

Heterodox Challenges to Consumption-Oriented Models of Legislation

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Consumption-oriented models of governance dominate the contemporary global legal architecture. The financial crisis beginning in 2008, however, poses fundamental questions about the future viability of these approaches to economics and law. This paper attempts to first, evaluate consumption's salient historical development and themes from the post-World War II era to more recent legislative innovation, and second, introduce seven heterodox vignettes that challenge the hegemony of consumption in legislative policy. The paper concludes with some brief reflections upon potential opportunities and limitations of these heterodox traditions within future scholarship and policy addressing the interplay of law and consumption in global governance.

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I. Introduction: The Scope and Crisis of Consumer-Based Legislation

Consumption-led models of governance dominate the contemporary global legal architecture. This paper attempts to firstly draw out some of its salient components and secondly, offers concise vignettes of seven critiques that challenge the hegemony of consumption in legislative policy. These critiques come from within and outside the legal tradition, but, this paper argues, deserve increased currency in the recognition that the current legislative models of economic growth and democracy are no longer sustainable nor meeting their claimed objectives.

In the first section, *Consumer Imperialism*, the paper examines the intellectual development of consumption-oriented theory in relation to law and provides an example of its implementation within the context of the European Union. Our argument is that the post-World War II era witnessed two conceptions that shape the current landscape of governance: first, the increased coupling of ideas about individualized economic freedom with democratic government, and second, the subsequent idea that liberty required healthy market functioning. The contemporary elevation of the ‘consumer’ and ‘market integration’ are the culmination of this economic thought, and a hallmark of the extent to which a quasi-neoliberal system has petrified policy across all spheres of global life. It is this static nature of consumption models, and its inability to accommodate new realities, which we believe animates the necessity for scholars and policy-makers to again consider embracing heterodoxy.

In the second section of the paper, *Heterodox Critiques*, seven challenges of mainstream consumption models of legislation are analyzed as possible correctives that come from both older and more recent traditions. First, the paper explores the Marxist critique of the consumer paradigm through the concepts of alienation and

commodification. Second, challenges are raised through a study of the first generation of institutional economics, in particular Thorstein Veblen, John Kenneth Galbraith, and more recently, Brendan Sheehan. Third, the paper turns to the structuralist perspective of Jean Baudrillard and the question of ‘need.’ Fourth, drawing upon Duncan Kennedy, the paper looks at how Critical Legal Studies exploits internal contradictions within liberal systems of governance to undermine certainties of the capacity to identify and predict cost-benefit outcomes. Fifth, we investigate the systems theory perspective of Gunther Teubner, and how autopoietic appraisals can potentially rethink the dynamics of ‘consumerization.’ Sixth, Buddhist economics, especially through the work of Ernst Schumacher, is explained as a way to rethink the link between, on the one hand, consumption and economic development, and on the other hand, quality of life. In the final critique, the paper explores how the Deep Ecology movement seeks to elevate the sense of kinship with the earth to destabilize basic consumer oriented notions of development, resources and wealth.¹ The paper concludes with a brief analysis of how these various critiques may be incorporated into new approaches towards consumption-based models of legislation.

While we do not embrace a specific proposition, our hypothesis is at least twofold: first, we seek to trace a concise intellectual history of the development of consumption policy and employ the European Union as an example to demonstrate how the consumer model of governance operates as a dictatorship of no alternatives whereby legislation espouses and (re)instigates a worldview establishing a very particularized story of Western capitalist development as the sole model of development and efficiency; and second, we attempt to map out various critiques of consumer-oriented governance in the hopes of providing scholars with traditions that could serve as building blocks for rethinking transnational governance in relation to law and economic policy, which might address the growing inequality and stagnation that faces global, and particularly Western, working populations. We have framed this analysis as ‘comparative’ and ‘transnational’ rather than simply ‘international,’ by which we hope to invoke the most aspirational sense of the terms within legal argument – on the one hand, the importance of overlap between the spheres of economics, politics and the law, and the domain of practice and normative evaluation (e.g. from positivist and essentializing notions of law to a methodological approach that focuses on different forms of regulatory governance and diverse sources of inspiration that transcend disciplinary or field-specific scholarship of the past); and on the other hand, the importance of looking beyond traditional modes and systems of governance (e.g., from ‘government’ and ‘nation-state’ to non-territorially confined, functionally differentiated sites of decision-making).² In other words, consumption challenges traditional modes of description within international law, pointing not only to new framing mechanisms, but also to new sources for explanation and critique. The function of consumption is

¹ For a succinct introduction, see Jane Holder & Maria Lee, *ENVIRONMENTAL PROTECTION, LAW AND POLICY* 48-50 (2d ed. 2007).

² For an in-depth overview of the various themes and literary traditions that animate this approach, see Peer Zumbansen, *Transnational Legal Pluralism*, 1:2 *Transnational Legal Theory* 141 (2010).

deeply embedded today in our theories and practices of governance (not only in industrial rich countries but throughout the world), which entrenches certain forms of distribution and interests; our goal is that this analysis provides insights that consumption is also, on a fundamental level, inherently ‘contingent’ and invites radical contestation from multiple sites of resistance and hope.

II. *Consumer Imperialism*

The post-World War II era witnessed the triumph of liberal economic ideology within Western-centric legislation, especially throughout much of Europe. In particular, two conceptions have developed over the last 60 years: first, the increased coupling of ideas about individualized economic freedom with democratic government, and second, the subsequent idea that liberty required healthy market functioning. In this section, the paper traces the development of these themes (using, in part, the European Union as a model case study of a larger trend within global governance) to explain the current preoccupation in consumption-oriented governance with ‘market integration’ and ‘consumer choice.’ Our goal here is not to present any in-depth examination, but to trace out a general intellectual history of how consumption became central to governance, and tell this story broadly through the Western European experience, in order to set the stage for a fuller appreciation of the following heterodox challenges to mainstream consumption-oriented policy.

The ordoliberal Freiburg school, led by the lawyer Franz Böhm and economist Walter Eucken, became increasingly influential in the immediate years following World War II.³ They were preoccupied with developing a response to what they saw as the factors that had led to the consolidation of the national socialist regime in Germany – most importantly, the close association between the national socialist regime and the great industrial cartels.⁴ The answer to the dangers of fascism and tyranny, they argued, lay in ensuring “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.”⁵ The basis for this society, they felt, was grounded in the principle of ‘complete competition,’⁶ which meant that no firm or individual in a market would have the power to coerce other firms in that market, at least to the extent that powerful economic actors would be able to mobilize government to advance their individual interests. Competition, quite

³ See David Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the ‘New’ Europe*, 42 AM. J. COMP. L. 25, 31-32 (1994); see also Giuliano Amato, ANTITRUST AND THE BOUNDS OF POWER 39. (1997); Doris Hildebrand, THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES 158-162 (2002).

⁴ See Amato, *supra* note 3, at 39-41.

⁵ See Gerber, *supra* note 3, at 36.

⁶ Gerber explains this idea as meaning “competition in which no firm in a market has power to coerce other firms in that market”. *Id.* at 43.

simply, could act as a corrective to regulatory capture by powerful economic actors.⁷ And here law would play an integral role, providing the framework for economic competition to limit the excesses of private power, which was so important in the context of Europe's 'market without a state.' In this context, ordoliberal thinking played a crucial role in vesting legitimacy in the arrangement to de-couple market regulation from stewardship for the social foundations of economic activity.⁸ Just as individuals should enjoy formally equal rights under the law to pursue their ambitions, the logic extended to the wider economic system in that firms should be able to follow shareholder interests, but only to the extent that there remained a formally free playing field that rewarded merit and ingenuity over shadow dealing or strong-armed political tactics, and which indirectly painted any distributional management outside of the 'market' as either insincere or misguided moralism.⁹

If government was to ensure a formal terrain of free economic competition, however, the state was nevertheless limited in regulatory scope; intervention, they argued, must never depart from "liberty- and market compatible means."¹⁰ To ensure limited government required a political constitution establishing checks and balances to prevent the arbitrary exercise of political power in a manner that might otherwise result

⁷ This logic mimicked the classic Scottish Enlightenment thought of authors such as Adam Smith. The eighteenth 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 eighteenth century politico-economic thought, see Istvan Hont, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* (2010).

⁸ See, e.g., Christian Joerges & Florian Rödl, "Social Market Economy" as Europe's *Social Model?*, in *A EUROPEAN SOCIAL CITIZENSHIP?: PRECONDITIONS FOR FUTURE POLICIES FROM A HISTORICAL PERSPECTIVE* 125, 130-31 (Lars Magnusson & Bo Straeth eds.) (2004). On the concept of the social embeddedness of economic activity on the state level, see Karl Polanyi, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944); see also Giovanni Arrighi, *THE LONG TWENTIETH CENTURY: MONEY, POWER AND THE ORIGINS OF OUR TIMES* (2d ed. 2010); Immanuel Wallerstein, *WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION* (2004).

⁹ For a brief but enlightening theoretical analysis of this reasoning from a critical perspective, see Morris R. Cohen, *Property and Sovereignty*, in 1 Felix S. Cohen & Morris R. Cohen, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY*, 26 (1951).

¹⁰ See Manfred E. Streit & Michael Wohlgemuth, *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).

in unjustified privileges accruing to undeserving economic actors.¹¹ Protection of individual consumers from markets, for the ordoliberals, became a non-issue: to the extent that markets operated without government manipulation, pricing and production by firms would be geared to consumer demand and guarantee the most efficient, cost-effective outcomes for their customers. Limited government meant individual economic freedom, which would allow the greatest degree of choice and determination on the part of firms and consumers. Intervention – whether justified on the basis of national prosperity, consumer well-being, or the necessities of the market – was, in most senses, simply collusion. In this way, the ordoliberals provided what appeared a clear line between liberty and coercion, and which pegged democracy to particular modes of economic behavior for individuals and firms alike.

As economic disparity grew throughout the United States and Western Europe, the ideological tie-in between competition and liberty diverged into two strands. On the one hand, competition would remain an essential component of liberty, especially at the level of international trade and national markets. On the other hand, at the individual level, the emphasis shifted slightly away from competition to emphasize the connection now between liberty and choice.¹² With the rise of neoliberal economics in the 1970s and 80s, the individual would no longer be conceived primarily as a ‘producer,’ nor as a ‘citizen,’ but rather the combination of principles of economic competition and democratic governance – what came to be known as ‘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,

¹¹ See *id.* at 233; see also 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).

¹² See Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29 *Oxford Journal of Legal Studies* 267 (2009); see also Liza Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernization of Article 82 EC*, 3:2 *EUR. COMP. J.* 329, 332 (2007) (providing a lucid description of this shift in relation to European competition law).

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.¹³

Market citizenship thereby preserved the ordoliberal conflation of competition with liberty while further entrenching the reliance on notions of capitalist consumption as the measure, means, and goal of democracy. Competition and consumption reinforced each other as the surest guarantees of political liberty, social progress, and economic health. As in its earlier restatements, liberty would best be guaranteed through choice, rather than political safeguards or revamping economic disparities - low prices meant more choices for consumers, and vice versa, the greater choice, or liberty, that firms enjoyed, the lower the prices for the consumer.

The turn to consumption also helped to answer confusion over how to gauge notions of utility, or more generally, what standard would determine exactly what was meant by liberty, either in economic or political terms. After all, it was not at all clear for many that the rise of fascism was linked to over-weening socialist policies. While ordoliberal ideology would be the dominant currency in the post-war era, economic legislation was in fact less to do with protecting 'individuals' from the state, but rather the importance among capitalist nations and industrial-financial interests to quell the revolutionary fervor rampant within the laboring classes that were calling for more fundamental economic and political change.¹⁴ For left-wing movements and scholars often sympathetic to varying degrees with the U.S.S.R., it was the failure of liberalism to deal with social disenfranchisement following the economic crisis of the late 1920s that paved the way for fascist takeover.¹⁵ To reinstate liberal economic policies would in the long run only reinstate the problems of tyranny that Western populations now sought so desperately to avoid repeating. If the conversation of the post-war era was about liberty and competition, in other words, liberty was that of capitalism from radicalizing tendencies on the condition that labor would be granted significant concessions by 'market forces' through the mediating role of the state, and competition referred to ideological tensions (capitalism versus communism) and institutionalized political antagonisms (e.g., labor unions and left wing political parties versus capitalist and more centrist liberal forces).

However, at the heart of the debate beneath broad concepts, such as liberty, was a shared appreciation that political and social life was grounded in economic

¹³ Amanda Root, *MARKET CITIZENSHIP: EXPERIMENTS IN DEMOCRACY AND GLOBALIZATION* 57 (2007).

¹⁴ See generally Polanyi, *supra* note 8; see also Dani Rodrik, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011).

¹⁵ For this thesis in relation to Italy and Germany, see, e.g., Alexander J. De Grand, *ITALIAN FASCISM: ITS ORIGINS AND DEVELOPMENT* (3d ed. 2000); see also Hans Mommsen, *FROM WEIMAR TO AUSCHWITZ* (Philip O'Connor trans.) (1991).

conditions. With the marginalization of left-oriented ideology,¹⁶ the dominant framework for explaining individual and firm behavior centered on the notion of utility, which was tied to the idea that actors operated to maximize their preferences.¹⁷ The nature of these preferences was in turn increasingly tied to wealth maximization, and by extension, the possibilities of consumption. By the time of neoliberal economic ascendancy, the maximization of consumption (while accounting for the inevitability of irrational or excessive behavior) had firmly overtaken other theories as a totalizing explanation of human behavior.¹⁸ Accordingly, if human behavior operated to maximize consumption, a ‘hands-off’ approach to government intervention fulfilled two essential goals: first, it guaranteed policies that would be real world-oriented to the extent that they were attentive to how people ‘really acted,’ and second, it ensured a democratic mode of governance, since accommodating human preference was akin to respecting the liberty of individual preference. The promise that stood behind this understanding of utility was an almost romantic idealism of progress, that there was simply no limit to accumulation and development:

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 indefinable, and therefore use as a proxy goal the maximization of consumption (and therefore of

¹⁶ The rise of neoliberal triumphalism (e.g., Washington Consensus, Fukuyama) in the post-Cold War era marked a high-water mark perhaps of anti-Marxist thought, though left-oriented ideology more broadly began its retreat much earlier (e.g., in France, the tradition from Nancy to Mouffe). For a discussion of neo-liberal triumphalism in the context of the former Soviet space, see John Haskell & Boris Mamyluk, *Capitalism, Communism ... And Colonialism? Revising Transitory as the Ideology of Informal Empire*, 9:2 *Global Jurist* (2009). For a polemic for the return of a programmatic left thinking after decades of retreat in either conservative or post-modern liberalism, see Slavoj Žižek, *FIRST AS TRAGEDY, THEN AS FARCE* (2009).

¹⁷ See Daniel M. Hausman, *THE INEXACT AND SEPARATE SCIENCE OF ECONOMICS* 18-19 (1992).

¹⁸ For some general historic and theoretical explanations concerning the development of this trend, see, e.g., David Harvey, *A BRIEF HISTORY OF NEOLIBERALISM* (2007); see also Andrew Lang, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011); Wolfgang Sachs, *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER* (1991); Joseph Stiglitz, *GLOBALIZATION AND ITS DISCONTENTS* (2003). For an argument as to its staying power, despite mounting economic catastrophes and political challenges, see Colin Crouch, *THE STRANGE NON-DEATH OF NEO-LIBERALISM* (2011).

production) within feasibility constraints. Thus the dominant economic paradigm has accepted the goal of increasing consumption, with no built-in concept of “enough.”¹⁹

The trajectory from ordoliberal to neoliberal economic thought, and its dominance in legislative policy, is clearly visible in the case of the European Union.²⁰ This is not necessarily self-evident at first glance, especially as the mainstream model of contemporary EU governance seems to craft legislation to ensure an “internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital”²¹; the notion of defining individuals as consumers and providing certain protections to this identification has been present in legislative policy consideration from the early stages. In the Annex to the Council Resolution of April 14, 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy,²² the drafters anticipated a broad definition of the consumer to be protected as “not merely 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.”²³ The Annex enumerated a list of concerns and objectives

¹⁹ Neva R. Goodwin, *Volume Introduction*, in *THE CONSUMER SOCIETY* xxvii, xxxi (Neva R. Goodwin et al. eds., 1997).

²⁰ For an extended overview of the European Union’s importance in global governance, see, e.g., *THE EUROPEAN UNION AND GLOBAL GOVERNANCE* (Mario Telò ed., 2009). For one of many examples of the proposition that the European Union may serve as a useful global model for governance, see Jacques Derrida, *Enlightenment past and to come*, *Le Monde diplomatique* (Nov. 2004), available at <http://mondediplo.com/2004/11/06derrida> (last visited September 1, 2012).

²¹ See Consolidated Version of the Treaty Establishing the European Community art. 3(c), Apr. 16, 2003, 2006 O.J. (C 321) 37 [hereinafter EC Treaty]. Since December 1, 2009, the EC Treaty has been renamed the “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.

²² 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>.

²³ 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->

in keeping with this policy, to include consumer health, safety and economic interests, redress against “strongly organized production and distribution groups,”²⁴ and allowing the possibility to inform, educate, and be heard in relevant decision-making processes. These early concerns for protecting the individual as a consumer were further enshrined in Article 153 EC – introduced by the Maastricht Treaty, which has carried over into Article 169 of the Treaty on the Functioning of the European Union, to specifically call for consumer protection to be taken “into account in defining and implementing other Union policies and activities”²⁵ and to adopt “measures which support, supplement and monitor the policy pursued by the Member states.”²⁶ The acknowledgement of some form of consumer rights, and the necessity of consumer protections in legislative deliberation and economic policy, seems to suggest that the European Union actually stands to the left of the ordoliberal and neoliberal economic traditions of governance.

However, at closer inspection, in many respects the economic legislation in the European Union follows the classic ordoliberal-neoliberal tradition to the exclusion of any other models of governance.²⁷ Legislation demonstrates a tight coupling between market and political processes in practice, while simultaneously sacrificing the constitutive role of politics in the shaping of the ‘market’ in favor of an idea of economics to be a ‘state of nature,’ where individuals and firms operate according to fixed economic realities that governments must acclimate to rather than adjust. This becomes more evident when looking deeper into legislative enactments and the importance placed on ‘market integration,’ which advances the idea that consumer protection is a positive externality flowing primarily from “the process of integration through ... a more efficient market... [to] yield more competition [and] allow[] wider choice, lower prices and higher-quality products and services.”²⁸ As the European Court of Justice made clear in paragraph 84 of its Tobacco Advertising decision,²⁹ consumer protection legislation “must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.”³⁰ In the

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425%2802%29:EN:HTML

²⁴ *Id.* ¶ 6, at 3.

²⁵ EC Treaty art. 153(2) (now TFEU art. 12).

²⁶ EC Treaty art. 153(3)(b) (now TFEU art. 169(2)(b)).

²⁷ For a concise overview of this dilemma, and an extensive bibliography of further reading that addresses its development and entrenchment, see Stanislav Maselnik, *The Neoliberal Union: EU and its model of economic integration*, The European Strategist (Oct. 17, 2011), available at <http://www.europeanstrategist.eu/2011/10/the-european-neoliberal-union/> (last visited September 1, 2012).

²⁸ Stephen Weatherill, *EU CONSUMER LAW AND POLICY* 4 (2005).

²⁹ See Case C-376/98, *Germany v. European Parliament and Council of the European Union*, 2000 ECR I-8419; see also Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide,”* 12 German Law Journal 827 (2011).

³⁰ Case C-376/98, 2000 ECR I-8419 at ¶ 84.

2008 Proposal for a Directive on Consumer Rights, the European Commission openly follows the logic that individuals are best protected as consumers through liberalized market policies – the goal of consumer rights best protected through the “contribut[ion] to the better functioning of the business-to-consumer internal market by enhancing consumer confidence and reducing business reluctance to trade cross-borders.”³¹ Within this paradigm, “[e]xcessively 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.”³² The emphasis on consumer confidence and choice through the liberalization of markets (in turn, which is claimed to lead to lower prices), as well as the routinization of individuals, not simply as wrapped up in economic interests, but defined primarily as ‘consumers’ in the legal architecture, is substantively in keeping with the economic orthodoxy of ordoliberal-neoliberal philosophy (and to which we will present a variety of challenges to the underlying logic in the following section).

What is striking is that the financial crisis has not yet resulted in any fundamental shift of economic legislative policy.³³ Market integration and liberalized trade regimes have not resulted in either lower prices or a higher standard of living for the majority of populations in Western Europe or elsewhere. Confidence is at its lowest ebb in recorded memory, and fears of inflation and economic stagnation (already a reality in many respects) grip not only the population at large, but financial and industrial sectors of the global economy. Politicians and the business sectors, however, continue to follow the traditional economic mantras. Yet, at the same time, disruptions in society and dissent within intellectual and policy circles are growing – though the direction of change is still uncertain.³⁴ The danger, we believe, is that the conditions are

³¹ 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*].

³² 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).

³³ The lack of meaningful economic or political reform – whether in banking laws, criminal prosecutions, currency controls, lobby influence, mortgage relief, and so forth – is a regular critique in the general media and scholarship. For an example of this style of critique in the media and then in monograph form, see Costas Lapavistas, *Germany: a euro laggard*, *The Guardian* (Mar. 21, 2010), available at <http://www.guardian.co.uk/commentisfree/2010/mar/21/germany-a-euro-laggard> (last visited September 1, 2012); see also Joseph E. Stiglitz, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012).

³⁴ Social and intellectual dissent to ‘capitalism’ is increasingly visible within academic, media, and social circles. For an example of this general shift in sentiment, see Costas Douzinas, *In the next decade, I hope to become more radical*, *The Guardian* (January 1, 2010), available at

again staged for some form of return to the years leading up to World War Two, with the rise of fascist or totalitarian forces providing formal political stability in the face of escalating economic chaos. In the following section, the paper turns to look at alternative traditions that challenge the modern orthodoxy that shapes economic legislation.

III. *Heterodox Challenges to Consumer Society*

As we witnessed in the last section, legislation is increasingly grounded in consumption-oriented theories that conflate choice with freedom and open trade with consumer protection. The decline of neoliberal triumphalism (at least in rhetoric),³⁵ despite calls for ‘innovative’ thinking and search for guilty parties, has not translated into substantive reform of economic, legislative, or political fundamentals.³⁶ In the wake of the financial crisis, however, it appears that new (and old) sources of contestation are emerging to challenge consumption orthodoxy. In this section, the paper offers seven vignettes of (re)emergent heterodoxies.

A. *The Marxist Spotlight: Alienation and Commodification*

The Marxist challenge to the consumer paradigm may be situated in the critiques of ‘alienation’ and ‘commodification.’ The problem of alienation is aptly described by Don 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.³⁷

<http://www.guardian.co.uk/commentisfree/libertycentral/2010/jan/01/goodby-noughties-radical-change> (last visited September 1, 2012).

³⁵ For an example of this retreat from a robust neoliberalism, see, e.g., Richard Posner, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009).

³⁶ See, e.g., Lapavistas, *supra* note 33.

³⁷ Don Slater, *CONSUMER CULTURE AND MODERNITY* 106 (1997). Of course, what the (especially earlier literature within) Marxist theory of alienation typically seems, to a

For Marx, the remarkability of the human species lays in the ability to engage in “free conscious activity,”³⁸ meaning that unlike other animals the productive activity of the laborer is not necessarily compelled by “immediate physical need[s],”³⁹ and one is able freely to confront the final product of one’s labor, thereby “contemplat[ing] himself in a world he himself has created.”⁴⁰ 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 the laborer in one’s pure potential (that life activity is not pre-determined simply by condition within nature, but is instead capable of agency) – “an object of [one’s] will and consciousness”⁴¹ – then it is the very essence of being human that labor within a capitalist economy turns on its head, by making one’s “life activity, his *being* . . . a mere means for his *existence*.”⁴²

certain degree, 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, which goes a long way to explaining the continued prevalence of capitalist organization in the economy. This does not, however, discount the extensive infrastructure and surplus labor costs of maintaining consumer satisfaction in the system and marginalizing dissent.

³⁸ Karl Marx, *Estranged Labour*, in THE CONSUMER SOCIETY READER 3, 8 (Martyn J. Lee ed., 2000). 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. To the extent, however, that liberty/freedom is something to strive for, Marx’s materialism is important for providing a clear understanding, if not initiating, the analysis of the relationship between the life of law and economics beyond morality based studies. For an insightful study into Marxism, liberalism and international law, see Akbar Rasulov, ‘*The Nameless Rapture of the Struggle*’: Towards a Marxist Class-Theoretic Approach to International Law, 18 Finnish Yearbook of International Law 243 (2008).

³⁹ Marx, *Estranged Labor*, *supra* note 38 at 8.

⁴⁰ *Id.* There is a danger here of conflating the early and late Marx, and missing the important Marxist contribution that there is no ‘human’ per se outside a given systemic mode of subsistence. For a discussion of this point, see generally Louis Althusser, FOR MARX (trans. Ben Brewster) (1985).

⁴¹ *Id.*

⁴² *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

Alienation is also intimately connected to the commodification of capitalist labor, namely the transformation of labor into a thing (labor-time) that can be bought and sold. The moment labor 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 labor, in other words, becomes consumption.

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.⁴³

It is this indirect nature of the relationship between production and consumption that gives rise to what Marx calls the “fetishism of commodities,” which is ultimately an issue of “recognition and distance.”⁴⁴ 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 acquire 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”⁴⁵ rather than from “relations of production [between people]: labour, wage-relations, structural class divisions.”⁴⁶ 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’.

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.

⁴³ Slater, *supra* note 37, at 107.

⁴⁴ *Id.* at 111.

⁴⁵ Karl Marx, *The Fetishism of the Commodity and its Secret*, in THE CONSUMER SOCIETY READER, *supra* note 38, at 10, 13.

⁴⁶ Slater, *supra* note 37, at 112.

The methodological strand of Marxist critique is divided in two parts. First, the equation of ‘relative prices’ with ‘the nature of products’ themselves, rather than oscillating relations of production, de-politicizes 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.’⁴⁷ 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 policymakers to discount anomalies as mere chance occurrences, when in fact they are part and parcel of the existing economic system. Consumer-centric economic policies, 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.⁴⁸ The anti-essentialist and re-politicization of consumption in the Marxist tradition here re-occurs often within the heterodox traditions within this article, and which we will return to in our conclusion via the writing of American Legal Realists, especially Morris Cohen.

The Marxist critique also challenges the consumer society approach 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 the world, Marx appears to refer to an understanding of labor as the process mediating the satisfaction of human needs through interaction with the world:⁴⁹ through labor, transforming raw materials into use values, laborers draws from an environment the things needed to survive. As long as one is able to hold together this intimate, transformative connection between production and consumption, then labor retains the ‘metabolic’ character.⁵⁰ 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

⁴⁷ See Roberto Unger, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN SERVICE OF RADICAL DEMOCRACY* (2004).

⁴⁸ See Susan Marks, *False Contingency*, 62 *Current Legal Problems* 1 (2009).

⁴⁹ See John Bellamy Foster, *MARX’S ECOLOGY: MATERIALISM AND NATURE* 157 (2000).

⁵⁰ This concept of ‘metabolic’ could also be discussed through the idea of ‘lost opportunity costs,’ which refers to the question of how much resource allocation is given to a particular mode of production, and what are the gains and losses of not doing (or risking to do) things differently.

feels one is transforming anything through work; instead, one is simply expending labor power in exchange for an abstracted wage largely for commodity consumption. The mediated relationship between labor and satisfaction of needs through the exchange of commodities no longer allows people to “recognize as our own the world we have made,”⁵¹ both because labor is no longer in an immediate relationship to the production of use-values (e.g., the critique of alienation of labor) 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 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 due to the necessities of capitalist accumulation.

B. The Institutional Economics Critique

The institutional economic critique of consumer capitalism is visible in the work of Thorstein Veblen, John Kenneth Galbraith and Brendan 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,⁵² and more specifically, 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.⁵³

⁵¹ See Slater, *supra* note 37, at 111.

⁵² See Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. Econ. Lit. 166, 173 (1998).

⁵³ Thorstein Veblen, *Conspicuous Consumption*, in THE CONSUMER SOCIETY READER, *supra* note 38, at 31, 45. See generally Thorstein Veblen, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS (2007).

For Veblen, in other words, conspicuous consumption is a method of “demonstrating the possession of wealth”⁵⁴ through a “waste of goods.”⁵⁵ In deciding what amounts to “waste,” he suggests that “in order to bring any given item or element in under this head it is not necessary that it should be recognized as waste . . . by the person incurring the expenditure.”⁵⁶ Instead, it is a test of “impersonal usefulness”⁵⁷ 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 and well-being on the whole.”⁵⁸ 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.⁵⁹ 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, etc.), 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 incorporates Veblen’s crucial insight that demand for products in a consumer society is not purely exogenous, but rather intimately related to supply. Commenting on the arguments made by economist J.S. Dusenberry, he writes:

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.⁶⁰

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.⁶¹ These

⁵⁴ Veblen, *Conspicuous Consumption*, *supra* note 53, at 40.

⁵⁵ *Id.*

⁵⁶ *Id.* at 46.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See David B. Hamilton, *Institutional Economics and Consumption*, in *THE CONSUMER SOCIETY*, *supra* note 19, at 170, 171.

⁶⁰ John Kenneth Galbraith, *The Dependence Effect*, in *THE CONSUMER SOCIETY READER*, *supra* note 38, at 217, 219.

⁶¹ *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

new wants are a consequence, not a cause, of increased production – what American economists have come to term, the ‘dependence effect’:

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.⁶²

Brendan 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”⁶³ are concerned, too many goods are chasing too few consumers:

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 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.

⁶² *Id.* at 220-21.

⁶³ 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,

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 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.⁶⁴

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.”⁶⁵

In conclusion, it appears that the progression from Veblen to Sheehan through Galbraith witnesses increasing skepticism towards a fundamental assumption of the consumption-oriented 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

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).

⁶⁴ *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.

⁶⁵ *Id.* at 10. Of course, this imperative could be read to apply beyond the ‘people of plenty’.

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 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.⁶⁶ 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 within a given socio-economic regime that promotes 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*, Baudrillard discusses the fundamental problem highlighted by Galbraith, “the contradiction . . . between a potentially unlimited productivity . . . and the need to dispose of the product.”⁶⁷ 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.”⁶⁸ The reality described by Galbraith, however, is one of “insatiable” needs - how then, the question arises, does one explain this paradox, of needs being both capable of satisfaction, yet also incapable of resolution? 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)”⁶⁹ so that “there can never be any *achieved* satisfaction, or therefore any *definition* of need.”⁷⁰ George Ritzer clarifies this last point:

⁶⁶ See Amanda Terkel, *With Recession Looming, Bush Tells America to “Go Shopping More,”* THINK PROGRESS (Dec 20, 2006, 12:56 PM), available at <http://thinkprogress.org/politics/2006/12/20/9281/bush-shopping/>.

⁶⁷ Jean Baudrillard, *THE CONSUMER SOCIETY: MYTHS AND STRUCTURES* (Chris Turner trans., 2000) at 71.

⁶⁸ *Id.* at 77.

⁶⁹ For Baudrillard, in fact, “every group or individual experiences a vital pressure to produce themselves meaningfully in a system of exchange and relationships.” See Jean Baudrillard, *The ideological genesis of needs*, in *THE CONSUMER SOCIETY READER* 57, 67 (Juliet B. Schor and Douglas B. Holt, eds., 2000). This postulates the presence of a language acting as an exchange structure through which “the human terms of the

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 ... 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 ... 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.⁷¹

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.”⁷² Consumption stops being a matter of possessing things to instead become a question of communication,⁷³ a code “by comparison with which individual needs and pleasures are merely speech effects.”⁷⁴ As Ritzer explains, consumption:

exchange [are differentiated] into partners, not individuated, but nevertheless distinct, and bound by the rules of exchange” *Id.* at 68. In addition to that, “[l]anguage cannot be explained by postulating an individual need to speak,” *id.* [emphasis removed]; it simply is, and it is *within* language that “the individual intention of speech” 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*. *Id.*

⁷⁰ Baudrillard, *THE CONSUMER SOCIETY*, *supra* note 67 at 78.

⁷¹ George Ritzer, *Introduction to Jean Baudrillard*, in Baudrillard, *THE CONSUMER SOCIETY*, *supra* note 67, at 1, 7.

⁷² Baudrillard, *The Ideological genesis of needs*, *supra* note 69, at 68.

⁷³ See TIM EDWARDS, *CONTRADICTIONS OF CONSUMPTION: CONCEPTS, PRACTICES, AND POLITICS IN CONSUMER SOCIETY* 176 (2000).

⁷⁴ Baudrillard, *THE CONSUMER SOCIETY*, *supra* note 67, 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

[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.⁷⁵

In other words, Baudrillard's departure from the institutional critique lies in his acknowledgment of 'needs' as a category internal to the system of consumption, which the latter requires 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.⁷⁶ 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 fails to effectively expose and scrutinize what really keeps people hooked to consumption, what Baudrillard identifies instead with the search for meaning inside a given social and symbolic structure.

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”⁷⁷ 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).”⁷⁸ 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*

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.

⁷⁵ Ritzer, *supra* note 67, at 15.

⁷⁶ See Baudrillard, THE CONSUMER SOCIETY, *supra* note 67, at 74.

⁷⁷ *Id.* at 175.

⁷⁸ *Id.*

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.⁷⁹

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 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.”⁸⁰ Consumption-oriented growth and accumulation, in other words, is not tantamount to progress.⁸¹

In linking affluence and violence, 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. At the same time, the linkage between affluence and violence may be 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. In short, 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.⁸²

Moreover, Baudrillard’s conclusion that ‘needs’ cannot be satisfied, and are thus an undesirable analytical concept, seems questionable. First, while ‘desire’ itself

⁷⁹ *Id.* at 175-76.

⁸⁰ *Id.* at 175.

⁸¹ See generally R.H. Tawney, *THE ACQUISITIVE SOCIETY* (2004).

⁸² For calls to scholars to explore the relationships between socio-economic forces and forms of domination, and the role of law, see, e.g., Rasulov, *supra* note 38; see also Rob Knox, *Marxism, International Law and Political Strategy*, 22(2) *Leiden Journal of International Law* 413 (2009); Susan Marks, *supra* note 48; China Miéville, *The Commodity-Form Theory of International Law: An Introduction*, 17(2) *Leiden Journal of International Law* 271 (2004).

may be ingrained in the human psyche, it is unclear that 'desire' is actually incapable of fulfillment 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 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 providing 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. Though his disruption of needs and consumption is an useful point of departure, 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 postmodern 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.

D. Indeterminacy, or Critical Legal Studies as Culture Jamming

The contribution of Critical Legal Studies (CLS) to the consumer paradigm debate arrives indirectly through structuralist critiques exploiting the internal contradictions embedded within liberal systems of governance. Through subjective (e.g., the focus on identity) and objective (e.g., the emphasis on economic distribution of resources) forms of inquiry, the CLS legacy, in part, has been the thorough taking apart of the logic behind the law and economics movement. In relation to consumption, CLS perspectives are useful to highlight 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.

The commentary following the choice of maximum harmonization⁸³ in the drafting of the Proposal for a Directive on Consumer Rights will serve as a case in point.⁸⁴ At one end of the spectrum, one finds the argument that cost-benefit analysis is 'neutral' and the goal of legislation is simply to enact formal, distant regulation thereby giving economic actors the maximum degree of liberty which is in turn equated with democratic policy - which as we saw earlier is brought about through the rhetorical

⁸³ 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.

⁸⁴ See *Consumer Rights Directive Proposal*, *supra* note 31.

coupling of ‘market harmonization’ and ‘consumer welfare’. At the other end of the spectrum, however, this one-to-one relationship is not nearly so certain an outcome:

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.⁸⁵

The intervention by Critical Legal Studies in this general debate adds theoretical momentum to these more critical reservations – in particular providing an answer to the question of how 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 in terms of cost-benefit analysis (and the efficiency-maximization rationale underpinning the latter) by stating that efficiency-based decision-making is actually indeterminate,⁸⁶ and that it is chiefly an apologetic tool for liberal-minded policies.⁸⁷ For Kennedy, the many dilemmas a policy-maker encounters when engaging in cost-benefit analysis are inescapable because the solution provided by cost-benefit analysis offers no value-free measuring stick 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, the benefits and thereby the outcome of the whole decision-making process. Any such assessment, Kennedy reminds us, is therefore never neutral.⁸⁸ The important thing is to elucidate the close tie between the distribution of wealth and the allocation of resources and decision-making within a given economy:

⁸⁵ Weatherill, *supra* note 28, at 25.

⁸⁶ See Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *Stan. L. Rev.* 387, 444 (1981).

⁸⁷ *Id.* at 445.

⁸⁸ *Id.* at 410.

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.⁸⁹

In reflecting upon these “wealth effects,” Kennedy highlights how 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.⁹⁰

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,’”⁹¹ thus leading to an infinite variety of possible outcomes (and therefore non-determinate). 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 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.”⁹² 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

⁸⁹ *Id.* at 422.

⁹⁰ *Id.* at 428.

⁹¹ *Id.* at 441.

⁹² *Id.* at 411.

economic models.⁹³ They merely express political values, rather than some empirically-grounded reality, or evaluation, which might be found or adequately quantified.

In this respect, Kennedy's endeavor to undermine the background assumptions behind consumer-centric economic paradigms may be likened to the *culture jamming*⁹⁴ of Kalle Lasn, best known as the founder of *Adbusters* magazine. For both, it appears necessary to pierce the "soft routine"⁹⁵ 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 experiences. .⁹⁶

Like Lasn, 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, which can never be simply 'naturalized' or taken for granted – the market exists as a domain of complexly related interest groups and is itself structured according to ever oscillating, though often weighted, patterns of distributional choices. It is the necessary antecedent of political decision, for it enables political decision-making to re-emerge as an 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."⁹⁷

⁹³ See Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1189 (2001).

⁹⁴ See Kalle Lasn, *CULTURE JAM: HOW TO REVERSE AMERICA'S SUICIDAL CONSUMER BINGE—AND WHY WE MUST* (2000). In our opinion, Kennedy's proposals on how to make law schools a "counterhegemonic enclave" appear very close to the spirit of "culture jamming" practices. See e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Leg. Ed. 591, 611-15 (1982).

⁹⁵ See Lasn, *supra* note 94, at 106.

⁹⁶ *Id.* at 104-105.

⁹⁷ *Id.* at 108.

If the language of consumption is, like everything else, merely the terms and outcome of political struggle between competing interests and ideas, authors like Lasn and Kennedy suggest that consumption-orientations are nevertheless escapable. Populist revolutions are possible, and they begin with people simply falling out of the system and surviving. This heterodox state of existence, in turn, enables new modes of subsistence and enjoyment, and if capable of sustaining enough participation, marks the grounding for some post-consumptive model of future governance. In this light, consumption models can only be sustained as long as they ideologically are capable of enlisting the majority of the population in endless consumptive routines and desires. The possibility of revolutionary change, by implication, is along two (not mutually exclusive) paths: on the one hand, through the material inability to meet consumption needs; on the other, through alienation to the point of retaliation against consumption-based lifestyles.

The language here adopts a distinctly post-modern flavor: the ‘few people’ of the nascent revolution appear like an artistic avant-garde, ‘daydreaming,’ ‘slipping out of old patterns’ and so forth. It is an individualized act and something that happens without organizational clarity, just ‘happens naturally,’ and then somehow evokes a ‘groundswell of support’ where people shrug off history and are ‘empowered’ to ‘perform’ new gestures. While the language is undoubtedly poetic, it is also misleading. What are the dynamics of the ‘naturally’ occurring ‘groundswell of support,’ we might ask, and does this not gloss over the political conflict that such a movement would almost certainly instigate, as well as pass over the necessity of understanding in more certain terms the tactical choices of rebellion? Moreover, the description of revolution as ‘performative’ and individually ‘empowered’ feels removed from the actual terms of political struggle. And what does it mean to be ‘unencumbered by history’ – are these completely new acts or drawing upon past traditions of emancipation? What do we mean by history in particular? And how does one escape this ‘history’? Would not the very concept of rebellion require an engagement with historical encumbrances? Authors such as Kennedy and Lasn, in other words, offer a profound critique to consumption-oriented models without providing a structural context to analyze their ultimate motivation or how they might be transcended.

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 his work, Gunther Teubner has drawn upon social systems theory (in the variance predominantly developed by the late German legal sociologist Niklas Luhmann) to construct one of the more visible critical appraisals of “consumerization”.⁹⁸ Teubner’s social systems theory is grounded in Niklas Luhmann’s theory of autopoiesis, which he described as “a self-reproducing network which relies exclusively on self-generated information and is capable of

⁹⁸ See Gotthard Bechman & Nico Stehr, *Introduction to the Aldine Transaction Edition* of Niklas Luhmann, *RISK: A SOCIOLOGICAL THEORY* at vii, viii (2005).

distinguishing internal needs from what it sees as environmental problems.”⁹⁹ A notoriously difficult theory, Moeller elaborates a useful definition:

[Autopoietic theory holds that] a system produces itself [which] 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.¹⁰⁰

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. 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 separation, can no longer fully participate in its environment as an “insider.”¹⁰¹ As Moeller explains:

⁹⁹ See Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *Cardozo L. Rev.* 1419, 1420 (1991).

¹⁰⁰ See Hans-Georg Moeller, *LUHMANN EXPLAINED: FROM SOULS TO SYSTEMS* 14 (2006); see also Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18:2 *Law and Society Review* 291 (1984).

¹⁰¹ 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 capitates external information by partitioning it between sound, taste, smell, touch

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.¹⁰²

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) are the ones that will be considered here.¹⁰³

There are two main consequences of this way of thinking about consumer society. First, society does not consist of individuals, or consumers, but “of communication ‘events’ such as communication by language, gestures, or money. Communicational sequences can then establish their own ‘individuality’”¹⁰⁴ and “grow into very specific shapes,”¹⁰⁵ (e.g., the separate social systems of law, politics and so on) - autopoiesis in action. Second, 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,”¹⁰⁶ while living (and more importantly, psychic) systems¹⁰⁷ are merely the environment, or conduits, of these various communicative systems:

For the autopoiesis of the social system the simultaneous (but separate) autopoieses[sic] of

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”.

¹⁰² See Moeller, *supra* note 100, at 13-14.

¹⁰³ See Niklas Luhmann, *ECOLOGICAL COMMUNICATION* 45 (1989).

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.*

¹⁰⁶ See Niels Åkerstrøm Andersen, *DISCURSIVE ANALYTICAL STRATEGIES: UNDERSTANDING FOUCAULT, KOSELLECK, LACLAU, LUHMANN* 75 (2003).

¹⁰⁷ For Luhmann, psychic and communicative systems are “structurally coupled,” in the sense that they mutually shape each other’s environment.

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.¹⁰⁸

This 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.”¹⁰⁹ Consequently, when “individuals” become socially active, they acquire different personas in different social systems.¹¹⁰ In this view, the consumer can be conceptualized as only one type of persona, specifically one that individuals take on 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.¹¹¹

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 membership¹¹² over a growing number of communicative events that were previously

¹⁰⁸ See 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).

¹⁰⁹ See Moeller, *supra* note 100, at 84.

¹¹⁰ *Id.* at 92.

¹¹¹ What seems left out here is the fact that systems overlap, or are enmeshed, so that the logic of economics for instance may have a lot to do with the logic, or vocabulary, of law. See Miéville, *supra* note 82. At the same time, for a critique of the juxtaposition in scholarship between law ‘and’ other subjects, such as economics, see Pierre Schlag, *The De-Differentiation Problem*, 41 *Cont. Phil. Rev.* 35 (2009).

¹¹² See Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting*, 8 *Theoretical Inquiries in Law* 51, 54 (2007) (illustrating the idea of multiple

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.¹¹³ The example of political totalitarianism in the twentieth century, and the very real human consequences it generated, is a sad illustration of where the totalitarianism of social systems may lead.¹¹⁴ Political totalitarianism, however, is only one possible example of "totalitarian" system dynamics, which may also arise in other social systems, including consumer society.¹¹⁵

Looking at the "consumerization" of economic and non-economic spheres through this lens, it is possible to construe it as an instance of "expansionism," whereby communicative events increasingly take on 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 consumer law the assessment of the unfairness of a term in a consumer contract in the context of Directive 93/13/EEC¹¹⁶ - 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,

membership of identical communicative acts in different social systems in relation to contractual transactions).

¹¹³ See Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 Mod. L. Rev. 327, 336-38 (2006).

¹¹⁴ 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. As we will develop shortly in the text, however, 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.

¹¹⁵ 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*].

¹¹⁶ See Council Directive 93/13, 1993 O.J. (L 95) 29 (EEC).

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.¹¹⁷

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,¹¹⁸ with reference to the judgment of conformity of consumer goods to their “normal” purpose and consumers’ reasonable expectations. In such a case, according to Parisi, 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.¹¹⁹ This case illustrates how 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, etcetera) to neutralize any potential compromise in its fundamental inner-working; and on the other hand, this ‘totalizing’ discursive/symbolic regime exists not only in itself, but is reflected and made alive only through human action, thought and organization, which is inextricably subjective (and thereby political) in character.

The question that Teubner raises in this situation is that, in such a context of individuals appearing under the formalized effect, or representation, of the consumer in ever increasing areas of social activity, when will this become too much, collapsing the totalizing process? Put slightly differently, when does the consumerization of social spheres (like law and politics) “hit the bottom,” obliterating all values other than efficiency from law through the promotion of consumeristic satisfaction of one’s first-order desires to until fundamental second-order desires are neglected.¹²⁰ These

¹¹⁷ See 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).

¹¹⁸ See Council Directive 99/44, 1999 O.J. (L 171) 12 (EC).

¹¹⁹ See Francesco Parisi, *The Harmonization of Legal Warranties in European Sales Law: An Economic Analysis*, 52 *Am. J. Comp. L.* 403, 419 (2004).

¹²⁰ See e.g., Benjamin R. Barber, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS AND SWALLOW CITIZENS WHOLE* 135-36 (2007). This pattern can be discerned across a wide spectrum of locations, from food to housing.

questions might very well open up 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 fundamental entities like the “mental environment,”¹²¹ the physical environment or the possibility for other generations to enjoy life on the planet? When is catastrophe looming so close it requires the erection of new internal limitations within the expansionist system to prevent it from running amok?¹²² In the end, for Teubner, this is the “good hard look,” or awareness, that social systems theory urges us to take, the recognition of the destructive risks embedded in the unbridled expansionism of the partial rationalities of social systems which might motivate attempts to erect new “constitutional” limitations *from within* an expansionist system.¹²³ With reference to consumer society, the “politicization of the consumer” (which is very different from the consumerization of politics briefly hinted at 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 in the economic system via a process of re-entry:¹²⁴

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

¹²¹ See Lasn, *supra* note 94, at 13.

¹²² See generally Teubner, *supra* note 115.

¹²³ 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.

¹²⁴ 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 100, at 67-68.

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.¹²⁵

The caricature of consumption-oriented policy as a totalizing vocabulary with real distribution stakes, and the emphasis on understanding how its dynamics operate in specific social spaces is substantively provocative and methodologically suggestive. At the same time, the autopoiesis hypothesis presents a set of challenges to scholars and policy-makers wishing to understand and reform consumption-oriented models of governance. First, the theory offers an almost claustrophobic vision of hermeneutically sealed environments, which is undoubtedly useful when taking a specific vocabulary or institutional framework seriously ‘on its own terms’ (e.g., to have a theory of law, rather than about or at law), but discounts the very real possibility that these environments themselves are embedded in background norms and structures, which not only have distributional effects, but more importantly, might be themselves linked to a systemic logic that determines their internal movement (e.g., in the last instance, perhaps, ‘the economy’). Second, this notion of ‘hermeneutically sealed environments’ looks suspiciously like a convenient mix of sensibilities: on the one hand, postmodern in its turn from states to a fragmented landscape of countless ‘cultures,’ and on the other hand, traditional international relations thinking, in the sense that it still privileges identifiable, and individualized, units of both meaning and statecraft. Third, it may be a mischaracterization to privilege the role of vocabularies and forms of communication in themselves at the expense of thinking about the ‘materiality’ of how language is conveyed and how it operates through real institutions and according to real needs, which may in turn not nearly be as open or closed as otherwise believed. In short, Teubner’s analysis gives added insight into the complexity and dangers of consumption-oriented policies (and that might serve as a vehicle to open new avenues of investigation), but under-theorizes the systemic logic behind these supposedly ‘sealed’ environments in overly scientific terminology.

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

¹²⁵ See Teubner, *supra* note 115 (emphasis added).

best means to maximize the satisfaction of desires that are themselves assumed (they are already determined, defined and known by the individual).¹²⁶ 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;¹²⁷ 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."¹²⁸

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 to "get" the consumer's predicament in consumer society. In raising this question, it encourages readers to step into what Buddhist economic theorists view as the uncharted, and perhaps hitherto shunned, world of "personal wisdom."¹²⁹ Buddhist economics foregrounds 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.¹³⁰ From a Buddhist perspective, this is a

¹²⁶ See Slater, *supra* note 37, at 43.

¹²⁷ *Id.*

¹²⁸ *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 e.g., 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).

¹²⁹ 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.

¹³⁰ See 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)[hereafter, *MINDFULNESS IN*

form of suffering.¹³¹ Indeed, Buddhist thought is chiefly concerned with suffering, the cause of which it finds in *tanha*, desire based on ignorance or craving.¹³² 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 Right Concentration.¹³³ In this Eightfold Path to liberation, *chanda* fits as desire based on “intelligent reflection.”¹³⁴ 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, while the classical economic model holds that unlimited desire is limited by scarcity, the Buddhist approach views limitations determined by appreciation of moderation and the objective of well-being.¹³⁵ This distinction between ‘needs’ and ‘wants’ (closely analogous to ‘good’ and ‘bad’) in turn requires more than legislative activity; rather it depends upon personalized cultivation of the ability to separate these impulses through the elevation of *chanda* (intelligent reflection) over *tanha* (ignorant desire).

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 may sometimes be satisfied through consumption and sometimes through non-consumption: “[t]he question is not whether to consume or not to consume, but whether or not our choices lead to self-development.”¹³⁶ To Baudrillard’s credit, much like his earlier commentary on needs, one might acknowledge that the equation of needs with consumption is endemic to the Western

THE MARKETPLACE]. 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))

¹³¹ *Id.* at 82.

¹³² *Id.* at 91.

¹³³ *Id.*

¹³⁴ *Id.* at 71.

¹³⁵ *Id.* at 79.

¹³⁶ *Id.* at 81.

economic paradigm centered on quantification¹³⁷ for the purpose of social engineering; an approach that, despite its merits, might very 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.”¹³⁸ As Schumacher explains 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.¹³⁹

At the same time, if we take Schumacher’s version of Buddhism seriously, 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 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

¹³⁷ See Shinichi Inoue, *A New Economics to Save the Earth: A Buddhist Perspective*, in MINDFULNESS IN THE MARKETPLACE, *supra* note 130, at 49, 53-54.

¹³⁸ See Jonathan Watts & David R. Loy, *The Religion of Consumption: A Buddhist Perspective*, in MINDFULNESS IN THE MARKETPLACE, *supra* note 130, at 93, 93.

¹³⁹ See Ernst Friedrich Schumacher, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED 61 (1975).

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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² Instead, the Deep Ecology movement supports the view of a participatory, rather than dominative, human involvement with nature.¹⁴³ This is famously summarized in Thomas Berry’s understanding of life on Earth as a “communion of subjects”¹⁴⁴ rather than a “collection of objects.”¹⁴⁵ 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.

¹⁴⁰ See Satish Kumar, *YOU ARE THEREFORE I AM: A DECLARATION OF DEPENDENCE* 149 (2002).

¹⁴¹ See Jane Holder & Maria Lee, *ENVIRONMENTAL PROTECTION, LAW AND POLICY* *supra* note 1, at 48.

¹⁴² See Stephan Harding, *ANIMATE EARTH: SCIENCE, INTUITION AND GAIA* 31-35 (2nd ed., 2009).

¹⁴³ *Id.* at 39.

¹⁴⁴ See Thomas Berry, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 82 (1999).

¹⁴⁵ See Harding, *supra* note 142, at 27.

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, but rather, human consciousness is understood as a quality emerging from the complex interaction of (simpler) forms of consciousness already present in matter.¹⁴⁶ In other words, ‘humans’ and ‘nature’ are incapable of any fundamental separation since 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.¹⁴⁷

Following from this, 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 ultimately something that men and women are doing to themselves.¹⁴⁸ As explained in Jungian archetypal psychology¹⁴⁹ by reference to the alienation of the individual from

¹⁴⁶ *Id.* at 93-94.

¹⁴⁷ Kumar, *supra* note 140, at 76.

¹⁴⁸ See Theodore Roszak, *Where Psyche Meets Gaia*, in *ECOPSYCHOLOGY: RESTORING THE EARTH, HEALING THE MIND*, ed. Theodore Roszak, Mary E. Gomes & Allen D. Kanner, 1, 5 (1995)[hereafter, *ECOPSYCHOLOGY*].

¹⁴⁹ In the words of Stephen Aizenstat:

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,”¹⁵⁰ 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. 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 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

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.

See Stephen Aizenstat, *Jungian Psychology and the World Unconscious* in *ECOPSYCHOLOGY*: *supra* note 148, at 92, 94.

Anthony 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,” 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. See Anthony Stevens, *ARCHETYPE REVISITED: AN UPDATED NATURAL HISTORY OF THE SELF* 17 (2nd ed., 2002).

¹⁵⁰ See Stevens, *supra* note 149, at 38-39.

systemic and ecological thinking that is characteristic of our time.¹⁵¹

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. 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.

Deep Ecology also faces limitations as a programmatic critique. First, there is an unfortunately tendency to equate ‘primal’ wisdom with pre-industrial/pre-technological systems of life. This seems to us unnecessarily pastoral, or romantic, and ignores the fact that technological development and the like can be assimilated within the realm of the ‘primal,’ ‘of nature’. Invoking ‘primal,’ we hope instead to 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, while recognizing that the particular interpretations or physical engagements with these environments may vary widely depending on the logics of the systems they inhabit. To think of the ‘primal,’ in this sense, 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, in relation to production, and to the world outside of what we call ‘human.’ The primal is an imagined non-consumer-centric potential of production/economic existence, which is both a means of analysis and a strategy to strive for.

Second, though not intrinsic to the logic of deep ecology, there is a tendency to adopt at least two suspicious binaries. On the one hand, the binary of ‘female’ versus ‘masculine’ values to characterize the field of engagement (woman equating with ‘nurturing’ versus masculine as ‘competitive’) tends to both unduly essentialize (or ‘Victorianize’) notions of gender and simplify a complex socio-economic challenge to governance into the language of individual ethics (e.g., to nurture, to be generous, and so forth). On the other hand, the binary of ‘natural’ versus ‘artificial’ is sometimes invoked to imply that the surface, or artificiality, of modern life can be drawn back to reveal a more holistic, organic reality that might somehow be engaged without the conceptual baggage and interpretive biases of the ‘artificial.’ What stands behind the synthesis of Deep Ecology (and Buddhism), and which we alternatively believe deserves 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 tends towards obstructing the potential for these relations. In the following section, we attempt to weave these various heterodox critiques into some

¹⁵¹ See Fritjof Capra, *Patriarchal Roots of Overconsumption*, in MINDFULNESS IN THE MARKETPLACE, *supra* note 130, at 9, 11.

general assessments of potential directions and pitfalls posed by the struggle over consumption-oriented legislation.

IV. Conclusion: The Black Swan of Consumerism

The consumer choice model in economic governance continues to reign 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,’ who, for better or worse, becomes a subject fully vested with control over her 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.¹⁵² 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 economic theory, consumer advocates maintain the juxtaposition between the autonomous, rational individual and both the meddling, power-hungry governmental bureaucrat and the monopoly-seeking industrialist.¹⁵³ 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 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. In line with 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.’

¹⁵² See generally Tawney, *supra* note 81.

¹⁵³ For an enlightening discussion of this theme in the context of Adam Smith and other Scottish Enlightenment moral economists, see Hont, *supra* note 7.

In this article, 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 (Institutional Economics), of the inability to articulate one’s predicament in a way that points to a way out (Baudrillard), of the 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), and of loss of spontaneity in our relationship with the world around us (Deep Ecology). Indeed, even consumer-market based approaches seem prone to these anxieties in their 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.¹⁵⁴

This sentiment is all the more real upon closer inspection of the claims justifying consumption-oriented legislation: that it is somehow linked to individual liberty, that it motivates innovation, and that it is more ‘real world’ oriented. In 1933, the American Legal Realist Morris Cohen addressed exactly these three claims that animate the mainstream dogmas of consumption, and which remain as relevant in our situation today. As to the assertion that ‘consumption’ driven policies are attuned to the ‘real’ or ‘underlying’ drives of economic (and individual) activity, he observes that concepts like consumption (or private property) do not relate directly to any ‘material thing’ or to an individual and a ‘thing,’ but rather to a set of rights embedded in modes of subsistence.¹⁵⁵ Especially since the “average life of goods that are either consumable or used for production of other goods is very short,” the real force of consumption-oriented legislation is that it brings with it a host of distribution choices concerning property rights of land and machinery - in short, the “future distribution of the goods that will come into being” and what “portion of the future social produce shall under certain conditions” will go to various strata of the population.¹⁵⁶ Moreover, much like the Institutional Economists would argue, these patterns of consumption not only vest certain parties with political advantage, but the ‘desires’ that drive consumption are likewise less the result of some ‘natural’ instinct, and more likely pegged to the dictates of “those who have the power to standardize and advertise certain products” and possess the power to “make us feel the necessity of buying more and more of [their] material goods.”¹⁵⁷

¹⁵⁴ See Slavoj Žižek, *VIOLENCE: SIX SIDEWAYS REFLECTIONS* 7 (2008).

¹⁵⁵ See Cohen, *supra* note 9, at 28.

¹⁵⁶ *Id.* at 29-30.

¹⁵⁷ *Id.* at 30.

That consumption is a contingent political device of centralized forces in finance and production, rather than simply a natural aspect of an individual's experience in the world of things, leads to a second, more troubling realization – namely, that the current trend focusing on a capitalist system of consumption does not lead to ‘emancipation’ or ‘freedom of choice,’ but quite the contrary, to various forms of popular subservience. To the extent that consumption is tied directly to the profit motive, Cohen notes that owners and stockholders of the means of producing the stuff of consumption lose “all personal touch with all but few of those who work for them,” releasing them “from all responsibility for the actual human effects of their policies,” and historically leading “industrial government to take the form of absolute monarchy.”¹⁵⁸ In other words, it makes “the producer of things ... the master mind that directs the currents of production,” which is especially troubling since it is not only patently undemocratic, but, perhaps even more troubling, secedes the “profound question as to ... [the] profound human need of controlling and moderating our consumptive demands” to those “whose dominant interest is to stimulate such demands.”¹⁵⁹ What makes this even more damning is that this drive towards stimulating demand in turn does not mean greater innovation, since what might be more sustainable or efficient for the general population may often be less profitable.¹⁶⁰ In short, the fundamental assertions of consumption – that it fosters individual freedom of choice and motivates innovation – are deeply unsound.

The difficulty of following these critiques from American Legal Realists and these other heterodox authors 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, etc.). 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

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 33.

¹⁶⁰ *Id.*

economic legal arrangements. 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. Furthermore, if we accept the proposition of the necessity of coercive change, it still begs the question to what extent its proponents within intellectual circles are really willing to fully participate and accept the potential costs of radical struggle – they may, to put it vulgarly, simply have too much comfort to lose. To what extent, in short, are current left-oriented calls within academia and policy circles merely reflecting the more general postmodern crisis of identity versus the partisan militant residing at any revolutionary core? In giving normative bite to any alternative model, as the American Legal 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 Spenserian formula.¹⁶¹

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 just a question of ethics or political will (e.g., the current distribution of resources is unjust/violent), but the feasibility of re-conceptualizing efficiency, both in terms

¹⁶¹ See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923). Of course, to counter Hale, one might argue that any system requires violence to maintain itself whenever fundamentally challenged. If we do not accept that any particular system is ‘natural,’ or alternatively, that any system can sustain itself indefinitely as the best of all possible organizational models, the question then becomes whether the prevailing system is at a stage beyond reform – the underlying hypothesis behind this paper, that the current economic (political) crisis potentially signifies just such a moment. This set of conditions, in turn, requires that we can name the current system with some clarity, which we feel in writing this paper might best be described (despite the inherent generality of any broad definition) as capitalism. Hale is a key figure, as noted earlier in Duncan Kennedy’s scholarship, within the Critical Legal Realist tradition and their critique of mainstream legal scholarship.

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.¹⁶² 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 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 slide-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*

¹⁶² For an in depth discussion of the relationship between ideology, strategy and tactics, see *generally* Althusser, *supra* note 40.

*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.*¹⁶³

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 to this, of course, can never be comprehensive, or anything more than *our* answer, but it would go something like this. As Indian philosopher Jiddu Krishnamurti suggests, sometimes even trying to change something is a form of denial, as it prevents proper acceptance of a state of fact that one seeks instead to remove, to scrape from one's worldview.¹⁶⁴ 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. This would not mean 'doing nothing,' but taking the time to recognize the actual stakes and dynamics within the existing order, and coming to a full appreciation of what it would mean to not be complicit in its violence. To reawaken to the costs that consumer-based models of governance entail on the domestic and international level, to subject our cherished ambitions and positions to this knowledge, and not to fashion reforms that would re-participate in its enactment. 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.¹⁶⁵

¹⁶³ See Aldo Leopold, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 129-30 (1989) (emphasis added).

¹⁶⁴ See Jiddu Krishnamurti, *THE FIRST AND LAST FREEDOM* 58 (1975).

¹⁶⁵ See Žižek, *supra* note 154, at 7. In short, 'consumption' (on the part of its opponents) is all too often under-theorized, which can lead to false utopias and despair.

This appreciation, we believe, is an animating factor of the academic literature that embraces ‘comparative heterodoxy.’ It is ‘comparative’ in a dual sense (as discussed in the introduction to this article): first, its willingness to study the overlap between various spheres of production and regulation irrespective of any essentialized spatial category, and second, its emphasis on the need to transcend traditional modes of analysis and to instead look for alternatives that allow for critical evaluation of entrenched practices and beliefs. It is ‘heterodox’ for at least two reasons as well: first, its comfort with anti-essentialist thinking, and especially its focus on breaking down the conceptual vocabulary within mainstream disciplinary or field-specific practices that may be ‘ossified’ or ‘exploitative,’ and second, its operation within a broad tradition of scholarship falls somewhere within the Marxist and critical liberal traditions, and today might be most aptly situated within the field of transnational legal pluralism.¹⁶⁶

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), and the expansionist tendency of economic rationality (social systems theory). On the other hand, however, consumerism also has a ‘micro’ shadow that unfolds in individual life-stories, through the enslavement to desire (Buddhist economics), and a deep disconnection from archetypal knowledge and thereby from the deep qualities of the world around us (deep ecology). If we might tie these strands together at all, its unifying thread is that they all confront the problem of capitalism as something that is profoundly complex and that requires an alternative conceptual paradigm concerning the production and regulation of subsistence.

¹⁶⁶ For an example of a contemporary Marxist reading of global governance and law, see Rasulov, *supra* note 37; see also Bill Bowring, *What is Radical in Radical International Law*, 22 *Finnish Yearbook of International Law* 3-30 (2011); B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, *Economic and Political Weekly*, 337 (Feb. 6, 1999). For an example of a critical liberal oriented perspective, or post-liberal perspective, in the tradition of the New Approaches to International Law movement, see Dan Danielsen, *Local Rules and a Global Economy: An Economic Policy Perspective*, 1 *Transnational Legal Theory* 49 (2010); see also Marks, *supra* note 48. For an useful exposition of the existing literature, themes and possibilities of transnational legal theory, see Zumbansen, *supra* note 2.