that the antipathy towards any 'totalizing' or 'appropriating' course of action plays easily into a liberal democratic model of global governance, which might actually censure the ability of former colonized peoples and other subjected groups to achieve victory through law or other means.

¹⁴⁰ See Gunther Teubner, *Two Readings of Global Law*, Paper Presented at the "Law of the Commons" Seminar, Turin (Mar. 10, 2011), available at <http://uninomade.org/two-readings-of-global-law/> [hereinafter Teubner, *Two Readings*].

unfairness of a term in a consumer contract in the context of Directive 93/13/EEC¹⁴¹ – arguably a communicative event taking place within the legal system – also gains membership in the economic system as the judge has to refer to a consumer persona derived from the economic system:

[S]tandard form contracts are beneficial to both consumers and firms since they lead to great savings in transaction costs which are reflected in lower prices when the market is competitive. When the market is not competitive, or when in a competitive market the market fails to ensure mutually beneficial transactions, consumer law can help by assuring the efficiency of the terms. Since such contracts are by definition not negotiated, economic analysis can help differentiate between efficient and inefficient contract terms. Efficient terms are the ones that the parties would have added themselves if they had negotiated. Inefficient, and thus abusive, terms are those terms that the parties would not have included in their contract had they had the chance to negotiate.¹⁴²

In other words, a reasoning based on efficiency (for instance, on maximizing utility given budget constraints) could potentially couple the legal and the economic systems by giving double membership to the same communicative operation. Parisi illustrates a similar case in the context of Directive 99/44/EC,¹⁴³ with reference to the judgment of conformity of consumer goods to their “normal” purpose and consumers’ reasonable expectations. In such a case, the judge needs to undertake an economic judgment (classification of a certain product attribute as an “experience,” “credence” or “search” property) to determine whether a certain property ought or ought not to be included in the “fitness” standard.¹⁴⁴ The language system centered on the subject of the consumer is imperialist in a dual manner: on the one hand, it commandeers and routinizes alternative vocabularies and their argumentative logic (whether constituted as people, things, processes,

¹⁴¹ Council Directive 93/13, 1993 O.J. (L 95) 29 (EEC).

¹⁴² Aristides N. Hatzis, *An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts*, in *STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW* 43, 56 (Hugh Collins ed., 2008).

¹⁴³ Council Directive 99/44, 1999 O.J. (L 171) 12 (EC).

¹⁴⁴ Francesco Parisi, *The Harmonization of Legal Warranties in European Sales Law: An Economic Analysis*, 52 *AM. J. COMP. L.* 403, 419 (2004).

etcetera) to neutralize any potential compromise to its fundamental inner-working; and, on the other hand, this ‘totalizing’ discursive/symbolic regime exists not only in itself, but is importantly reflected and made alive only through human action, thought and organization, which is inextricably subjective – and thereby political – in character. Here is the double bind, which feels deeply theological, or ‘philosophical’ in some respects: humans require and are enabled through language, but the language is no more capable of transcendence than its bearers – the product of a world oscillating between the sacred and the mundane, fellowship and alienation, freedom and totalitarianism, in a never ending see-saw of countless variations. At most, a particular language takes on an idolatrous, totalizing persona, over-extending its claims and projecting ‘inner’ traits as universal guarantees of measurement, aspiration, and security.

The question that Teubner raises in this context is that, in such a context of individuals appearing under the formalized guise, or symptom, of the consumer in ever increasing areas of social activity, when will this become too much, thereby collapsing the totalizing process? Put slightly differently, when does the consumerisation of social spheres (like law and politics) “hit the bottom,” by which Teubner means the obliteration of all values other than efficiency from law through the promotion of consumeristic satisfaction of one’s first-order desires to such an extent that fundamental second-order desires are neglected¹⁴⁵ – These questions open to further lines of inquiry for social theorists in relation to consumer-led governance. For instance, when would this ‘consumeristic’ orientation go as far as to threaten such fundamental entities as the “mental environment,”¹⁴⁶ the physical environment or the possibility of other generations equally to enjoy life on the planet? When is catastrophe looming too close so as to require the erection of new

¹⁴⁵ See BARBER, *supra* note 59, at 135-36. The tension between first- and second-order desires being discussed here bears resemblance to Tocqueville’s concept of “soft despotism” (see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Hackett Publishing Company 2000) (1835)).

¹⁴⁶ LASN, *supra* note , at 9 ff.

internal limitations within the expansionist system that will prevent it from running amok?¹⁴⁷ This, in the end, is the “good hard look” that social systems theory urges us to take, after bringing awareness to the destructive risks embedded in the unbridled expansionism of the partial rationalities of social systems.¹⁴⁸ A good hard look that, in Teubner’s perspective, is instrumental to the subsequent attempt to erect new “constitutional” limitations *from within* an expansionist system. With reference to consumer society, therefore, “politicisation of the consumer” (which is very different from the consumerisation of politics briefly hinted to above) is seen as one such form of societal constitutionalism, whereby through organized consumer action in the market rationalities other than consumerism can find their representation into the economic system via a process of re-entry:¹⁴⁹

Instead of being taken as given, individual and collective preferences are openly politicised through consumer activism, boycotts, product-criticism, eco-labelling, public interest litigation and other expressions of ecological sustainability. Such politicisation of economic action represents a transformation of the inner constitution, *touching the most sensitive area of the circulation of money, namely, the willingness of consumers and investors to pay*. And this becomes a question of constitutional importance, or more precisely, a question of horizontal effects of constitutional rights in the economy: how to protect the formation of social preferences against their restrictions through corporate interests.¹⁵⁰

¹⁴⁷ See Teubner, *Two Readings*, *supra* note 140.

¹⁴⁸ The ‘good hard look’, like the theory of autopoiesis, contains both ‘traditional’ and post-modern elements. On the one hand, the emphasis on rationality as a floating signifier to denote wildly different perspectives and argumentative patterns, thus ushering in the inescapability of subjectivity as the authentic (un)grounding beneath human consciousness, is in keeping with leading post-foundationalist political philosophy ushered into the modern moment with authors such as Ernesto Laclau and Chantal Mouffe. At the same time, the post-foundationalist strand is met with an equally powerful traditional dating back to theological literature, where individuals – and more generally, the Word – are characterized as hopelessly fallen, the outcome of a modern tower of Babel in which attempts to build a universal endeavor are (tragically) thwarted by communication impasse.

¹⁴⁹ Re-entry, with reference to communicative systems, occurs after the operational closure of a system has taken place with the demarcation of an “inside” and an “outside.” As stated before, this distinction enables observation of the environment from the system. When, however, the system is able to “make sense” of this system/environment separation and reproduce it within itself, it gains the ability also to look at itself as it would look at something other than itself, like the environment. Re-entry, in other words, enables the observer of the environment to “observe” itself as though it were other than itself. Of direct relevance to what is said in the text is also the fact that re-entry enables the observer-system to articulate knowledge of its environment in a manner that is *intelligible in terms of the system’s internal operations*. For additional background, see MOELLER, *supra* note 127, at 67-68.

¹⁵⁰ Teubner, *Two Readings*, *supra* note 140 (emphasis added).

F. *Buddhist Economics*

The contribution of Buddhist Economics to the debate on consumerism, particularly as it is articulated in neoclassical consumer theory, is to bring a renewed focus on substantive, as opposed to purely formal, rationality. Formal rationality is defined by Slater as the “logic and procedures through which individuals calculate the best means to maximize the satisfaction of desires that are themselves assumed (they are already determined, defined and known by the individual).”¹⁵¹ From this formal perspective, it doesn’t so much matter what people choose, but how they do it. Modeling consumer choice as rational choice, in other words, does not prescribe a substantive criterion with which to discriminate between a “good” and a “bad” choice;¹⁵² it merely discriminates between rational and irrational choices, regardless of the ends they pursue. Substantive criteria, on the other hand, are very much culturally embedded, as “we think about needs and goods in terms of their meanings within a specific way of life, values and social relations.”¹⁵³

The specific contribution of Buddhist economics, however, moves beyond this purely theoretical distinction between procedural and substantive choice criteria and engages directly with the problem of what makes a choice “good” or “bad.” In so doing, Buddhist economics puts a very real issue on the table, namely whether something beyond a purely intellectual understanding of the consumer paradigm is needed actually to “get” the consumer’s predicament in consumer society; and, in raising this question, it encourages readers to move the first steps into what Buddhist economic theorists

¹⁵¹ SLATER, *supra* note 64, at 43.

¹⁵² *Id.*

¹⁵³ *Id.* The importance of culture in providing meaning to individual commitments and identities is very much dear, for instance, to communitarian scholars like Taylor (*see* CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1992)), and in another work, one of the authors here, Luigi Russi, has previously endeavored to explore the relationship between the formal rationality one finds in neoclassical consumer theory with the substantive notion of “authenticity” present in communitarian literature (*see* Luigi Russi, *Autonomy and Authenticity: The Battle for Common Sense in the Age of Consumer Capitalism* (Jan. 11, 2011) (unpublished manuscript) (on file with author)).

view as the uncharted, and perhaps hitherto shunned, world of “personal wisdom.”¹⁵⁴ This section, and the two that follow, seek to take up this invitation by looking at three closely intertwined contributions and their take on the economic model of consumer choice: Buddhist Economics, Deep Ecology and Critical Religion (in connection with the thought of Indian philosopher Jiddu Krishnamurti).

The best way to introduce a Buddhist perspective on consumerism is perhaps through the distinction between different kinds of desire that may underpin economic activity. At the root of the problem of consumerism one finds “ignorant” desire (*tanha*), which clings to objects to pursue self-interests that are not grounded in wisdom and personal knowledge.¹⁵⁵ From a Buddhist perspective, this is a form of suffering.¹⁵⁶ Indeed, Buddhist thought is chiefly concerned with suffering, the cause of which it finds in *tanha*, desire based on ignorance or craving.¹⁵⁷ In order to remove suffering, it is necessary to overcome craving, which is achieved through the “Eightfold Path” of Right View, Right Intention, Right Speech, Right Action, Right Livelihood, Right Effort, Right Mindfulness and

¹⁵⁴ It is perhaps useful to recall the opinion of psychologist Carl Jung, according to whom the “intellect” is, along with feeling, sensing and intuition, just one of the four ways of knowing the world around us. See ANTHONY STEVENS, JUNG: A VERY SHORT INTRODUCTION 86-87 (1994). Of course, this is not to argue that the shift to ‘personal wisdom’ is indeed ‘unchartered’ or ‘shunned’ territory, especially as the dominant discourse within liberalism centers around notions of ‘subjectivity’ and the accommodation of fractured preferences. Alternatively, Buddhist economics may remind us that behind any set of pragmatic assessment is a motivation in the first place to engage ‘ethically’ (to make value judgments), and also offer something potentially unique in its focus on the experimental terrain of desire.

¹⁵⁵ Ven. P.A. Payutto, *Buddhist Perspectives on Economic Concepts*, in MINDFULNESS IN THE MARKETPLACE: COMPASSIONATE RESPONSES TO CONSUMERISM 77, 77 (Allan Hunt Badiner ed., 2002). This desire can be likened to the cultural image – surfacing in many cultural traditions – of the “Hungry Ghost,” a creature that eats relentlessly, but is never filled because of its own insubstantial being. A curious adaptation of this image to depict the shallowness of consumer existence is presented in a song with the same title by British punk band “The Cure”:

Swallow doubt as the hunger grows
 Make believe it's like no one knows
 Even if we turn more to most
 We'll never satisfy the hungry ghost
 And all of this
 We know we never need
 (THE CURE, *The Hungry Ghost*, on 4:13 DREAM (Suretone Records 2008))

¹⁵⁶ See Payutto, *supra* note 155, at 82.

¹⁵⁷ See *id.* at 91.

Right Concentration.¹⁵⁸ In this Eightfold Path to liberation, *chanda* fits as desire based on “intelligent reflection.”¹⁵⁹ There is a crucial difference between the two: while “ignorant” desire always requires more consumption to take place so that, effectively, the only constraint is in the available resources, *chanda* recognizes the need for moderation and contentment. In other words:

In the classic economic model, unlimited desires are controlled by scarcity, but in the Buddhist model they are controlled by an appreciation of moderation and the objective of well-being.¹⁶⁰

There are, as mentioned in the opening to this section, notions of “right” and “wrong” consumption in the Buddhist perspective.¹⁶¹ The discrimination between the two, however, cannot be articulated in theory, but is up to each one to find for him/herself an individual path by cultivating the ability to distinguish between “needs” and “wants” within oneself, through *chanda* (intelligent reflection) rather than *tanha* (ignorant desire).

This may, on its face, appear quite simplistic and easy to dismiss from a more rigorous intellectual standpoint, for instance by considering Baudrillard’s pervasive critique of the category of “needs” for the purpose of understanding the predicament of the “people of plenty” living in a consumer society. From a Buddhist perspective, however, the use of the concept of “need” does not automatically imply consumption. “Needs” may, in fact, also be met by non-consumption. Indeed, “real” needs, those grounded in the enhancement of a person’s well-being and quality of life (again, not quantified in a narrow materialistic sense in terms of consumption bundles, thereby losing much of the *qualitative* in “quality of life”), may sometimes be satisfied through consumption and sometimes through non-consumption: “[t]he question is not whether to consume or not to

¹⁵⁸ *See id.*

¹⁵⁹ *Id.* at 71.

¹⁶⁰ *Id.* at 79.

¹⁶¹ *See id.* at 78.

consume, but whether or not our choices lead to self-development.”¹⁶² To Baudrillard’s credit, one may however acknowledge that the equation of needs with consumption might indeed be endemic to the Western economic paradigm that is centered on quantification¹⁶³ for the purpose of social engineering, an approach that despite its merits might well be “incomplete, because it does not take into sufficient account the very purpose of material development: human happiness, which is a more subjective consideration that includes our spiritual concerns.”¹⁶⁴ Schumacher aptly sums this all up in *Small is Beautiful*:

[T]he modern economist . . . is used to measuring the “standard of living” by the amount of annual consumption, assuming all the time that a man who consumes more is “better off” than a man who consumes less. A Buddhist economist would consider this approach excessively irrational: since consumption is merely a means to human well-being the aim should be to obtain the maximum of well-being with the minimum of consumption The ownership and the consumption of goods is a means to an end, and Buddhist economics is the systematic study of how to attain given ends with the minimum means. Modern economics, on the other hand, considers consumption to be the sole end and purpose of all economic activity, taking the factors of production – land, labour, and capital – as the means.¹⁶⁵

If we take Schumacher’s version of Buddhism seriously, however, what emerges is not something necessarily foreign, or even antithetical, to Western late-capitalist ideologies. First, the Buddhist economic critique of consumerism still adopts a ‘rational’ versus ‘irrational’ analysis, which is itself rooted in a quasi-materialist understanding of ‘balance’ and the ‘good life’ and tied closely to ideas of possession. Schumacher’s Buddhism aspires to “obtain” (possession) the “maximum of

¹⁶² *Id.* at 81.

¹⁶³ See Shinichi Inoue, *A New Economics to Save the Earth: A Buddhist Perspective*, in MINDFULNESS IN THE MARKETPLACE: COMPASSIONATE RESPONSES TO CONSUMERISM, *supra* note 155, at 49, 53-54.

¹⁶⁴ Jonathan Watts & David R. Loy, *The Religion of Consumption: A Buddhist Perspective*, in MINDFULNESS IN THE MARKETPLACE: COMPASSIONATE RESPONSES TO CONSUMERISM, *supra* note 155, at 93, 93.

¹⁶⁵ ERNST FRIEDRICH SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* 61 (HarperPerennial 1975) (1973).

well-being with the minimum of consumption” (cost-benefit, efficiency analysis) – nothing outlandish to production/service sectors of the global economy (e.g., to offer the highest standard of service or product, itself not defined by use but ‘lifestyle’, with the minimum amount of resources), nor the standard council of economic/professional self-discipline (e.g., to save rather than spend). Indeed, the emphasis on ‘well-being’ over ‘consumption’ is a staple in middle-to-upper middle class behavior where we see the prioritization of quality over quantity, time and preparation over speed or economic value (e.g., especially in relation to food), and so on. Second, to claim that modern economics posits consumption as the ‘sole end and purpose of all economic activity’ is to perhaps overstate the case. While modern economics is deeply entwined with the necessity of consumption, the market itself constantly justifies the emphasis on the accumulation of commodities in terms beyond mere accumulation: whether ‘lifestyle’ (e.g., to facilitate leisure time), beauty (e.g., products to ‘unleash’ the ‘real you’), or even a more peaceful world (e.g., in the truism that two countries with McDonalds have never gone to war with one another). What is lost in Schumacher’s version of Buddhist economics is specifically the ways in which Buddhism might allow for serious inquiry and contestation over the very idea of how ‘well-being’ itself will be assessed and what are the strategic possibilities to realize such outcomes. At its most powerful, Buddhism points to the deeply ethical, or even political, choices on both an individual and universalized plane that are involved in structuring economic governance, and suggests the potential for a non-hedonistic orientation for understanding the possibilities and goals of politics. It is in this next source of critique, deep ecology, that these challenges are more fully approached.

G. *(Deep) Ecology*

There is a famous anecdote recounting that Buddha was once asked where he learnt compassion and forgiveness from, and in answer, he touched his hand to the Earth.¹⁶⁶ Indeed, there exists a profound connection between Buddhist values and Deep Ecology, which in relation to consumerism also shapes the latter's critique as an invitation to reconsider the founding values of the predominant economic and social paradigm. The Deep Ecology movement was initiated by Norwegian scholar Arne Naess, who sought to inquire into the "deep" questions about the human relationship with nature.¹⁶⁷ At its heart, the Deep Ecology movement distances itself from the paradigm of "Western scientism" that traces its roots back to the philosophy of René Descartes, where nature is construed purely as an object that is available for the domination and cultivation of human ambitions.¹⁶⁸ Instead, the Deep Ecology movement supports the view of a participatory, rather than dominative, human involvement with nature.¹⁶⁹ This is famously summarized in Thomas Berry's understanding of life on Earth as a "communion of subjects"¹⁷⁰ rather than a "collection of objects."¹⁷¹ A view, we believe, that entails a radical paradigm shift. If what tells a subject apart from an object is the former's ability to experience, then Berry's suggestion is that feeling and consciousness are everywhere. More formally, this translates in a *panpsychist* perspective, whereby (human) consciousness is not seen as something that is "blown" into inanimate matter from somewhere outside of this world. Human consciousness is, instead, understood as a quality emerging from the complex interaction of (simpler) forms of consciousness already present in matter.¹⁷² In other words, 'humans' and 'nature' are incapable of any fundamental separation since

¹⁶⁶ SATISH KUMAR, *YOU ARE THEREFORE I AM: A DECLARATION OF DEPENDENCE* 174 (2002).

¹⁶⁷ See JANE HOLDER & MARIA LEE, *ENVIRONMENTAL PROTECTION, LAW AND POLICY* 48 (2nd ed., 2007).

¹⁶⁸ STEPHAN HARDING, *ANIMATE EARTH: SCIENCE, INTUITION AND GAIA* 31-35 (2nd ed., 2009).

¹⁶⁹ *Id.* at 39.

¹⁷⁰ THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 82 (1999).

¹⁷¹ HARDING, *supra* note 168, at 27.

¹⁷² *Id.* at 93-94.

they are merely abstract distinctions for the varying functions or manifestations of an unified substance or process.

In light of this, the Deep Ecology movement carries with it a radically egalitarian message: if we are nothing but a specific form of consciousness rooted in the underlying consciousness of all matter, we have a deep relationship of *kinship* to the rest of the Earth that resists any legitimate claim to ‘ownership’ or right to endless consumption for its own sake. For this reason, the human adventure on the Earth no longer fits in a progress narrative where a hostile environment is subjugated to human control, but rather intimates a participative journey of reverence, mystery and respect:

Nature has its own sovereign spirit. Animals, birds, rivers, mountains, gods and goddesses live together in an interdependent relationship. Their sanctity does not come from “God” reigning somewhere above, but from the divine or sacred element which is inherent within. Divinity is immanent in nature, not transcendent, not beyond nature. We human beings receive the bounty of nature as a divine gift. We are an integral part of nature. We are required to live upon the Earth with a sense of humility and gratitude. Caring and conserving the Earth is our responsibility not only because the Earth is useful to us, but because the Earth is sacred and good in itself. This I call Reverential Ecology.¹⁷³

Additionally, the genetic connection between human and other-than-human consciousness embedded everywhere in matter makes it much harder to fix the boundaries of the individual Self, which may well extend into the “outer” world. Looking at the outer world as an integral part of the Self, then, gives one a basis to reconsider many of the socio-economic practices that define the way of living in the Western world, including consumerism, since what is being done to the world is

¹⁷³ KUMAR, *supra* note 166, at 87-88.

ultimately something that men and women are doing to themselves.¹⁷⁴ As explained in Jungian archetypal psychology¹⁷⁵ by reference to the alienation of the individual from the collective unconscious, “there reside[s] the collective wisdom of our species, the basic programme enabling us to meet all the exigent demands of life,”¹⁷⁶ and which Deep Ecology would suggest transcends the confines of the ‘species’.

The result of this prying ourselves apart from our primal wisdom is a cultural imbalance that projects spiritual aspirations onto matter.¹⁷⁷ Capra characterizes this imbalance by the ascent of “patriarchal values,” and suggests a re-orientation brought about by ecological thinking:

The association of manhood with the accumulation of possessions fits well with other values that are favored and rewarded in patriarchal culture – expansion, competition and “object-centered” consciousness. In traditional Chinese culture, these were called yang values and were associated with the masculine side of human nature. They were not seen as being intrinsically good or bad. However, according to Chinese wisdom, the yang values need to be balanced by

¹⁷⁴ See Theodore Roszak, *Where Psyche Meets Gaia*, in *ECOPSYCHOLOGY: RESTORING THE EARTH, HEALING THE MIND* 1, 5 (1995).

¹⁷⁵ In the words of Aizenstat:

Jung . . . offered the possibility of a broader, shared human psyche that he called the “collective unconscious.” The collective unconscious is made up of universal psychological forms known as archetypes. The term archetypes refers to psychological patterns that appear throughout human experience and can be seen in the motifs of age-old myths, legends and fairy tales found in every culture throughout the history of the human species. (Stephen Aizenstat, *Jungian Psychology and the World Unconscious*, in *ECOPSYCHOLOGY: RESTORING THE EARTH, HEALING THE MIND*, *supra* note 174, at 92, 94)

Stevens has offered an interesting evolutionary explanation of archetypes in terms of inherited modes of functioning or, better, as “neuropsychic centres responsible for co-ordinating the behavioral and psychic repertoires of our species in response to whatever environmental circumstances we may encounter,” (ANTHONY STEVENS, *ARCHETYPE REVISITED: A NATURAL HISTORY OF THE SELF* 17 (2nd ed., 2002)) and which evolved in the course of the life of our species. Archetypes would, therefore, reflect ways of relating with the world around us that developed in the context of a symbiotic relationship with the environment.

¹⁷⁶ STEVENS, *supra* note 175, at 38-39.

¹⁷⁷ To speak of ‘primal’ wisdom, however, is contentious if not handled carefully. Within deep ecology literature there is what we believe an unfortunate tradition to equate the ‘primal’ with something pre-industrial/pre-technological. This seems unnecessarily pastoral / romantic, and ignores that technological development and the like can be assimilated within the realm of the ‘primal’, of ‘nature’. Invoking ‘primal’, we hope to instead highlight the intuition in Deep Ecology to seize upon often unacknowledged associations that human’s experientially share by the necessity of life with their physical environments. To think of the ‘primal’ is to form new connections in terms of social relations and to reimagine the processes, possibilities and costs of modern existence in relation to each other, production, and the world outside of what we call ‘human’.

their yin, or feminine, counterparts – expansion by conservation, competition by cooperation, and the focus on objects by a focus on relationships. I have long argued that the movement toward such a balance is very consistent with the shift from mechanistic to systemic and ecological thinking that is characteristic of our time.¹⁷⁸

In this respect, the relentless quest for material wealth that sits at the heart of the consumer paradigm is regarded as nothing more than a distraction from the pursuit of truly nurturing values.¹⁷⁹ While similar to Buddhism (if not many of the other forms of critique, to the extent that consumerism is viewed as a process of alienation from some better or more accurate set of ‘realities’), Deep Ecology distinguishes itself to the extent that it contextualizes the struggle over the individual subject not so much through a focus on suffering (Buddhism) or class struggle (Marxism), but rather in the effort to root “real” values in a symbiotic and respectful relationship with nature which is believed the only path out of the “malaise” of consumerism.

H. *Critical Religion and Jiddu Krishnamurti*

In order better to understand the contribution that the ideas of Indian philosopher Jiddu Krishnamurti can bring to the debate on consumer society, it is perhaps most appropriate to start from the work of Timothy Fitzgerald, a leading exponent of the Critical Religion movement.¹⁸⁰ Fitzgerald challenges the legitimacy of the very category of “religion,” which is often treated in

¹⁷⁸ Fritjof Capra, *Patriarchal Roots of Overconsumption*, in *MINDFULNESS IN THE MARKETPLACE: COMPASSIONATE RESPONSES TO CONSUMERISM*, *supra* note 155, at 9, 11.

¹⁷⁹ Though not necessarily intrinsic to the logic of deep ecology, as the quote above demonstrates, there is a tendency to adopt at least two suspiciously framed binaries. First, the binary of ‘female’ versus ‘masculine’ values as characterizing the field of engagement, and characterized in strikingly Victorian, or at least ‘traditional’, conceptions of gender (e.g., the woman as ‘nurturing’ versus the masculine drive for ‘competition’). Second, the binary of ‘natural’ versus ‘artificial’ where the surface, or artificiality, of modern life can be drawn back to reveal a more holistic, organic reality that might somehow be engaged with outside the conceptual baggage and interpretive biases of the ‘artificial’. What stands behind the synthesis of deep ecology and Buddhist thought, and which we believe may deserve consideration, is firstly, the intimate connection between human experience and the non-human environment, and secondly, the recognition that a consumer-centric model of economic governance is incapable of realizing, and in fact is destructive to this intimate connectivity.

¹⁸⁰ See Timothy Fitzgerald, *CRITICAL RELIGION* (Apr. 21, 2011), <http://www.criticalreligion.stir.ac.uk/staff/dr-timothy-fitzgerald/> (Prof. Fitzgerald’s personal page at the University of Stirling, acknowledging the influence of Krishnamurti’s thought on Fitzgerald’s own work).

academia as though it has an essential meaning and is part of a “natural” ordering of human experience. He argues, instead, that once one sets about to ascertain what religion actually is, one ends up referring to a series of dichotomies - such as natural versus supernatural or rational versus irrational - that serve to differentiate the “religious” from the “secular.” In the end, the use of religion as a distinct category appears not so much to be grounded on any intrinsic properties of the religious, but to have the sole use of accommodating the self-narration of such secular domains as the “state,” “politics” or “economics,” by being what they are not.¹⁸¹

Once one moves beyond these received partitions of human activity, a series of startling facts become apparent. First of all, the moment one challenges the idea that categories, in our case ‘economics’ are strictly “secular”, it is problematic to rebut the questioning with straightforward answers.¹⁸² This is due precisely to the semantic softness of the category itself, whose boundaries are by no means fixed and easy to pinpoint. Indeed, this might be the very strength behind the hold that the ‘economic’ exerts in the contemporary world:

I would say that the power of all these categories, whether we are talking about religion, politics, the state, society . . . you know, actually none of us have seen a religion, none of us have seen a society. What we see is human beings behaving in certain ways. These are all constructs, and if we get into the notion that we can define definitively one of these terms I think that we are deluding ourselves. And, indeed, I would say the power of these categories to persist in public discourse is precisely their evasiveness, their slippery quality, that you cannot pin them down.¹⁸³

Secondly, the other startling fact about the use of “natural” categories like politics and economics is that these ultimately come to inform our way of learning about the past as well. So, for instance,

¹⁸¹ See TIMOTHY FITZGERALD, DISCOURSE ON CIVILITY AND BARBARITY 23, 52 (2007).

¹⁸² See Timothy Fitzgerald, *Faith: Is Capitalism a World Religion?*, THE GLOBAL HERALD (Apr. 12, 2011), <http://theglobalherald.com/faith-is-capitalism-a-world-religion/14952/>.

¹⁸³ Research Centre Vergelijkende Cultuurwetenschap, *Prof- Timothy Fitzgerald – On Religion and the Secular, Part 2*, YOUTUBE (Jan, 21, 2008), http://www.youtube.com/watch?v=puRsboyTq_I&feature=related. [hereinafter *Fitzgerald Part 2*].

historical narration is often partitioned into “political” events as opposed to “economic” developments (e.g., or in terms more familiar to our discussion, public vs. private, or consumer vs. non-consumer driven behavior, and so forth). This, however, takes place even though such divisions might not be “indigenous” to the time period being studied.¹⁸⁴ Fitzgerald observes how historically “religion” has not always been demarcated from “secular” categories like politics or economics, since these could not exist in isolation from a “religious” understanding of the world.¹⁸⁵ Such partitions have, instead, been retroactively imposed on the narration of the past by historiography, thereby contributing to the feeling that the secular-religious dichotomy (and the wealth of other dichotomies implicit in it) is somehow inscribed in the working laws of human action.

Breaking free of the dichotomies embedded in the ordering categories of the contemporary understanding of the world sets one free to look at them in a dispassionate manner, opening a space to see how many of the characteristics assumed by common sense to belong to a given category are simultaneously the basis of its supposed antithesis.¹⁸⁶ In particular, by looking past rigid categorizations, Fitzgerald is able to give a rather unusual account of economics, contemplated from the foot of the statue of the Bull of Wall Street, which is worth quoting in its entirety:

The Bull perfectly represents capital as a force of nature, inscribed into the real order of the world. But more than merely a force of nature, the Bull is virtually a supernatural beast with its own volition. This powerful sculpture conveys to us a mystical power, the aggressive life force of the Bull market

One could say that this masculine bovine divinity belongs in the same general category as a female deity I once researched, Mariai, an unmarried goddess who, if neglected, periodically strikes down the

¹⁸⁴ FITZGERALD, *supra* note 181, at 144-45.

¹⁸⁵ Research Centre Vergelijkende Cultuurwetenschap, *Prof- Timothy Fitzgerald – On Religion and the Secular, Part 4*, YOUTUBE (Jan, 21, 2008), <http://www.youtube.com/watch?v=CCxmXzyioGY&feature=related>. [hereinafter *Fitzgerald Part 4*].

¹⁸⁶ FITZGERALD, *supra* note 181, at x. In a completely different context, this time in law, we can see a similar arguments made by Martti Koskenniemi and David Kennedy in their magisterial structuralist analyses of legal reasoning. *See* David Kennedy, *INTERNATIONAL LEGAL STRUCTURES* (1987); *see also* Martti Koskenniemi, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

villagers with vomit and stomach cramps. However, her dangerous anger can, as a result of the appropriate sacrificial and redemptive disciplines, be auspiciously transformed for married yet barren women into the gift of fertility

. . . The Beast of Capital can normally be placated through the performance of the appropriate ritual proprieties, but he will fork you on his horns if you waver in your faith

. . . Worship of capital, disguised as a science of economics, is an example of what anthropologists and religionists used to call animism – belief in the independent autonomy of the products of the collective imagination.

Our collective belief in ultimate economic virtues like the value of money and the price of commodities is a circular, self-validating rhetorical construct that alienates us from our own productive power by seeming to stand above and over us as a god that controls our destiny. Should we at any time falter in our belief, we engender the perils of inflation, deflation, or stagflation or, worst of all, another Great Depression. Then we must turn to the prognostications of the gurus – professional economists and the managerial functionaries, the politicians, whose religion is, like all priests, prophets, and liturgists, ultimately inspired by blind faith in the necessary existence of their gods.¹⁸⁷

From the perspective of Krishnamurti's thinking, a tranchant deconstruction like that carried out by Fitzgerald is far from unsettling. Rather, there is a profoundly liberating force in the overcoming of all-too-common dichotomies that condition our understanding of the world and our action within it. Indeed, "knowing your own way of thinking and why you think certain things"¹⁸⁸ is the prerequisite for coming in touch with reality. For the Indian philosopher, in fact, there is a fundamental problem in most human efforts to grasp reality and craft responses to the problems so perceived, namely that all too often people react based on some form of conditioning. This "conditioned reaction," be it mandated from religious or political beliefs (or from any other type of belief system) causes any new event to add to whatever story one is buying into, creating a "filtered", and thereby incomplete or distorted experience of reality, that in turn generates equally incomplete

¹⁸⁷ *Id.*

¹⁸⁸ JIDDU KRISHNAMURTI, *THE FIRST AND LAST FREEDOM* 31 (Harper & Row 1975) (1954).

responses.¹⁸⁹ For Krishnamurti, however, this problem has no “solution,” understood as a conscious practice that will with time bring the problem to an end. Time, in fact, is for him a product of the mind’s constant effort to build a narrative unfolding through the past, the present and the future. Replacing one narrative with another that promises “change” is not solving the problem; it is merely thinking of having solved the problem:

Thus regeneration is only possible in the present, not in the future, not tomorrow. A man who relies on time as a means through which he can gain happiness or realize truth or God is merely deceiving himself; he is living in ignorance and therefore in conflict. A man who sees that time is not the way out of our difficulty and who is therefore free from the false, such a man naturally has the intention to understand; therefore his mind is quiet spontaneously, without compulsion, without practice. When the mind is still, tranquil, not seeking any answer or any solution, neither resisting nor avoiding – it is only then that there can be a regeneration, because then the mind is capable of perceiving what is true; and it is truth that liberates, not your effort to be free.¹⁹⁰

The aforementioned thoughts by Krishnamurti and Fitzgerald can add several ideas to the debate on the consumer paradigm. First of all, building on Fitzgerald’s questioning of received dichotomies, the construction of consumption in economic theory as an essentially rational, value-less process to meet one’s needs may appear uncritically dismissive of, for instance, the possibility that some needs may not be tended to by consuming goods or services, but better served by restraining from consumption. This point ultimately boils down to the denial that there be something “essential” in the definition of consumer behavior adopted in economic theory, which Fitzgerald considers instead as “persuasive rhetoric based on myths such as progress and autonomous individuals whose

¹⁸⁹ *Id.* at 54, 58.

¹⁹⁰ *Id.* at 135.

rationality lies in the maximisation of personal profit, not as a theory that represents real processes that objectively exist in nature.¹⁹¹”

Secondly, the fetishistic hold that our conceptual categories have on our way of being in the world cannot be overcome by subscribing to yet another grand narrative that will, via a process of change, promise to tackle the perceived shortcomings of our current predicament. For Krishnamurti, liberation from time, which he sees a constituent element of any narrative, first needs to occur at the individual level.¹⁹² This requires fully grasping the dualistic rhetoric of change and to strive for a future goal upon rejecting the present condition¹⁹³ as it unfolds in our own minds. In other words, only upon understanding how the process of time unfolds in our individual experience may healing follow, since only then, after having overcome dualistic divisions in our perception of the world, will it be possible to open up to reality and undertake truly creative action that is outside of time. Reference to Baudrillard’s semiotic critique may make the point easier to illustrate in relation to consumerism: one could in fact say that it is the moment each one of us comes to terms with the dualism implicit in the needs-based discourse so ubiquitous in consumer society (whereby the next product is what moves us out of a “needy” predicament towards the release of tension) that we can free ourselves from its hold by staying with our needs or desires without obsessively trying to overcome them (itself as much a form of denial as is suppressing them),¹⁹⁴ and thereby bringing the frenzy of consumerism to an end for us.

¹⁹¹ FITZGERALD, *supra* note 181, at 57.

¹⁹² KRISHNAMURTI, *supra* note 188, at 49.

¹⁹³ *Id.* at 68-69.

¹⁹⁴ *Id.* at 67.

IV. CONCLUSION: THE BLACK SWAN OF CONSUMERISM

The consumer choice model in economic governance currently reigns supreme, espousing the mantra that individuals (and by extension, society) best realize their sovereignty – imagined in the broadest sense of the term – through market activity. This claim is, we believe, grounded in at least two rationales. First, drawing upon the assumption that there is a close nexus between material acquisition and the twin (democratic) goods of freedom and security, consumer choice advocates claim to vest power in the hands of the ‘buyer’, whom for better or worse, becomes a subject fully vested over their destiny, and whose success in turn can importantly be measured in clear, quantifiable terms that therefore allows for more nuanced and experiential calculation in future dealings. Here, freedom is neither abstract in its constituency nor its outcome, but rather provides an identifiable set of primary agents, substantive aspiration, and means of rational calculation and knowledge. Privileging the consumer, in the spirit of the Scottish Common Sense Enlightenment moral economists (e.g., Hume, Smith), consumer advocates maintain the juxtaposition between the autonomous, rational individual and both the meddling, power-hungry governmental bureaucrat and the monopoly-seeking industrialist. Consumer-based approaches to economic governance, in other words, allow people to vote with their wallets, even when governments or powerful economic ‘sellers’ exert pressure otherwise.

Second, advocates of consumer choice policy will often admit that the formal equality of law – the ‘equal opportunity’ of all people to ‘consume’ as they wish in principal - may cover over real economic, socio-political inequality, but these very inequalities are seen to lay at the core of the human condition, and which should be confronted openly rather than from behind ethical appeals whose impracticality only exasperate economic disparities and political discontent, at least in the long term. According to this reasoning, differences of success in material acquisition and consumer

lifestyle firstly, give motivation for those less fortunate (whether producers or consumers) to aspire upwards (e.g., towards greater efficiency), secondly, provide a clear set of role-models and pathways for ascertaining progress, thirdly, if nothing else, peg analysis to the ‘real’, underlying drives of economic activity, and finally, to some extent, even for those less fortunate, allow for a certain level of minimum participation across the political landscape.

The consumer-market paradigm, however, faces both immanent and external challenges, which, despite economic growth over cycles of boom and bust, have not disappeared in the course of the last century – especially contained in the sentiment that something valuable is lost in the market’s monopoly over the promise of the ‘good life’. In this paper, we have looked at some of these critiques: the tendency of the market to engender a sense of disconnection and alienation (Marx), of being “pushed” around by silent persuaders (institutionalists), of inability to articulate one’s predicament in a way that points to a way out (Baudrillard), of urge to pierce the lingo that narrows down our choice (Critical Legal Studies), of feeling overpowered by the impersonal dynamics of partial social rationalities (social systems theory), of addictive excess (Buddhist economics), of loss of spontaneity in our relationship with the world around us (deep ecology) and of confinement to a dualistic myth of progress and change that prevents the appraisal of a more meaningful, timeless dimension of reality (Krishnamurti). Even consumer-market based approaches seem prone to these anxieties in their manifestly-felt necessity to constantly innovate and establish new forms of entertainment, productivity, and wants. Moreover, it is unclear that the abstract ‘buyer’ and the supposedly innate drive towards ‘self-interest’ are actually useful conceptions for addressing contemporary economic crises, nor that such concepts are themselves ‘natural’ (or de-politicized) in a way that might serve to counter the possibilities of state or corporate ambitions. If it does stand as part of the solution for some, this feeling for many others is that the light at the end of the tunnel is the proverbial train coming full speed in our direction - whether that come as an nuclear industrial

crisis, the escalation of terrorist attacks, global economic depression, ecological disaster, or some black swan yet to be felt.¹⁹⁵

The difficulty of following these critiques to any normative conclusion, however, seems two-fold. On the one hand, to think outside of consumption seems in some ways to border on a theological aspiration, to be ushered into the responsibility of remaking society according to some almost other-worldly dimensions: an economic order that conceives progress beyond growth, a socio-political structure that allows for systemic change without reducing the possibilities of human freedom, the normative agenda to substantiate egalitarian relationships, a global order that preserves the victories of industrial capitalism while simultaneously transcending its costs (ecological, human, etcetera). On the other hand, critiques of consumption-led governance seem both anachronistic and violent. They are anachronistic because they either too readily rely on the possibilities of the Enlightenment assumption that there is a clear set of 'truths' that once disseminated to the population will enact meaningful change (e.g., if particular industries or products are demonstrated to be unsustainable to the environment, populations will demand alternatives) or they overly invest in the possibility of some benevolent, universalizing spirit that is capable of trumping the politico-economic exigencies of personal well-being (e.g., individuals are naturally willing to collectively do the right thing for the greatest amount of people even at personal cost in a consistent manner). They are violent because in calling for systemic change, such reversals would almost undoubtedly entail significant, and most likely intensely hostile opposition from entrenched actors who benefit from the current economic legal arrangements.¹⁹⁶ Moreover, in giving normative bite to any alternative model, as the legal

¹⁹⁵ SLAVOJ ŽIŽEK, *VIOLENCE: SIX SIDEWAYS REFLECTIONS* 7 (2008).

¹⁹⁶ A liberal mode of economic management (e.g., consumerism) is itself undoubtedly more coercive and violent than its advocates tend to admit (e.g., it is part of the very problems it claims to address), but where the fundamental point of disagreement arises is over the question whether the current trajectory is occasioning a level of lost opportunity costs that warrant the effort and violence most likely necessary to enact an alternative mode of political life.

realist Robert Hale pointed out, it seems undoubtedly the case that any future system would only find new constraints and forms of violence to sustain its cohesiveness.

[T]he systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of “equal opportunity” or of “preserving the equal rights of others.” Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to conform to any Spencerian formula.¹⁹⁷

If fundamental reform to consumer-centric governance is inherently violent – in that it will necessarily create only new winners and losers, and not without potentially violent conflict and disruption – the challenge is therefore not a question of ethics (e.g., the current distribution of resources is unjust / violent), but the feasibility of re-conceptualizing efficiency, both in terms of strategy and tactics: in other words, upon what standard might we measure progress (or stated differently, what are the lost opportunities costs of continuing on the current trajectory versus an alternative economic model), and how might this be actually accomplished. To set out on such a task is exactly the stakes of future progressive scholarship, and upon which we wish to close our study with a brief reflection.

Perhaps the first steps to be taken would be in keeping with the Enlightenment project of ‘waking up’ in a real sense, on the one hand, to the possibility that the current path of economic management is unsustainable from the vantages of ecology (e.g., the earth’s resources cannot sustain the current growth models of economic ‘development’) and politics (e.g., economic disparity has constantly intensified over the last decades despite numerous reform strategies, and seem linked to rising global violence in both structural and subjective

¹⁹⁷ Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923).

terms); and on the other hand, to the reality that resistant movements to consumerist ideologies (and more generally, global capitalism) are unlikely to mount a significant unified front capable of significantly changing things, at least in the near term. The necessity of a profound ‘waking up’ conceived here is analogous to the concept of ‘deep experience’ found in ecological literature:

We were eating lunch on a high rimrock, at the foot of which a turbulent river elbowed its way. We saw what we thought was a doe fording the torrent, her breast awash in white water. When she climbed the bank toward us and shook out her tail, we realized our error: it was a wolf. A half-dozen others, evidently grown pups, sprang from the willows and all joined in a welcoming melee of wagging tails and playful maulings. What was literally a pile of wolves writhed and tumbled in the center of an open flat at the foot of our rimrock. In those days we had never heard of passing up a chance to kill a wolf. In a second we were pumping lead into the pack, but with more excitement than accuracy; how to aim a steep downhill shot is always confusing. When our rifles were empty, the old wolf was down, and a pup was dragging a leg into impassable side-rocks. We reached the old wolf in time to watch a fierce green fire dying in her eyes. *I realized then, and have known ever since, that there was something new to me in those eyes--something known only to her and to the mountain. I was young then, and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view.*¹⁹⁸

In the foregoing excerpt from Aldo Leopold's *A Sand County Almanac*, becoming crudely conscious of the paternity of an act of violence which he had never before dwelt upon, the author seems to experience a momentary dissolution of his own certainties: the dying wolf that dares to stare at her killer in her last moments of agony is unshakeable and life-changing. So how does the wolf's heroic (if overly romanticized) stare translate in human terms? The answer, of course, to this can never be comprehensive, or anything more *our* answer, but it would go something like this. As Krishnamurti suggests, sometimes even trying to change something is a form of denial, as it prevents

¹⁹⁸ ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 129-30 (cmv. ed., 1989) (1949).

proper acceptance of a state of fact that one seeks instead to remove, to scrape from one's worldview. So, perhaps, "sitting and waiting" is not after all just a provocation. Instead, pondering without censorship the current predicament of ourselves and the society we live in, by trying to extrapolate its myriad shadows, could be the necessary step to open up to the reality that is lost in the current struggles that confound our best efforts to restructure the economic landscape. In Žižek's words:

A critical analysis of the present global constellation – one which offers no clear solution, no "practical" advice on what to do, and provides no light at the end of the tunnel, since one is well aware that this light might belong to a train crashing towards us – usually meets with reproach: "Do you mean we should do nothing? Just sit and wait?" One should gather the courage to answer: "YES, precisely that!" There are situations when the only truly "practical" thing to do is to resist the temptation to engage immediately and to "wait and see" by means of a patient, critical analysis.¹⁹⁹

This, at least, is what we have attempted to do in this paper. In first presenting an overview of the dimensions of "consumer society," and the way it is articulated in economics, law and politics, and then presenting a range of diverse critiques, we have nevertheless sought an approach that refuses the temptation to privilege one perspective over the others. All have, instead, been deemed equally worthy of attention and consideration, in the belief that each of them provides a meaningful take on the 'black swan' lurking in the shadows of the consumer society paradigm. Indeed, it is a shadow that takes several shapes. On the one hand, one finds "macro" aspects inherent in the fetishism of commodities (Marx), the trivialization of choice via the action of the institution of marketing (institutional economists), the symbolic circularity of the consumer paradigm revolving around the discourse of "needs" (Baudrillard), the technicalization of decision-making (Critical Legal Studies), the expansionist tendency of the economic rationality (social systems theory). On the other

¹⁹⁹ ŽIŽEK, *supra* note 195, at 7 .

hand, however, consumerism also has a “micro” shadow that unfolds in individual life-stories, through the enslavement to desire (Buddhist economics), a deep disconnection from archetypal knowledge and thereby from the deep qualities of the world around us (deep ecology), as well as a dualistic concern for constant change and transformation (Krishnamurti). In this light, the only conclusion we believe that may be drawn from this comparative observation is that all these shortcomings exist, and that they have as much a right of citizenship as does the “orthodox” consumer paradigm, from which they derive. Beyond this, the processing of such awareness is still unanswerable.