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# THE SIGNIFICANCE OF THE DISTINCTION BETWEEN CHILDREN AND ADULTS FOR CONSUMER PROTECTION

*M. Neil Browne\**  
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“I long remained a child, and I am still one in many respects.” – Jean-Jacques Rousseau, *Confessions*

## I. INTRODUCTION

During 2009, at least 114 million U.S. consumers regularly purchased dietary supplements.<sup>1</sup> Almost all scientific evidence indicates that dietary supplements are *not effective* in helping people lose weight.<sup>2</sup> Despite the scientific evidence contradicting the efficacy of dietary supplements, 62.9 percent of dietary supplement users and 42.8 percent of dietary supplement non-users indicated in a National Obesity Study that they perceived dietary supplements as an *effective* method of weight loss.<sup>3</sup> Meaning, substantial proportions of American adult consumers have gross misconceptions about the safety, efficacy,

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<sup>1</sup> See Natasha Singer, *Study Urges More Oversight of Dietary Items*, N.Y. Times, (Mar.4,2009), [http://www.nytimes.com/2009/03/04/business/04diet.html?ref=dietarysupplementsandherbalremedies&\\_r=0.on](http://www.nytimes.com/2009/03/04/business/04diet.html?ref=dietarysupplementsandherbalremedies&_r=0.on).

<sup>2</sup> See Janine L. Pillitteri et al., *Use of Dietary Supplements for Weight Loss in the United States: Results of a National Survey*, 16 OBESITY 790, 790 (2008).

<sup>3</sup> *Id.* at 794.

and regulation of dietary supplements.<sup>4</sup> Despite the hazards and ineffectiveness of dietary supplements, consumers continue to be beguiled by the marketing claims of these products.

Would children behave less skillfully as consumers? The question is stark and hyperbolic. They would, but how legally significant is the difference?

American culture and its derivative jurisprudential habits place a strong emphasis on individualism and personal responsibility.<sup>5</sup> But the expectation of personal responsibility does not extend to children. Rather, children are considered vulnerable and in need of protection, while adults are assumed to be rational and autonomous.

But when we think about fairness in the marketplace and the allocation of responsibility for the quality of consumer decisions, should the distinction between child and adult have major legal implications? Is the social distinction between children and adults in fact properly conceptualized as being on a continuum? Specifically, should adult consumers be presumed autonomous and self-sufficient in their market exchanges, or do they, like children, have moments of vulnerability requiring legal protection?

The assumption that adults are autonomous and rational holds major significance for our attitudes toward legal regulation of business. When we assume that adult consumers: (1) are able educate themselves about the numerous products on the market and choose the ones that best fit their needs, (2) are able to sort the puffing from the substance in promotional appeals from alternative sellers, and (3) possess the time to make the calculations that would best guarantee their health and safety when they choose a good or service, it follows that social norms in the marketplace yield efficiency and fairness.<sup>6</sup> Such a perspective

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<sup>4</sup> *Id.* at 790.

<sup>5</sup> See M. Neil Browne & Michael D. Meuti, Individualism and the Market Determination of Women's Wages in the United States, Canada, and Hong Kong, 21 *LOY. L.A. INT'L & COMP. L.J.* 355, 357-372 (1999); Nancy Kubasek et al., It Takes an Entire Village to Protect an Endangered Species: Individualism, Overlapping Spheres, and the Endangered Species Act, 10 *FORDHAM ENV'T'L. LAW J.* 155, 157-161 (1999); Carlos A. Ball, Communitarianism and Gay Rights, 85 *CORNELL L. REV.* 443, 448 (2000).

<sup>6</sup> Richard A. Epstein, *Lawyers' Rise or Fall?*, *NAT'L L.J.*, May 31, 2004, at 27 (arguing that "most routine disputes about the practice of law don't call for legal intervention precisely because the wide range of low-level social sanctions works remarkably well to keep people in line"). In other words, legal

emphasizes both the desirability and the reasonableness of minimizing legal “interference” in the daily affairs of contracting agents. However, many behavioral studies suggest that consumers are often not rational decision makers as assumed by classical economic theory, but are instead vulnerable and easily influenced. If such research is correct, the power imbalance in negotiations over price and quality in markets cries out for a remedy in those market instances where the three assumptions discussed above are merely wishful thinking. A remedy will only be created if consumers are looked at in a different light.

A productive metaphor for thinking about relationships and tensions in the millions of decisions made each day in assorted markets is the distinction between that stage of life we refer to as “childhood” and the later stage we call “adulthood.” Even those of us who are the most vigilant guardians of the economic freedom of business entities do not feel comfortable when brilliant marketing campaigns are directed at children. Children are highly vulnerable to manipulation by others, and we acknowledge that heightened vulnerability. Indeed, if all consumers were small children, the extent of regulation that democracies would expect from their governments would boggle our minds in its expansiveness. Children bring out our compassionate and sensitive sides; we want to protect them.

However, in individualistic cultures like the United States,<sup>7</sup> we change our attitudes toward the “terms of the trade”

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intervention on behalf of consumers in markets is a costly waste of time inconsistent with the value of efficiency. However, even Professor Epstein, a persistent critic of the legal regulation of business recognizes that norms are only useful in particular contexts. In the spirit of this article, he realizes that each market operates in a context of more or less openness and accessibility to consumer needs: “The success of these sanctions, however, varies inversely with the size of the target group. In small communities and businesses, individuals are constantly under the watchful eye of family and friends; any small deviation from some deeply held social norm is likely to prompt a pointed response.” *But cf.* Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, And The Use Of Norms As Private Regulation*, 57 ALA. L. REV. 1, 2-4 (2005) (arguing that social norms do not provide the promised ethical protection to the general public because of various habitual cognitive errors that distort social judgment about organizational behavior).

<sup>7</sup> See ROBERT N. BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 23 (1985) [hereinafter, BELLAH 1985]. Freedom is often defined as the freedom from an oppressive authority and from having others views and lifestyles forced upon them. What it is that one might do with that freedom is much more difficult for Americans

or the “results of the bargain” once we see the parties involved as “adults.”<sup>8</sup> Then, except in exceptional cases, we expect the individual to watch out for his or her own interests in market transactions, to behave, as we say, “like an adult.” For example, American courts have been very hesitant to rush to consumers’ defense when the consumers claim that they bought a good or service only because the seller concealed information about its attributes.<sup>9</sup> It is difficult to imagine similar rulings had the judges

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to define. See also ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, as excerpted in ROBERT N. BELLAH, ET AL. EDS., INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE 11 (1987) [hereinafter, BELLAH, 1987] (“Individualism’ is a word recently coined to express a new idea. Our fathers knew only about egoism. Egoism is a passionate and exaggerated love of self which leads a man to think of all things in terms of himself and to prefer himself to all. Individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself. Egoism springs from a blind instinct; individualism is based on misguided judgment rather than depraved feeling. It is due more to inadequate understanding than to perversity of heart. Egoism sterilizes the seeds of every virtue; individualism at first only dams the spring of public virtues, but in the long run it attacks and destroys all the others too and finally merges in egoism. Egoism is a vice as old as the world. It is not peculiar to one form of society more than another. Individualism is of democratic origin and threatens to grow as conditions get more equal.”); Andrea Giampetro-Meyer, et al., *Advancing the Rights of Poor and Working-Class Women in an Individualistic Culture*, 2 LOY. POVERTY L. J. 41, n.2 (1996) (holding that the only purpose of society is to benefit the individual, atomism places a high value on negative liberty (the absence of government interference in the lives of its citizens); E.K. HUNT, PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEAS 39-40 (7<sup>th</sup> ed. 1995) (influence remains evident in the market-oriented thought of neoclassical economists today); HARRY C. TRIANDIS, INDIVIDUALISM & COLLECTIVISM 2 (1995). Defining individualism as “a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, rights, and the contracts they have established with others; give priority to personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others”).

<sup>8</sup> See, e.g., Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47 (2012) (discussing how U.S. law protects minors from engaging in contracts under a traditional “infancy defense” due to their youth and assumed lack of understanding). Under this doctrine, minors’ contracts are generally voidable. This defense is not available to adults due to the sheer fact of age alone.

<sup>9</sup> See M. Neil Browne, Justin Rex, & Curtis Bunner, *Concealment of Information in Consumer Transactions*, 21 LOY. CONSUMER L. REV. 270, 274

been thinking of the prospective buyers as children.

The logic of this paper is as simple as it is important. The first part presents a brief review of the traditional bases for opposition to consumer protection. This cursory treatment has the purpose of highlighting the extent to which oppositional arguments rely implicitly on the distinction between a child and an adult. The following section enumerates the specific constitutive attitudes and behaviors of a child. These attributes suggest heightened vulnerability to what can be an unforgiving world. They need collective support to enable human flourishing, and this need is broadly recognized.

Before examining the extent to which adults differ in their cognitive habits from children, the third section explains the assumptions that are made about the mental acuity of those who negotiate price and quantity decisions in markets. The “consumer” reflected in this portrayal is far from childlike. This section is a necessary prelude to thinking deeply about adult cognitive tendencies because those market assumptions need to be realized in human agents if the beneficent effects of private supply and demand interactions are to prevail. The key to this section’s importance is the discussion of what we know about adulthood in terms of the quality of decision-making of the typical adult. While it would make little sense to claim that there are no differences at all between a representative 10 year-old and a typical 45 year-old, the evidence we have from many scientific sources suggests that older humans tend to exaggerate their relative prowess to some degree.<sup>10</sup> Accepting a more accurate portrayal of who “adults” are creates a more thoughtful foundation for weighing the costs and benefits of consumer protection.

## II. STANDARD ARGUMENTS AGAINST CONSUMER PROTECTION

In the United States, resistance to the regulation of business practices stems from the argument that businesses are private entities that should operate under the “invisible economic hand,” not under the control of the government.<sup>11</sup> More

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(2008).

<sup>10</sup> See *infra* Section II.

<sup>11</sup> See Jonathan B. Baker, *Preserving a Political Bargain: The Political*

specifically, advocates of free market systems and deregulation of businesses assert that the “invisible economic hand” leads to growth and prosperity,<sup>12</sup> and transactions that are best for both businesses *and* consumers.<sup>13</sup>

The reasoning behind the argument against regulation of business practices relies on several descriptive assumptions. Primarily, proponents against regulation of businesses make several assumptions about the cognitive abilities of consumers; consumers are assumed to be rational calculators, who have fixed, predetermined preferences between and among all available goods and services, and thus, have the ability to make choices that maximize their self-interested preferences.<sup>14</sup> Consumers are assumed to have the ability to weigh the costs and benefits of a purchase, and behave in a manner that maximizes his or her best interest.<sup>15</sup> According to those who advocate “getting the heavy burden of government off of the backs of business”, consumers are rational calculators capable of making purchasing decisions in their best interest.<sup>16</sup> Therefore, despite the profit motivations of sellers, regulation of the business firm is an unnecessary and costly attempt to guide consumer purchases – an unwarranted coercion of consumers. Under the assumption that consumers are rational actors, it would follow that consumers should be granted autonomous decision-making privileges, or, “consumer sovereignty,”<sup>17</sup> because they can take care of themselves.

If we assume that consumers are rational actors and “self-interest maximizers,” then not only is business regulation an

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*Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605, 637 (2010).

<sup>12</sup> *Id.*

<sup>13</sup> See Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1197 (2010).

<sup>14</sup> See Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135, 138-39 (2009).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Ronald Chen and Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 83-84 (2004). Stating that consumers “know their preferences, institutions should therefore defer to their choices. This concept of consumer sovereignty is implicit, if not explicit, in most U.S. laws and policies, including corporate law.”

impediment on consumer sovereignty, but business regulation is also an unwarranted imposition on the internal structure of the business firm.<sup>18</sup> Business regulations require spending money on measures of compliance, and thus, spending money on massive changes that alter the financial and structural make-up of the business firm.<sup>19</sup> In short, advocates against business regulation are often reacting to what is perceived to be an unwarranted financial and structural burden.

If we reread the argument about the wisdom of deregulation and opposition to prospective regulations of seller conduct from a different perspective, the argument sounds hollow and lacking in empathy. Suppose we conceive of adult consumers as overwhelmed by the scope of skills and the amount of time required for them to protect themselves in a struggle where they are frequently out of their league in terms of knowledge of chemistry, nutrition, health effects, and the persuasive use of psychology by marketers, as well as being comparatively mismatched in terms of the time they can realistically be expected to devote to making wise consumer decisions. In other words, notice how draconian those assumptions sound when used as descriptive of expectations placed on vulnerable consumers.

### III. CHILDREN VS. ADULTS

#### *A. Childhood: For Better or Worse*

If we are to consider adults as vulnerable in the marketplace, a good place to start in appreciating that vulnerability is to focus on the attributes of a child because children are clearly in need of guidance from empathetic parents and a nurturing community. Defining the traits and expectations for a “child” versus an “adult” is dependent on culture.<sup>20</sup>

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<sup>18</sup> See Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, WIS. L. REV. 535, 547 (2010).

<sup>19</sup> *Id.* at 547.

<sup>20</sup> See Sigal Benporath, *Autonomy and Vulnerability: On Just Relations between Adults and Children*, 37 J. PHIL. EDUC. 127, 129 (2003) (“Childhood as a state and as having a particular social status evolved through the endorsement of laws and treaties protecting children from physical abuse, neglect, work at a young age, premature marriage, and other previously unquestioned social norms. . . The particular Western conception of childhood, sometimes taken for granted by people in developed countries today, does not apply outside this specific geo-historical context.”); Michael Shanahan,

However, the definition of “child” does have certain unchangeable aspects because it is a biological classification related to immaturity and a period of physical, mental, and emotional development.<sup>21</sup> Generally, children are educated to acquire the knowledge and skills they will need as adults.<sup>22</sup> Children are also assumed to require extra protection and guidance since they are vulnerable relative to older individuals.<sup>23</sup>

Some philosophies consider childhood in positive terms as a time of growth and change. Yet other philosophies regard childhood as a state of incompleteness, a liability because it is a condition partly defined by dependence. For example, under Kantian philosophy adults are labeled autonomous, while children are characterized by their need for paternalistic control.<sup>24</sup> Kantian scholar Tamar Schapiro suggests that “To treat someone like a child is, roughly, to treat her as if her life is not quite her own to lead and as if her choices are not quite her own to make.”<sup>25</sup>

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*Pathways to Adulthood in Changing Societies: Variability and Mechanisms in Life Course Perspective*, 26 ANN. REV. SOC. 667, 667 (2000). See also, Sarah Hayford & Frank Furstenberg, Is 30 the New 20? Trends in Age Distribution of Problem Behaviors in Young Adulthood 1-2, 12 (January 2005) (Paper Presented at American Sociological Association Conference), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/2/2/2/p22229\\_index.html?phpsessid=81e99e59b11a765ec823e9eb9143ddb](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/2/2/2/p22229_index.html?phpsessid=81e99e59b11a765ec823e9eb9143ddb) (discussing that, since the Baby Boom generation, adults have been attaining a higher level of education, getting married and having children later, and waiting longer after marriage to have a first child. They are also more likely now than in previous generations to live with their parents again after being independent for a period of time, and they are more likely to return to school after working for a number of years).

<sup>21</sup> See David Kennedy, *Reconstructing Childhood*, 14 THINKING 29 (1998).

<sup>22</sup> See Louise Friquegnon, *What is a Child?*, 13 THINKING 12 (1997) (“The concept of childhood is a normative concept because it involves preparation for adult life, acquiring information, skills, and self-control, and forming preferences, priorities and goals, in accordance with socially shared standards”).

<sup>23</sup> Kennedy, *supra* note 21.

<sup>24</sup> See Tamar Schapiro, *What is a Child?*, 109 ETHICS 715, 716 (1999) (“These special obligations to children include duties to protect, nurture, discipline and educate them. They are paternalistic in nature because we feel bound to fulfill them regardless of whether the children in question consent to be protected, nurtured, disciplined, and educated. Indeed we think of children as people who have to be educated whether they like it or not”).

<sup>25</sup> *Id.* at 715 (“It is in virtue of children’s undeveloped condition that we

Kantian philosophy privileges autonomy and independence. Adults are considered autonomous because they have formed perspectives and opinions they use to conduct their lives.<sup>26</sup> As Schapiro states, “an adult. . . is one who is in a position to speak her own voice, the voice of one who stands in a determinate, authoritative relation to the various motivational forces inside her.”<sup>27</sup> Meaning, an adult has a value structure and an understanding of her preferences that guides her decisions.<sup>28</sup>

In contrast, Schapiro suggests that a child cannot be autonomous because her voice is still developing, so “there is no voice which counts as hers.”<sup>29</sup> Since children lack social experience, their words and actions have less “weight” than those of adults.<sup>30</sup> Further, because children cannot fully consider the social implications of their actions, we do not hold them responsible for those actions in the same way we hold adults responsible.<sup>31</sup>

### *B. Child/Adult Continuum*

Conversely, Frances Waksler argues that the divisions between adulthood and childhood are flimsy at best, stating, “Perhaps adulthood is at heart a tenuous achievement, being adult a continuous accomplishment, and the serious questioning of adult understandings thus a challenge to a fragile view of the

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feel we have special obligations to them, obligations which are of a more paternalistic nature than are our obligations to other adults”).

<sup>26</sup> *Id.* at 729.

<sup>27</sup> *Id.* at 729-30 (suggesting that adults have a framework for making decisions, but she also states adults should not be expected to have an immediate answer to all questions; an adult may need time to consider how the question and her answer fit into her values framework).

<sup>28</sup> *Id.* at 729.

<sup>29</sup> *Id.* at 729. *Contra* Benporath, *supra* note 20, at 132 (“A child should be accepted for what she is now, and not regarded as lacking by comparison to others.”); Kennedy, *supra* note 20, at 34 (suggesting that our perceptions of children and childhood are often “adultcentric,” favoring adult perspectives).

<sup>30</sup> *See* Schapiro, *supra* note 24, at 716 (“The consent or dissent of a child does not have the same authority and moral significance as the consent or dissent of an adult”).

<sup>31</sup> *See* Schapiro, *supra* note 24, at 717. *Contra* Benporath, *supra* note 20, at 136 (arguing that adults who are exposed to new countries, languages, and cultures need as much help and guidance as children; suggesting these adults, like children, should not be held fully responsible for their actions because they are also learning cultural norms).

world. . . Much of adult knowledge is based on faith—faith in the correctness of what people were taught as children.”<sup>32</sup>

“Child” and “adult” are not dichotomous terms, but are instead at opposite ends of a continuum. As Sigal Benporath suggests, we need to “[Realize] the flexibility of the concept of childhood. . . There is no specific point in the process of development that turns children into adults.”<sup>33</sup> He reasons that humans are continuously weaving between states of autonomy and dependence, and while children and adults may not be very different, children “have unique traits that must be considered by the relevant public institutions.”<sup>34</sup> For example, governments must decide at what age individuals are generally mature enough to vote, get a driver’s license, and be legally responsible for their welfare. Yet Benporath cautions that individual responsibility is not dependent on age: “All of these somewhat arbitrary judgments are based on statistical assumptions that people of a specific age can indeed be expected to drive carefully, decide autonomously on their sexual conduct, or be sufficiently morally developed.”<sup>35</sup> Simply living until the age of twenty-one does not guarantee that an individual has reached a certain level of emotional and intellectual maturity. Given this variability in human development, it also stands to reason that traits we generally ascribe to either adults or children are not exclusive to one or the other group, but tend to vary from individual to individual.

### 1. Emotional Control

One marker of adulthood is supposed to be the ability to control emotions. Thus, were children to be unprotected in the marketplace, they could be easily manipulated to purchase goods

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<sup>32</sup> FRANCES CHAPUT WAKSLER, *STUDYING THE SOCIAL WORLDS OF CHILDREN: SOCIOLOGICAL READINGS* 62 (1991).

<sup>33</sup> See Benporath, *supra* note 20, at 131. See David Goode, *Kids, Culture, and Innocents*, 9 *HUMAN STUDIES* 83, 87 (1986). Emphasizing the fluidity of the labels “child” and “adult,” and how perceiving and acting the world as a child or an adult is not dependent on age, but on culture and social groups. Adults are not barred from seeing the world as children, just as “adulthood (perceiving and acting upon the world as an adult) is not guaranteed by virtue of having matured biologically and is not something which is barred to children.”

<sup>34</sup> See Benporath, *supra* note 20, at 132.

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

and services that are inconsistent with their needs but highly consistent with the profits of the manipulators. Children are generally less able than adults to suppress their feelings, as they have not yet learned how to be calm in stressful situations or when they do not get their way. This inability “[makes children] more liable to behavioral ‘excess,’ whether in the form of ‘acting out,’ or emotional upset.”<sup>36</sup> Many people have witnessed such displays in the checkout aisle of grocery stores as harried parents try to calm a screaming child demanding candy.

However, many adults are not immune from emotional “excess.” Consider reports of road rage in which adult drivers display extreme frustration towards other drivers, sometimes leading to accidents or violence.<sup>37</sup> According to Bruce Sharkin, “Driving behaviors such as tailgating, cutting someone off, making obscene gestures, and flashing one’s headlights are becoming more and more commonplace in everyday driving situations,”<sup>38</sup> suggesting that a decent number of adults lack the ability to control their emotions in certain situations.

## 2. Autonomous Decision-Making

We assume that because children do not have as much life experience as adults, they require more guidance when making decisions. We know that we cannot allow children to eat cookies

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<sup>36</sup> See Kennedy, *supra* note 21, at 33 (suggesting that adults feel many of the same emotional impulses as children, but have disciplined themselves not to act on these emotions: “In a culture balanced toward repression, the child is the “wild body” par excellence. . . each of her instinctual expressions is living reminder of the adult’s own repressed impulses”).

<sup>37</sup> See Thomas Britt & Michael Garrity, *Attributions and Personality as Predictors as Predictors of Road Rage Response*, 45 BRIT. J. SOC. PSYCHOL. 127, 128 (2006) (defining road rage as combination of thoughts, feelings, and behaviors that an individual has in response to what she perceives as a provocation when driving).

<sup>38</sup> See Bruce Sharkin, *Road Rage: Risk Factors, Assessment, and Intervention Strategies*, 82 J. COUNSELING & DEV. 191 (2004) (citing a report by the American Automobile Association Foundation for Traffic Safety stating that aggressive incidents on the road increased 50 percent from 1990 to 1996). These incidents caused thousands of injuries and 200 deaths. Sharkin suggests that, “Similar to other forms of aggression, aggressive driving is believed to occur under conditions of anonymity, that is, when drivers are less visible to other drivers.” *Id.* at 192. While drivers realize that their poor conduct is not socially acceptable, they allow themselves to commit such acts if they think their identity will not be known. *Id.*

for dinner, watch too much television, or spend all their allowance money. We must encourage them to eat vegetables and read books, and open a savings account, since these choices will benefit them in the future.

In American culture we also assume that adults should be able to make all life decisions independently, and that these decisions will be the correct ones for their circumstances.<sup>39</sup> Yet it is difficult to make autonomous decisions without some level of experience with the subject matter. Since life experience is a variable quality, different adults will have had different experiences. An adult who may feel competent making decisions in one area of her life may feel less competent in another area and require assistance to make an informed choice.<sup>40</sup>

For example, just as children need help with decision-making to help them prepare for adult life, adults may need help when entering new stages of life, such as deciding how to best to care for aging parents. Adult children and their parents have not been “socialized to optimally cope with the intergenerational issues involved with increased longevity,”<sup>41</sup> and may require assistance to negotiate shifting adult/child relationship boundaries and make the best choices for themselves and their parents.

This analysis has a direct link to consumer decisions. Each new good or service we encounter as buyers presents a new, previously unexplored challenge. What is the function of this potential service? Is it safe and dependable? Is the price reasonably related to the price of alternatives? To what extent can I believe claims about the potential purchase made by those motivated by a profit incentive? Even for products with which we believe we have extensive experience, any alteration in an element of the good or service requires a new set of consumer calculations of costs and benefits.

### 3. Rational Nature

Rationality, defined here as the ability to make logical decisions, is another variable quality in both adults and children.

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<sup>39</sup> For information on the inability of adults to make rational decisions, *see* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

<sup>40</sup> *See* Kennedy, *supra* note 21.

<sup>41</sup> CLAIRE M. BRODY & VICKI G. SEMEL, STRATEGIES FOR THERAPY WITH THE ELDERLY 88-89 (2nd ed. 2006).

Most children are less rational than adults, but can be educated how to think rationally.<sup>42</sup> Children's intellectual abilities are in large part dependent on the education and training they receive. In turn, some adults argue that children must receive educational interventions allowing them to develop the skills they need to reflect critically on important decisions.<sup>43</sup> In other words, addressing vulnerability does not require interfering with autonomy, but rather can mean constructing the capacity to pursue decisions consistent with a more reflective autonomy. As Colin McLeod states, "Equipping children with robust deliberative capacities will assist them, as they mature, in identifying ends that are valuable and worth pursuing and in discarding or revising ends that are insufficiently valuable."<sup>44</sup> This theory can be applied to adults on a continuum who may not think rationally in the market place.

#### 4. Childhood and Adult Autonomy

Mika LaVaque-Manty states that according to Kant, "to be an autonomous agent is to act on reasons you give yourself, as opposed to being the vehicle for some other force" such as someone else's demands, or the instincts of one's own body.<sup>45</sup> Autonomy is a cherished value because it reflects respect for each individual. The consumer role is just one of many where we hope we can function effectively through self-reliance. In American culture we assume that adults are autonomous and children are not, so children must trust adults to provide them with an

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<sup>42</sup> See Benporath, *supra* note 20, at 131. Benporath quotes Locke as stating that reason is "available to children as early as they understand language," and reason can develop into rationality if children "experience favourable conditions." At the same time, we must ask what happens to children who do not experience favourable conditions in their education, and how their decision-making abilities may be affected. See Colin McLeod, *Shaping Children's Conviction*, 1 THEORY & RES. IN EDUC. 315, 317 (2003).

<sup>43</sup> See McLeod, *supra* note 42, at 318.

<sup>44</sup> *Id.* at 321. McLeod promotes rational thinking for children, but admits it has limits. His argument assumes "that the value we seek for our lives is fairly translucent to reflective reasoning...that developed deliberative capacities can track value reasonably well. To be sure, our capacities to track value are imperfect. Even highly autonomous persons can make poor choices. But we have a better chance of identifying errors and effecting revisions to our like plans if we have developed powers of critical reflection." *Id.*

<sup>45</sup> See Mika LaVaque-Manty, *Kant's Children*, 32 SOC. THEORY & PRAC. 365, 387 (2006).

education that will prepare them for adulthood. Yet if not all children receive the same level of education, they will enter adulthood with different capacities. This variability creates a logical problem: some children will be well-trained to enter the marketplace as adults with established critical thinking skills, while others will get older, but their additional years will do little to reduce their vulnerability to those whose education and focus equip them to sell buyers on the desirability of products and services of questionable merit.

### *C. Autonomy vs. Paternalism*

LaVaque-Monty asserts that measurements of autonomy are difficult to make with any sense of accuracy: “The point isn’t that there is some unequivocal fact of the matter about whether someone really is or can be autonomous. Things always are, to some extent, ambiguous. . .it’s an open question whether autonomy in one dimension is reasonable grounds for ascribing autonomy in another.”<sup>46</sup> While adults are generally more autonomous than children, we cannot assume that most adults will often make the best decisions for themselves. Adults have variable personality traits, levels of education, and life experiences, so it is difficult to know whether any given adult will have the proper tools to deal with a particular problem.

Because children are considered more vulnerable than adults, they have more protections under the law.<sup>47</sup> However,

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<sup>46</sup> *Id.* LaVaque-Monty emphasizes the social dimensions of autonomy, stating that considering someone autonomous implies that she can think for herself, and that other people agree she can think for herself: “I am autonomous if someone ascribes self-authorization to me. My actual cognitive ability to think may be a necessary condition for such an ascription, but it isn’t a sufficient one. There is a complex interrelation between acquiring the capacity for responsible agency and coming to be recognized (in one’s closer and wider social environment) as capable of being responsible.” *Id.* at 369. If we agree that one’s autonomy is dependent on social acceptance, it is possible for an individual to be autonomous and not be recognized as such. For example, women and people of color were denied autonomy for a long period of time. *Id.* at 386. Conversely, an individual could be socially accepted as autonomous and yet not able to make the best decisions for her or himself.

<sup>47</sup> See Melvin Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212-13 (1995). Eisenberg explains that the enforcement of a contract with a child can be limited because of lack of capacity, which “exists when a party is not competent to understand the nature and consequences of his acts. . .he cannot make adequate judgments

adults are not fully autonomous in all areas of life and do not always have complete control over their environment, so they are also in need certain protections.

In an individualistic culture, like America, some adults consider any form of paternalistic regulation that defines what they can and cannot do as an infringement on their right to make autonomous decisions.<sup>48</sup> While we agree that paternalism is fine for children, such treatment for adults is vigorously opposed. That attitude may be based on the child/adult dichotomy. We accept the idea that a child needs a parent, but in an individualistic culture, regulatory interventions in the decisions of businesses are often reduced to the label of “paternalistic.” Here the idea of a parent is transformed into a pejorative rhetorical flourish.

However, Francis Schrag argues it is logically difficult to justify paternalism for children and not adults since there is no measurable trait that can distinguish children from adults.<sup>49</sup> Even though he fails to find such a difference, however, Schrag argues we must support the idea of this difference as a “noble lie,” so children do not harm themselves and adults do not become subject to paternalism.<sup>50</sup> Schrag’s philosophy and aversion to

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concerning his utility. . .” *Id.* Eisenberg further argues that because adults also have cognitional limits, they should have more protections under contract law. *Id.* at 212.

<sup>48</sup> See Francis Schrag, *The Child in the Moral Order*, 52 PHIL. 167, 169 (1977). See *id.* at 171 (“We adults are likely to recoil at the suggestion that others might be better placed than we, ourselves, to make decisions regarding our welfare. But why do we not recoil from the idea that we are so placed with regard to our children’s welfare?”). See generally Friedman, *infra* note 60, for his comments on the importance of free choice.

<sup>49</sup> See Schrag, *supra* note 48, at 170-72. Schrag states that while people assume an individual needs to be rational to be independent, the concept of rationality is an abstract and inaccurate means of measuring who needs paternalistic protection and who does not. Schrag further argues that self-sufficiency is also an inadequate means to determine who needs paternalistic care, as there is no clear way to delineate the self-sufficient from those who are not. For instance, some children may be able to earn enough money to care for themselves, but they are not able to make the best decisions regarding their welfare. Conversely, elderly or disabled people may not be able to earn enough to support themselves, but they can make their own decisions. *Id.* at 173.

<sup>50</sup> See Schrag, *supra* note 48, at 177. Schrag states that even though adults, like children, may not be able to grasp the effects their actions will have in twenty years’ time, adults should not be subject to paternalism. He states, “What is troubling is the possibility. . .that most men might be generally misled

paternalism for adults mirrors the ideals of an individualistic society, in which respecting people means respecting their individual choices.<sup>51</sup>

The next question we must ask is: can an individual choice be justified if it poses a risk to the individual or to other people? Even Schrag admits that adults need some behavioral controls to prevent injury, such as not being allowed to drive while intoxicated or buy certain drugs without a prescription. Adults cannot always be expected to do everything in their own best interest or refrain from engaging in behaviors that might harm to others.<sup>52</sup>

Some paternalistic restrictions can be justified because they are designed to protect the health and well-being of the community. For instance, some states and cities prevent restaurant patrons from smoking inside because it exposes other diners to toxins.<sup>53</sup> We cannot protect ourselves from smoke in restaurants, so we must have regulations to control those behaviors.

Slightly more complicated and controversial are laws that focus on preventing individuals from harming themselves, such as restricting the kinds of food that can be sold in vending machines.<sup>54</sup> Another example of this type of law are regulations

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about the sources of their own happiness.” *Id.* Schrag further warns against a society in which “adults become like children. . . can we not imagine farsighted individuals able to recognize that much we do now is not merely injurious to others and to future generations but shortsighted in just the same way—that in twenty years we ourselves will profoundly regret the choices we have made, choices, for example, in the areas of diet or resource conservation or family planning.” *Id.* at 175. See *contra* Aharon Aviram, *The Subjection of Children*, 24 J. PHIL. EDUC. 213, 223 (1990). Aviram suggests that if Schrag believes there is no real difference between adults and children, why would children bring worse things on themselves than adults bring on themselves?

<sup>51</sup> See Michael Neumann, *Did Kant Respect Persons?* 6 RES PUBLICA 285, 293-94 (2000) (“To respect an individual is to let that person go his own way, whether we approve of it or not, as long as he doesn’t injure others”).

<sup>52</sup> See Schrag, *supra* note 48, at 177.

<sup>53</sup> See J.D. Trout, *Paternalism and Cognitive Bias*, 24 L. PHIL. 393, 394 (2005). Trout argues certain regulations should be imposed by the government to counteract our natural inclinations toward cognitive biases. He suggests these biases impede our thinking and hamper the achievement of our true goals: “Regulation can be permissible even when it runs counter to that person’s spontaneous wishes, particularly when the regulation advances the agent’s considered judgments or implicit long-term goals.” *Id.*

<sup>54</sup> See Ministry of Labour and Citizens’ Services, *Healthier Choices in*

that require motorcyclists to wear helmets to lessen the chance of a traumatic head injury if the rider is involved in an accident. Some decry these regulations as limiting personal choice. Forty-seven states used to have mandatory helmet laws, but during the past three decades many have been repealed. Now only twenty states have mandatory helmet laws, and twenty-seven states have helmet laws for minors.<sup>55</sup> Many of these state laws were repealed because of the efforts of motorcycle enthusiasts who argued helmet laws infringed on their rights.<sup>56</sup> Alternatively in some states, the courts ruled helmet laws were not only designed to protect the motorcyclists, but to protect society from paying for the care of injured motorcyclists.<sup>57</sup> Many arguments regarding

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*Vending Machines in B.C. Public Buildings: Policy Paper*, May 25, 2007, available

at: <http://www.lcs.gov.bc.ca/HealthierChoices/pdf/CompletePolicy.pdf>. British Columbia's provincial government has enacted a province-wide policy to replace junk food with healthy food in vending machines in public buildings. The government's objective is to encourage markets for healthier foods, and "promote an environment that encourages healthier eating in line with the goal of reducing health care costs by promoting individual health." *Id.* Food is classified into four categories—choose most, choose sometimes, choose least, and not recommended—based on the amount of sugar, salt, fat, and fiber relative to the number of calories. Vending machines in public buildings cannot sell foods in the "not recommended" or "choose least" categories. See Rob Moodie, Boyd Swinburn, Jeff Richardson, Bertino Somaini, *Childhood Obesity – A Sign of Commercial Success, but a Market Failure*, 1 INT. J. PEDIATRIC OBESITY, 133, 136 (2006). Moodie and his colleagues argue that those who overeat may need protections because they do not know or have a difficult time achieving what is best for their welfare: "People may not have the correct information, nor the analytical ability, strength of character, or will to convert what they know to be best for themselves or their children into effective action." *Id.* Also, Moodie and his colleagues suggest those who have a long-term goal to eat healthily might weaken in the short term and seek immediate gratification in the form of junk food. *Id.*

<sup>55</sup> See Marian Moser Jones & Ronald Bayer, *Paternalism & Its Discontents: Motorcycle Helmet Laws, Libertarian Values, and Public Health*, 97 AM. J. PUB. HEALTH 208 (2007). Curiously, the repeal of "paternal" motorcycle helmet laws occurred at the same time all U.S. states except New Hampshire passed mandatory seatbelt laws.

<sup>56</sup> *Id.* at 210-11. See *American Motorcycle Association v. Department of State Police*, 11 Mich. App. 351 (1968). The state of Michigan argued for universal helmet laws on the grounds they wanted to keep citizens healthy and able to support themselves. However, the appeals court ruled the helmet policy could lead to undue paternalism.

<sup>57</sup> Jones & Bayer, *supra* note 55, at 211. See *Simon v. Sargent*, 346 F. Supp. 277 (1972). In this case, a Massachusetts court ruled that universal

paternalistic laws can be reduced to issues of the extent to which the consumer is possessed of attributes that sharply distinguish him or her from a child. Surely, adults are resistant to the suggestion that they may be less than skilled consumers than children, but that resistance may be more wishful thinking than evidence-based supposition.

Autonomy and freedom of choice are very strong values in American society, as Richard Stivers suggests: "In the popular culture of American television and the movies, the autonomous individual stands out, whether as the rebel against the system or as the self-centered consumer of endless products, services, and other people."<sup>58</sup> An individual is expected to "create [her] mark on the world through [her] accomplishments, and to be rewarded for those accomplishments by happiness."<sup>59</sup> Under this philosophy, our triumphs and our failures are our own doings, and we are expected to make the best of whatever situation life presents.

Economists such as Milton Friedman even apply the individualist argument to children who are born into families with poor economic circumstances. He argues that the resources owned by a particular family should not matter to the growth and development of a child, as he assumes all parents will raise their children well and produce uniformly rational adults.<sup>60</sup> Despite

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helmet laws were needed to protect society from covering unnecessary medical expenses of injured motorcyclists, and paying for welfare if the cyclist was unable to work following a motorcycle accident. After twenty-eight states repealed helmet laws, motorcycle deaths increased from 3,312 in 1976 to 4,062 in 1977. Jones & Bayer, *supra* note 55, at 213. Other states repealed helmet laws in the late 1990's and early 2000's, however the state legislatures included provisions requiring helmetless riders to have at least \$10,000 worth of insurance coverage. See David Houston & Lilliard Richardson, *Motorcycle Safety and the Repeal of Universal Helmet Laws* 97 AM J. PUB. HEALTH 2063 (2007). It is estimated that for every 100 motorcycle deaths, 37 riders would have survived if they had been wearing a helmet. See Trout, *supra* note 53, at 407. Trout defends regulations that protect the public good. He states that while paternalistic policies are considered to interfere with a person's will, when a regulation helps us get closer to our long-term goals, that regulation should not be considered paternalistic. *Id.* at 409. Further, Trout states some legal scholars advocate paternalism, arguing "intervention that is based on third-party effects is not paternalistic." *Id.* at 412.

<sup>58</sup> See Richard Stivers, *Ethical Individualism and Moral Collectivism in America*, 16 HUMANITAS 56 (2003).

<sup>59</sup> See Barry Hoffmaster, *What Does Vulnerability Mean?*, 36 HASTINGS CENTER REP. 38, 42 (2006).

<sup>60</sup> See MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE* 33 (1980) ("We

Friedman's assumptions about parenting, however, we cannot expect all parents will care for their children in the same way and provide the same level of education. Many parents are constrained in terms of resources, including money and time, and may not be able to devote as much time and energy to their children as they would like.

Friedman agrees it is not fair that some children have an advantage over others because their parents are wealthy, but he further asserts that "unfairness can take many forms." Children can inherit property or they can inherit talent, such as "musical ability, strength, [or] mathematical genius."<sup>61</sup> Friedman asks why

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believe, and with good reason, that parents have more interest in their children than anyone else and can be relied on to protect them and to assure their development into responsible adults"). *See contra* Kubasek et al., *supra* note 5, at 90 (Stating that because children are not parented in the same way, they grow to become different sorts of adults. All of society benefits when children are raised well and become productive citizens. However, when children are not nurtured by their parents, they are more likely to engage in destructive behavior that harms society); Thomas D. Cook & Frank Furstenberg, Jr., *Explaining Aspects of the Transition to Adulthood in Italy, Sweden, Germany, and the United States: A Cross-Disciplinary, Case Synthesis Approach*, 580 ANN. AM. ACAD. POL. SOC. SCI. 257, 283-4 (2002) (discussing the fact that young unmarried mothers in American society have a particularly difficult time juggling work and childcare, as they cannot always depend on their families for assistance. Daycare arrangements have improved because of programs such as Head Start, because while businesses want employee mothers to feel comfortable with their childcare arrangements, they do not want to pay for those services. While daycare can help children learn social skill and prepare for school, many "state or local subsidized daycare programs. . .vary considerably in structure and quality," which can affect a child's growth and development).

<sup>61</sup> *See* FRIEDMAN, *supra* note 60, at 136 (arguing against the idea of "fair shares for all." Friedman is too quick to change the terms of the debate from the fairness of financial inheritance to "inherited personal qualities." He reasons that some children have money and some children have talent, and ultimately this distribution is fair. Friedman argues it would be silly to educate children who are not musically inclined while not letting children who are musically inclined receive a musical education); *Id.* at 136 (further stating, "Life is not fair. It is tempting to believe that government can rectify what nature has spawned"); *Id.* at 137 (ignoring the fact that for many children to develop their talents, they require monetary resources). *See contra* Thomas W. Ogletree, *Corporate Capitalism and the Common Good: A Framework for Addressing the Challenges of a Global Economy*, 30 J. RELIGIOUS ETHICS 79, 97 (2002) (arguing that while markets support freedom for people who have been able to develop their talents, many people do not have the resources to support their talents. He further asserts that a society founded on freedom has

people resent the inheritance of money but not talent, since under the logic of our individualistic society, children should be able to make the best of the talents or resources they receive.<sup>62</sup>

However, these individualistic ideals also create a fearful society in which everyone has to act for her or himself. Stivers argues this is the price to be paid for our emphasis on individualism:

“No one can tell us what to do, for we are equal. At the same time, however, we cannot rely on others for assistance; they are not morally bound to us in a reciprocal relationship. . . We live in tacit fear of others, not so much of their potential for physical violence as of their ability to manipulate us.”<sup>63</sup>

In a culture based on individualism, vulnerability is particularly frightening because it signifies a loss of power and control. We fear harm as a result of our vulnerability and want to maintain our power, even in old age.<sup>64</sup> Hoffmaster argues that

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an obligation to assure everyone has an opportunity to improve his or her abilities).

<sup>62</sup> See FRIEDMAN, *supra* note 60, at 136.

<sup>63</sup> See Stivers, *supra* note 58, at 59 (arguing that we live in an increasingly fragmented and depersonalized world in which we lack connections to others. This lack of connection builds fear because we cannot depend on others, we can only compete with them for scarce resources. In turn, fear and competition builds greed). See also Frank Cunningham, *Market Economies and Market Societies*, 36 J. SOC. PHIL. 129, 134-5 (2005) (arguing that in a market economy there is always fear, that companies fear their competitors, and that working people fear job loss and not being able to afford food and housing); *Id.* at 135 (“In an economy where one is never sure whether the resources required to satisfy needs or pursue desired life goals will be forthcoming, or where one must always fear being done in by the competition, resting easy with what one has can be risky”); *Id.* at 137 (suggesting that to rid the market economy of fear, we would have to guarantee an annual income and health care to all people. He also states these provisions would decrease greed and consumerism since people would be able to have more meaningful jobs and lives without the constant pressure to make money); *Id.* at 138 (discussing the possibility that there could be problems with this solution because an economy free of fear could also be free of competition and undermine the efficiency of the market); *Id.* at 139 (discussing that some argue that even without fear, Americans would still be possessive individualists since we have been conditioned as such. Cunningham asserts, however, that being a possessive individualist is stressful, and people have an incentive to change that behavior).

<sup>64</sup> See Hoffmaster, *supra* note 59, at 41.

“...individualism seeks and requires self-sufficiency and insulation from the risks that vulnerability poses. . .Vulnerability threatens individualism, however, because it is enveloped in contingency and chance. . . .”<sup>65</sup>

In an individualistic society vulnerability must be limited to children, because if we admitted adults are also vulnerable, we would call into question our beliefs of personal responsibility and autonomy; ultimately asking how much control an individual has over her life’s path. Because we want to assume that we are in charge of our circumstances, we cannot let ourselves be labeled as vulnerable.

By the time young people reach adulthood in the United States, they are expected to have cast off their childhood vulnerabilities and acquired all the skills they need to survive in the adult world. Adults are assumed to be independent and able to accept responsibility for their decisions. In the marketplace, adult consumers are considered to be rational and independent. As buyers they are not vulnerable to the influence of advertising, and can exercise free choice to make the best decisions for themselves and their families. Such individualistic assumptions dominate market thinking in the United States, as we will discuss in the next section.

#### IV. MARKET ASSUMPTIONS AND ADULTHOOD

If the typical consumer were a child, there would be little mention of privatization, free enterprise, or deregulation. Markets work efficiently on behalf of both buyers and sellers, if and only if, adult status results in competence and reflection onto whoever ages.

##### *A. Happiness is a Free Market*

Scholars who support free markets assume several characteristics about the nature of buyers and sellers in the marketplace. These assumptions help free market supporters promote the free market as an optimal economic system. This

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<sup>65</sup> *Id.* at 42; *See also id.* at 43 (“Human beings are rational, but human beings also have bodies, and. . .they are vulnerable. In fact, vulnerability is an even more basic feature of our human constitution than rationality because, while all human beings are vulnerable, not all human beings are rational or even possess the potential to become rational”).

optimality is reliant on highly skilled adults to serve as a counterweight to the incentive structures of sellers.

### 1. Markets Distribute Resources Fairly

One of the primary assumptions made by free market supporters is that the market distributes resources fairly, depending on how hard an individual works and the value of her labor.<sup>66</sup> According to this line of thought, workers earn what they are due. If laborers are not pleased with their wage, they are free to acquire more training and find a new job where they can make more money.<sup>67</sup> They make careful calculations, choosing an occupation most consistent with their life goals and abilities.

Following this logic, people should not be poor because they have the autonomy to seek their own employment. Milton Friedman suggests poor individuals simply need to work harder, and that they should not be entitled to government aid simply because they are lazy.<sup>68</sup> He argues that the market creates jobs by responding to demand. When consumers want more of a certain product, workers will be needed to create that product, companies will provide higher wages and better conditions for those workers, and more people will want to work in that industry.<sup>69</sup> Friedman believes that;

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<sup>66</sup> See Horace L. Fairlamb, *Adam Smith's Other Hand: A Capitalist Theory of Exploitation*, 22 SOC. THEORY & PRAC. 193, 194 (1996). Capitalists argue that management personnel are paid more because their managerial services are worth more than the other workers. *See id.* ("Smith sometimes treats these occurrences as mere possibilities, although other remarks imply that these possibilities are as much structural features of capitalism as are the laws of supply and demand").

<sup>67</sup> See Ogletree, *supra* note 61, at 85.

<sup>68</sup> See FRIEDMAN, *supra* note 60, at 5. Friedman rails against the idea that individuals do not have full control over their lives. He states, "Emphasis on the responsibility of the individual for his own fate was replaced by emphasis on the individual as a pawn buffeted by forces beyond his control. The view that government's role is to serve as an umpire to prevent individuals from coercing one another was replaced by the view that the government's role is to serve as a parent charged with the duty of coercing some to aid others." *Id.* He further argues, "Most of the present welfare programs should never have been enacted. If they had not been, many of the people now dependent on them would have become self-reliant individuals instead of wards of the state." *Id.* at 119.

<sup>69</sup> See FRIEDMAN, *supra* note 60, at 15. *See also* Fairlamb, *supra* note 66, at 193 ("According to the free market model, players in the market are

“Wherever the free market has been permitted to operate, whenever anything approaching equality of opportunity has existed, the ordinary man has been able to attain levels of living never dreamed of before. Nowhere is the gap between rich and poor wider. . . than in those societies that do not permit the free market to operate.”<sup>70</sup>

## 2. Markets are Automatic

Furthermore, Friedman argues that a free-market system

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rewarded according to the efficiency of their performance at serving the ultimate aim of the market: meeting society’s needs as efficiently—that is, at as low a price—as possible”).

<sup>70</sup> See FRIEDMAN, *supra* note 60, at 146. Scholars debate Friedman’s assertion that the market is a tool for economic equality, pointing to growing economic disparities within the United States. See *contra* Cook and Furstenberg, *supra* note 60, at 280. When compared with Sweden, Italy, and Germany, the United States has the most variability in the quality of the transition to adulthood. This phenomenon is due to the American emphasis on individualism and reliance on the market system instead of any formal means of social support. In the United States, students must work or get loans to pay for college if their parents cannot, and there is no formal collaboration between the state and businesses to help train young people for jobs. As such, it may be difficult for young people from low-income families to be able to afford a college education that would lead to a higher-paying job. Cook and Furstenberg suggest that while people of color in many countries have problems transitioning to adulthood, the problems seem most serious for racial minorities in the United States who tend to have lower incomes. See *contra* Jack Otis, Eileen Mayers Pasztor, & Emily Jean McFadden, *Child Labor: A Forgotten Focus for Child Welfare*, 80 CHILD WELFARE 611, 612-14 (2001). Migrant farm workers also experience cyclical poverty in the United States, as they labor for low pay under harsh conditions. Often children work beside their parents to help their families survive, and only one in ten migrant worker children graduate high school. With this lack of education, it is difficult for these young adults to find other work and help their families escape the fields. See *contra* Ogletree, *supra* note 61, at 88. Ogletree argues there is a market incentive to exploit vulnerable workers who need jobs by giving them low wages, no guarantee of job security, and no health care. See *contra* Edwin M. Epstein, *The Continuing Quest for Accountable, Ethical, and Humane Corporate Capitalism: An Enduring Challenge for Social Issues in Management in the New Millennium*, 10 BUS. ETHICS Q. 145, 151-52 (2000) (“Within many of our business organizations today, the differential in compensation between the top leadership and the rank and file had increased significantly during the past decade. More generally, the income and wealth gap between the top 10 percent of U.S. citizens and the remainder of the nation continues to widen”).

is the optimally efficient means of providing customers with the products they want and for the prices they are willing to pay. In this system, the buyer and the seller have to find a price that is agreeable to both of them. According to Adam Smith, who is considered to be the father of free market philosophy, products on the market would find a “natural price,” which he defined as the average price of bringing the product to the market.<sup>71</sup> Further, because sellers must please consumers if they wish to remain in business, Friedman asserts that products that do not satisfy the consumer will not continue to exist.<sup>72</sup>

This automaticity assumption is best understood by contrasting it with its opposite: a market that is controlled by specific stakeholders for their personal benefit. Here, some group of people is imposing its will on those who must buy its products. Examples of decidedly non-automatic markets are the markets for ice and milk during the aftermath of a hurricane. Anyone controlling the supply of those commodities in such a scenario could charge a price significantly above what the market would normally dictate. It should be noted that defenders of market decision-making see such a premium price and its resulting flow of profits as not only a just reward for the thoughtfulness of the people who controlled the price, but also as a signal to others about the promise of greed for coordinating resource allocation.

Free market supporters also assume that business owners will divulge the needs of the consumer and the prices they are willing to pay for a product, so producers will be naturally concerned with making the consumer happy and garnering repeat business.

### 3. Markets Capitalize on Natural Greed

Horace Fairlamb states that in proposing the free market system, Adam Smith wanted to suggest that commerce was not morally flawed, since individual and collective interests could be combined in the free market. The system would use the sense of self-interest that is inherent in humans to find a price agreeable to both the consumer and the producer.<sup>73</sup> Consumers want to pay the lowest price possible and sellers want to reap the highest

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<sup>71</sup> See Fairlamb, *supra* note 66, at 197.

<sup>72</sup> See FRIEDMAN, *supra* note 60, at 202-303.

<sup>73</sup> See Fairlamb, *supra* note 66, at 195.

profits possible, so they will naturally find a point that is satisfactory to both parties. Free market supporters suggest markets are a sensible reaction to our natural selfishness, coaxing cooperation from self-centeredness.<sup>74</sup>

#### 4. Individuals are Rational

Free market supporters assume that individuals are rational, meaning that an individual can consider several options and the costs and benefits of those options, then make the best decision for their situation. Market thinking assumes consumers have all the information they need about the price of a product and its alternatives, the benefits and the drawbacks of the products, and their wants and needs as consumers.<sup>75</sup> Free market

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<sup>74</sup> Yet many scholars argue that Smith's thoughts on self-love and self-centeredness have been misinterpreted by economists and overemphasized in promoting the free market system. See David F. Carrithers & Dean Peterson, *Conflicting Views of Markets and Economic Justice: Implications for Student Learning*, 69 J. BUS. ETHICS 373, 381-2 (2006). Carrithers and Peterson argue that economists excerpt sections from Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations* and distort the meaning of Smith's thoughts. See *id.* at 382 ("[E]conomists implicitly champion an ethical position that equates narrow self-interest with good behavior. . .we end up teaching students that their only duty to society is to be narrowly self-interested, profit maximizing, shareholder wealth maximizers.") See also Harvey S. James, Jr. & Farhad Rassekh, *Smith, Friedman, and Self-Interest in Ethical Society* 10 BUS. ETHICS Q. 659, 661 (2000). James and Rassekh state that textbook authors interpret Smith's thoughts as "The idea is that nothing more than the pursuit of one's self-interest, with self-interest defined in narrowly egoistic terms, is necessary for a market economy to function well, since an invisible hand will guide such actions so as to produce positive effects for society." *Id.* at 664. James and Rassekh argue that ". . .in Smith's mind there is a sharp distinction between selfishness and self-interest" and Smith believed individuals had to control their tendency to selfishness in a successful society, and consider the welfare of others as well as themselves. *Id.*

<sup>75</sup> See Eisenberg, *supra* note 47, at 212-13 (citing Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLIN L. REV. 385, 385-86 (1989)) (arguing the rational choice model requires that decision makers "know, or can know, all the feasible alternative actions open to them, that they know, or can easily discover, all relevant prices, and that they know their wants and desires.") See M. Joseph Sirgy & Chenting Su, *The Ethics of Consumer Sovereignty in an Age of High Tech*, 28 J. BUS. ETHICS 1 (2000). Sirgy and Su argue that in a market based on technologically advanced products, consumer sovereignty is a fiction. Consumers cannot be sure they are choosing the highest quality product for the lowest price, although this might have been possible when products were simpler. *Id.* at 2. The authors

supporters also “[assume] that whatever a person prefers is automatically best for that particular person.”<sup>76</sup>

Further, market supporters assume that because consumers are rational, outside forces such as advertising and marketing do not affect consumer autonomy by making them want things they would not want otherwise.<sup>77</sup> As Anne

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Sirgy and Su further state that in the high-tech economy, consumers do not have access to the technical information they need about products, and even if they did it would be difficult for them to process information about quality way with proper ability or motivation that would aid their decision. *Id.* at 3. Further, consumers do not shop around and compare products and cannot easily inspect different brands in the store because large companies work to secure shelf space. Because larger companies monopolize this space, consumers may not be aware of most brands in a product category. *Id.* at 9.

<sup>76</sup> See generally Stephen Jan & Gavin H. Mooney, *Childhood Obesity, Values, and the Market*, 1 INT’L. J. PEDIATRIC OBESITY 131 (2006). Jan and Mooney argue that even if we do not like the choices that an individual consumer makes, we should not attempt to limit or change her decision making process: “In practice, it is often observed that markets will allocate in a manner that some of us find unsavoury – for example inequitable or indeed unhealthy.” However, “Ultimately markets are about individuals maximizing their utility by freely exercising their preferences. If they do that in MacDonald’s [sic] or a health food store, each is okay by the market.” *Id.* Jan and Mooney further suggest that consumers who choose to eat unhealthy things may be doing so rationally, based on cost, taste, convenience. *Id.* at 132.

<sup>77</sup> See Anne Cunningham, *Autonomous Consumption: Buying into the Ideology of Capitalism*, 48 J. BUS. ETHICS 229-30 (2003). Yet many other scholars argue that marketing is a powerful tool for manipulating consumer desires. See *contra* Moodie et al., *supra* note 54, at 136 (Emphasizing the “constant exposure of individuals to preference manipulation by those marketing unhealthy products. . . [yet economics] assumes preferences to be fixed and unchanging.”) Ironically, while marketing draws on psychology and behavioral research to decide how to influence consumer behavior, economics assumes equal power between buyers and sellers. Advertisers clearly want consumers to believe they will be happier if they have a certain car, eat a certain candy bar, or achieve a certain weight. See *contra* James Helmer, *Love on a Bun: How McDonald’s Won the Burger Wars*, 26 J POPULAR CULTURE 85 (1992). For example, Helmer discusses how, in the 1980’s, McDonald’s advertising campaign focused on images of families to promote McDonald’s “as a potential source of love and human happiness—as a place for being a family.” *Id.* at 85-86. Helmer argues that Americans “struggle to maintain a sense of community” and this need for communal loyalty is part of what drives Americans to consume things. *Id.* at 86. McDonald’s focused on promoting a sense of community in its advertising, suggesting the restaurant could hold family, friends, and generations together. See *contra* Joseph M. Farrell, *The Ethical Implications of Direct-to-Consumer Pharmaceutical Advertising*, 23 PHIL. & PUB. POL’Y Q. 20 (2003) (arguing that marketing is meant to create

Cunningham states, while advertising can shape beliefs, it does not create “discordant [beliefs] that violate one’s autonomy. Advertising does condition us to purchase but it does not condition us to act in ways that we cannot control or rationally explain.”<sup>78</sup>

## 5. Markets Support Choice

Friedman argues the ability to have and make choices in a free market is invaluable. While he admits that individuals sometimes make poor decisions in the market, such as investing in businesses that are not successful, he asserts those individuals were knowledgeable about the risks of their choice: “For the most part, they went in with their eyes open. They knew they were taking chances.”<sup>79</sup> Friedman emphasizes that people are rational and responsible for their own well-being, and, through making the right choices, they can succeed in life no matter where they began. He states that while chance dictates the resources an individual has in life initially, it is her choice what she wishes to do with those resources.<sup>80</sup>

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desires, but some of these desires can have dangerous consequences. He emphasizes the potentially harmful nature of advertisements for prescription medication, especially since some consumers would prefer a cholesterol-lowering medication to making changes in what they eat. Farrell states that doctors may selectively tell patients information about medications and treatment options based on the patient’s ability to make choices among those options and how effective the options will be. Yet while doctors select information with the patient’s best interest in mind, drug companies advertise with the aim of selling their product).

<sup>78</sup> See Cunningham, *supra* note 78, at 234.

<sup>79</sup> See FRIEDMAN, *supra* note 60, at 139. Contrary to Friedman’s assertions, many studies have demonstrated that people are ignorant of risk. See Eisenberg, *supra* note 47, at 212. Individuals base decisions and calculate risk based not on scientific research or reliable surveys, but on “data and scenarios that are readily available to . . . memory or imagination.” *Id.* at 220-21. Eisenberg emphasizes that individuals tend to “give too little weight to future benefits and costs as compared to present benefits and costs,” and they tend to underestimate risk, ignore low risks, and overestimate low probability risks. *Id.* at 222-23.

<sup>80</sup> See FRIEDMAN, *supra* note 60, at 22. Friedman’s support of individual choice and the free market mirrors mainstream American economic and political thought. See *contra* ROBERT A. SOLO, *THE POSITIVE STATE* 25 (1982). As Robert Solo suggests, in American politics the individual and personal choice are primary: “. . .the source[s] of all efficiency, all coherent social energy, all ingenuity, all reason, [are found] in the self-seeking individual

## 6. Regulations are Harmful

Because choice is primary, market supporters decry government regulations as limiting the consumer's right to make her own decisions.<sup>81</sup> For example, Friedman suggests that individuals should be able to enter whatever profession they choose and not be restrained by government policies that require a license: "Today you are not free to offer your services as a lawyer, a physician, a dentist, a plumber. . . without first getting a permit or license from a government official."<sup>82</sup>

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operating from a base of private property." *See contra* Jiwei Ci, *Justice, Freedom, and the Moral Bounds of Capitalism*, 25 SOC. THEORY & PRAC. 413 (1999). Countering Friedman, Ci argues that considering choice and freedom to be moral values is detrimental to society and our cultural beliefs. "Thanks to the moralization of freedom, market behavior, an exercise of freedom. . . is actually morally affirmed. It is morally good to gain profit." Because the profit motive is viewed in a positive light, ". . . individual interests, whether self-regarding or other-regarding, enjoy full ethical (not just legal) legitimacy as long as they are pursued within the rules of a rather limited notion of justice that is more or less identical with the rule of law." *Id.* at 415.

<sup>81</sup> *See* FRIEDMAN, *supra* note 60, at 66. Friedman states freedom of choice should be one of our primary values, and further decries any limit placed on choice in the market: "We are not free to buy an automobile without seatbelts, though, for the time being, we are still free to choose whether or not to buckle up." *Id.* At times it seems Friedman values individual choice more than safety considerations. Certainly he would argue that if an individual chooses not to wear a seatbelt that is her decision, yet others would counter that if that individual is involved in an auto accident, society will bear part of the burden for her medical care. *See contra* Farrell, *supra* note 77. Counter to Friedman, Farrell argues that some paternalism is necessary. He states that some people argue not giving consumers drug information through advertisements leads to a paternalistic doctor-patient relationship, while learning information about prescription drugs allows patients to be autonomous and better describe their symptoms to their physicians. Farrell asserts, however, that some drugs can be dangerous if not taken properly, and doctors have training and understanding that the rest of us do not, which is why we must relinquish some control to them. *Id.* at 21.

<sup>82</sup> *See* FRIEDMAN, *supra* note 60, at 66. Friedman does not seem to consider the role of proper training to professional licensing practices. He implies the government is simply thwarting free choice and has no practical concerns, and that current doctors and plumbers are not concerned about consumer harm, but selfishly want to control the number of individuals who can enter the profession. *Id.* at 240. Yet Robert Solo suggests that even though economists constantly decry government and the limits it places on freedom of choice, the state is a necessary power because there is much the market cannot do. *See contra* SOLO, *supra* note 80, at 12. Solo argues that economists have to

Additionally, free market supporters believe that businesses should not be regulated since concentrations of market power such as monopolies will not last. They assume new companies will enter the market and provide better products at a lower cost thereby breaking the monopoly. Market supporters also assert any decisions made by regulators will result in worse problems than those they are trying to regulate.<sup>83</sup>

*B. Errors Limiting Adults in the Market: Invisible Hand or Visible Fist?*

Many scholars have explained systemic errors in the determination of market prices and consequent consumer decisions, which along with common cognitive errors, inhibit the ability of actual adults to imitate the conceptual adults envisioned in defenses of the self-regulating market.

1. Adam Smith: Lost in Translation?

Some economists suggest that the writings of Adam Smith have been read selectively with the intent of promoting the free market system, while in fact Smith had many ethical concerns about the workings of the free market.<sup>84</sup> Bassiry and Jones argue Smith was especially worried about monopolies and the concentration of economic resources. He was also concerned that economic power could translate into political power, and that businesses might become influential in proposing legislation. Smith envisioned a free market based on small producers in which no individual or company would be able to set prices,

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keep resetting the boundary lines over which the state can cross, as the limitations of the market system become steadily apparent. *Id.* at 13. For instance, inept doctors could be weeded out of the market system because they will provide poor care and lose patients, but do we want to risk patient harm by abandoning the licensing process and allowing the market to take over?

<sup>83</sup> See *contra* Irwin M. Stelzer, *A Conservative Case for Regulation*, PUB. INT. 85, 86 (1997). Stelzer suggests not all markets are equal, and some are not competitive enough to produce fair results. He argues conservatives should accept some regulations to prevent more direct government involvement. Stelzer adds that a limited number of regulations can also promote support for capitalism, as consumers want to assure power is distributed fairly and small business owners can enter the market. *Id.* at 87.

<sup>84</sup> See G.R. Bassiry & Marc Jones, *Adam Smith and the Ethics of Contemporary Capitalism*, 12 J. BUS. ETHICS 621, 621-22 (1993). See also James, *supra* note 77, at 659.

which is not the same as our current capitalist system.<sup>85</sup>

James and Rassekh further argue that scholars must study Smith's book *The Theory of Moral Sentiments* to understand his more well-known text, *An Inquiry into the Nature and Causes of the Wealth of Nations*. If one does not read both of these books, it is easy to misinterpret Smith's ideas on social systems. James and Rassekh assert that Smith does not "[consider] self-interest to be synonymous with selfishness and thus devoid of ethical considerations," as some have interpreted his philosophy to mean.<sup>86</sup> Instead, the authors emphasize Smith's ethic included concern for others and their interests, as Smith ". . . maintains that we are also endowed with the capacity to exercise self-command to contain our passions when the pursuit of self-love injures other people."<sup>87</sup>

## 2. Monopoly Money

Smith believed monopolies were natural but temporary, because market forces would lower the price of goods to "natural" levels. This assumption has present bearing here because the progenitors of an unfettered capitalism realize that even a thoughtful adult consumer is not able to bargain effectively with representatives of large concentrated firms. However, the existence of Smith's "natural" prices is dependent on monopolies being temporary. Additionally, Smith did not elaborate on how monopolies might negatively affect labor.<sup>88</sup> Smith realized business owners would have a power advantage over workers and could lower wages below the "natural" level, but he did not press the idea further, only implying monopolies might cause labor to be exploited.<sup>89</sup> These workers are the same persons who, in a different role, are supposed to be the power equals of corporate sellers.

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<sup>85</sup> See Bassiry, *supra* note 84, at 623. See also Ogletree, *supra* note 61, at 96. Ogletree argues business and politics have merged too closely and created distortions in both the political and the market system. He asserts "personal or corporate wealth is employed to promote narrow special interests over against the interests of others, as though some 'invisible hand' would assure a mutually satisfactory outcome." *Id.*

<sup>86</sup> James, *supra* note 77, at 659.

<sup>87</sup> *Id.* at 663.

<sup>88</sup> See Fairlamb, *supra* note 66, at 201, 214.

<sup>89</sup> *Id.* at 207, 210.

True to Smith's predictions, Horace Fairlamb argues that monopolies and power concentrations in the free market promote the emergence of a second invisible hand "where systematic advantages accrue to those who are already positioned with power, whether through nature, institutions, or wealth."<sup>90</sup> As power concentrates among a few businesses, the autonomous consumer loses her power to gain product information from businesses and make educated choices.

### 3. Unequal Distribution of Resources

While market supporters argue that individuals in a free market are given what they deserve as a result of their work, this division is far from equal. This inequality is relevant to the distinction between child and adult in that consumer interests are advanced in large part by ability to pay. Anything that reduces the likelihood that most consumers will have the economic resources required for showing muscle in market negotiations

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<sup>90</sup> See Fairlamb, *supra* note 66, at 212. Many argue that in our market economy, economic power has concentrated among relatively few businesses. As a result, small businesses are shut out of the market, and consumers can be forced to pay unfairly high prices for goods and services. See Sirgy & Su, *supra* note 76. Sirgy and Su argue that in a high-tech world, competition will falter since small businesses with superior products will not have the resources to compete with large businesses. Larger firms are able to devote more resources to creating innovative products, and stores prefer to work with large companies to maximize their sales. See Ronald Paul Hill, *Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas*, 37 J. BUS. ETHICS 202, 209 (2002). Hill states that businesses have a distinct advantage in poor communities since sources of income and available goods are few. *Id.* at 209. The poor are often victims of price inflation, as costs for items in a poor neighborhood are about 41% higher than those items in an affluent neighborhood. *Id.* at 214. Additionally, businesses take advantage of the poor through high-interest credit arrangements such as rent-to-own agreements, because individuals must either accept these conditions or go without. *Id.* at 215. See *contra* C.W. DeMarco, *Knee Deep in Technique: The Ethics of Monopoly Capital*, 31 J. BUS. ETHICS 151 (2001). DeMarco suggests monopolies should not be regarded as inherently bad. While neoclassical economic theory tells us that competition is good and monopolies are not, DeMarco argues we cannot assume that just because there is competition, there is economic justice. He readily admits monopolies should be closely monitored as they can lead to price fixing, price discrimination, and collusion, ultimately harming consumers. Yet he also suggests there are some occasions when monopolies might be achieved fairly, and be more beneficial or efficient than competitive structures. *Id.*

thereby increases the vulnerability of consumers.

Milton Friedman's concept of equality is negative equality or equity, defined as equality before the law.<sup>91</sup> Under a system of equity, people's votes and pennies are worth the same amount, but some people may have more pennies or votes than others.<sup>92</sup> Equity allows individuals to keep what they have, based on the assumption that they have gained it fairly. According to this assumption that individuals can keep what they have, even if it is more than that resources of others, individuals have no obligation to pay for public services, health care, unemployment, or other social safety nets for others who may experience economic problems.<sup>93</sup>

Conversely, Martin Hollis argues for the idea of positive equality or "equality," suggesting that people are "equal only if we have the same full, participating share in the costs and benefits of the social enterprise."<sup>94</sup> Hollis argues that because the market does not distribute resources equally, societies need to devise a minimum standard for redistribution of wealth that will allow people to be comfortable while they are free to "[live] life in their own way."<sup>95</sup> Many suggest that a system of equality would also

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<sup>91</sup> See Martin Hollis, *Market Equality and Social Freedom*, 7 J. APPLIED PHIL. 15, 16 (1990).

<sup>92</sup> See Hollis, *supra* note 91, at 20. ("Egalitarians argue for equality of power, if there is to be equal freedom of choice. Equity does not involve equality of power"). See Hill, *supra* note 90, at 211 (citing data from the 2000 U.S. Census, which found 12% of people in the U.S. were impoverished, including 10% of elderly and 17% of children. Further, slightly less than 25% of African-American and Hispanic people were living below the poverty line, but a surprising 74 % of the poor were employed).

<sup>93</sup> See Charles Maechling, Jr., *The Next Century: Can the Free Market Panacea Survive?*, 71 VA. Q. REV. 1 (1995) Maechling emphasizes that countries such as Japan and Germany have successful mixed state and free market economies, because the national governments believe the state has a duty to secure the well-being of its population. The free market alone cannot guarantee the well-being for all people in a given country. Because the free market system is based on individual good, it also poses dangers through commodification of natural resources on a global scale. See David Bollier, *Why We Must Talk About the Information Commons*, 96 Law Libr. J. 267 (2004). There is no global authority to assure for the well-being of poor nations, so their citizens risk losing access to natural resources such as water if they cannot pay for them. A lack of clean water could parch poor nations and even lead to loss of life due to unequal distribution.

<sup>94</sup> See Hollis, *supra* note 91, at 17.

<sup>95</sup> *Id.* at 20.

benefit society as a whole, as an increase in economic equality would lead to a decrease in crime.<sup>96</sup> If individuals are provided with the means to meet basic needs, the temptation to steal or otherwise gain property by illegal means decreases.

#### 4. Asymmetric Information: What You Don't Know Can Hurt You

In the free market it is important for buyers to have information about their product choices so they can make the best possible purchasing decisions. However, sellers have more information about their products than buyers, and even when buyers do have information, they are prone to misuse it. The profit motive can encourage business owners to withhold information or lie outright.<sup>97</sup> It can be valuable for companies to be the sole possessor of that knowledge since they can make more money if they only give the consumer partial information.<sup>98</sup> For example, Joel Davis argues marketers sometimes bend scientific

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<sup>96</sup> The emphasis on materialism in the United States combined with an unequal distribution of income arguably leads to a higher crime rate. *See* Cook and Furstenberg, *supra* note 60, at 284. Even though young people in the United States have less social support and access to good jobs than young people in other countries, they are expected to consume many goods. These young people need money to purchase goods, and so some of them resort to crime and are eventually incarcerated. Because many of these young people are men, their families lose a source of income, and the young men themselves lose time when they could be developing work and social skills. Some have argued that assuring individuals a fair minimum income would lead to an increase in crime and sloth, but others suggest the crime level would decrease. *See* Doris Schroeder, *Wickedness, Idleness, and Basic Income*, 7 RES PUBLICA 1 (2001). Schroeder argues that studies have connected unemployment and crime, but that is different than connecting idleness and crime. Schroeder further suggests that if material inequality leads to crime, guaranteeing a basic income might decrease crime.

<sup>97</sup> *See* William Keep, *Adam Smith's Imperfect Invisible Hand: Motivations to Mislead*, 12 BUS. ETHICS: EUR. REV. 343 (2003). Keep argues that dishonest businesses encourage consumers to be dishonest, since businesses committing fraud against consumers lead consumers to commit fraud against businesses. *See also* David C. Colander, MICROECONOMICS 38, 417-19 (5th ed. 2004).

<sup>98</sup> *See* Keep, *supra* note 97, at 345. Companies have an incentive to keep information private if revealing the information would harm profits. Businesses have a further incentive not to do a lot of research on product safety, since such research can be expensive. *Id.* at 347.

information to make products more attractive to consumers.<sup>99</sup> An advertisement may claim that a garbage bag is biodegradable, which may be technically true, though the bag will take a long time to biodegrade in the landfill where it will most likely end up.<sup>100</sup> Additionally, studies have demonstrated that consumers make purchases based partly on their emotional responses to a product, and sellers can either lie or provide partial information about a product to take advantage of those emotions.<sup>101</sup>

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<sup>99</sup> Joel J. Davis, *Riskier Than We Think? The Relationship Between Risk Statement Completeness and Perceptions of Direct to Consumer Advertised Prescription Drugs*, 5 J. HEALTH COMM'N 349, (2000). For example, in the market for direct to consumer (DTC) prescription drug advertising, research was conducted to assess the extent to which DTC prescription drug advertising provides consumers with the information they need to make an informed evaluation of an advertised drug's relative benefits and risks. In the case of this research into prescription drug advertising, the results show that the benefits of the drugs are overstated in a way that makes drugs appear to be safer than they actually are in the mind of the consumer because of the number and types of side effects included in their risk statement. *Id.* at 366.

<sup>100</sup> See Joel Davis, *Ethics and Environmental Marketing*, 11 J. BUS. ETHICS 81, 81-82 (1992). Davis argues regulations that are supposed to protect consumers from deceptive practices are often ineffectual or disregarded by companies. Even though the Federal Trade Commission "[prohibits] advertising or packaging claims which are untrue, misleading, deceptive, or fraudulent, including claims that, although literally true, mislead by omitting or obscuring facts necessary for the public to properly interpret the claims. . .marketers have a history of pushing regulatory guidelines to their limits, relying on scientific truths to substantiate their claims and ignoring the manner in which the typical consumer will interpret the claim." *Id.* at 84.

<sup>101</sup> See Keep, *supra* note 97, at 347. Keep argues that emotion is very important to economic decision making, as individuals and business make purchases based on "non-economic motivations ranging from sentiment and nostalgia. . .to the need for personal control." As a result of the influence of emotion, sellers can affect consumer behavior by ". . .attaching emotional responses to preferred outcomes." See generally ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1993). Psychologist Robert Cialdini suggests that advertisers, salespeople, and other individuals we interact with in daily life can affect how we make decisions by purposefully or unwittingly causing a reaction in our normal thought processes. Cialdini explains that certain ideas or events garner an almost instinctual reaction in both people and animals. He calls this reaction "click-whirr," comparing it to an audio-tape that is set to play after a certain event happens. Individuals can use this knowledge about reactions to cause other people to act in certain ways. Cialdini writes, "Although there are thousands of different tactics that compliance practitioners employ to produce yes, the majority fall within six basic categories. . .consistency, reciprocity, social proof, authority, liking, and scarcity," *Id.* at xiii.

Some people might suggest that with all of the information consumers are given through advertisements, they should be able to make rational choices. Others argue consumers are overloaded by so much information it can be confusing and misleading.<sup>102</sup> Richard Beltramini suggests that drug advertisements provide so much information that they mystify rather than inform: “It is easy to envision how consumers can potentially let down their guards, and based on the perceived scientific precision of an abundance of charts and graphs included, assume a far less skeptical orientation toward such information-rich advertising.”<sup>103</sup> Beltramini adds that elderly, sick, or economically disadvantaged people are especially vulnerable to drug company claims, as they “want to believe these products will solve their problems, [and] oftentimes assume the veracity of the scientific information provided.”<sup>104</sup>

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<sup>102</sup> See Robert E. Lane, *THE MARKET EXPERIENCE* 138,139-45 (1991). In his book, Lane provides evidence that reveals cognitive complexity “matches environmental complexity to higher and higher points, and then, when the environment becomes too complex, ‘stress’ or ‘trauma’ reduces cognition to simpler levels—perhaps even below the starting points.” See David Glen Mick, Susan Broniarczyk, & Jonathan Haidt, *Choose, Choose, Choose, Choose, Choose, Choose, Choose: Emerging Research on the Deleterious Effects of Living in Consumer Hyperchoice*, 52 *J. BUS. ETHICS* 207 (2004). Mick, Broniarczyk, and Haidt state one of the current problems in the marketplace is that there are too many options. When the number of products becomes overwhelming, consumers are less happy and tend to regret their purchasing decisions, assuming the products they did not choose might have been better than the one they selected. *Id.* at 208. Requiring consumers to make many choices in rapid succession has also been shown to have detrimental effects on cognition and “[drain] psychological energy, as seen through decrements in self-regulation and willpower.” See Trout, *supra* note 53, at 417. Trout suggests that too many choices paralyze consumers with options, and choosing poorly makes consumers feel awful. Trout argues consumers assume many choices should make them happy and expand their ability to choose, but in the end they only become depressed.

<sup>103</sup> See Richard Beltramini, *Consumer Believability of Information in Direct-to-Consumer (DTC) Advertising*, 63 *J. BUS. ETHICS* 333, 334 (2006). Most consumers cannot meaningfully evaluate drug manufacturer claims about products, and may “find themselves vulnerable to disingenuous exaggerations (bordering on outright deception).” *Id.* at 334.

<sup>104</sup> See Beltramini, *supra* note 103, at 334. Beltramini suggests that a senior citizen examining an ad for arthritis medication will focus more on the picture of a healthy old person that accompanies the ad than on warnings and scientific language about the product: “Although the advertisement is legally compliant in not explicitly promising such recuperative benefits from this

Further, consumers often cannot wisely interpret product details.<sup>105</sup> When companies only provide a small amount of information, consumers tend to put too much emphasis on that limited knowledge and form an extreme opinion about the product that is either too positive or negative.<sup>106</sup> If consumers realize they have limited information they are less inclined to make extreme judgments, but sometimes only experts can realize information is missing.<sup>107</sup>

Also, consumers may end product information searches too early, believing they have enough information to make a decision when in fact they are missing important details.<sup>108</sup> While buyers understand they should consider a number of criteria when deciding which product to buy, often they do not know which criteria are most important, and they usually trust those who provide information about the product to be honest and accurate.<sup>109</sup>

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product, the normally skeptical reader's proportionate attention to the wishful results illustrated, actually enhances his believability of the ad's implied performance claims." *Id.* at 335.

<sup>105</sup> See George Katona & Eva Mueller, *A Study of Purchase Decisions*, CONSUMER BEHAVIOR (1954). In their study of household appliance purchasing decisions, Katona and Mueller discovered that most buyers did not spend a long time planning for the purchase, looking for information about different products, or visiting different stores to compare models.

<sup>106</sup> See David M. Sanbonmatsu, Frank R. Kardes, David C. Houghton, Edward A. Ho, *Overestimating the Importance of the Given Information in Multiattribute Consumer Judgments*, 13 J. CONSUMER PSYCHOL. 289, 296 (2003).

<sup>107</sup> *Id.* at 291.

<sup>108</sup> *Id.* at 298. Sanbonmatsu and his colleagues conducted a study in which they presented participants with certain automobile characteristics and asked the participants to explain whether or not these attributes were important in their purchasing decisions. Even though participants were given different attributes, they stated the ones they were given were important considerations in their decision—gas mileage if gas mileage was described, reliability if reliability was described. Economic assumptions suggest consumers have a set of criteria in mind before they make a decision, but this study suggests that the information given to consumers affects their decision if they are not experts on the subject. *Id.* at 297. See Colander *supra* note 97 at 200. Galbraith suggests that companies have the power to direct consumer decisions, yet few other economists share this perspective as they assume consumers have preferences that do not change and cannot be altered by outside influences. See also generally Gary Becker and George Stigler, *De Gustibus Non Est Disputandum*, EVERYTHING FOR SALE (1999).

<sup>109</sup> *Id.* at 297.

Consumers must trust that companies are producing safe products, but this trust is often in jeopardy because consumers realize businesses do not always provide all the required product information.<sup>110</sup> Franck Meijboom and colleagues state that economists assume buyers and sellers are “rational agents and that trust is a form of rational calculation in which both the trustor and the trustee aim to maximize their interests.”<sup>111</sup> Yet the process of trust is not always rational, because consumers can interpret the same information in different ways. A product recall may assure one consumer that the company is being diligent, but make another consumer worried because the company initially manufactured a defective product.<sup>112</sup>

### 5. Rationality: When Logic Escapes Us

Classical economics assumes that humans are selfish and rational, however this is not always the case.<sup>113</sup> For instance,

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<sup>110</sup> See Franck Meijboom, Tatjana Visak, Frans Brom, *From Trust to Trustworthiness: Why Information is not Enough in the Food Sector*, 19 J. AGRIC. & ENVTL. ETHICS 427, 427-28 (2006). Meijboom and his colleagues argue that trust is crucial to a successful economy. Consumers have to “depend on the expertise of others, the checks and balances within the supply chain, and first and foremost on the goodwill of anonymous people. . .” The global food market has left consumers feeling a loss of control because they do not know how or where their food is produced, and they fear tainted food. See Keep, *supra* note 97, at 349 (arguing that trust is necessary to markets so that producers and consumers can have long-lasting relationships, while lies and deceptive practices “[break] important social threads by increasing uncertainty and unreliability”).

<sup>111</sup> See Meijboom, *supra* note 110, at 429.

<sup>112</sup> *Id.*; See also *id.* at 430 (“This does not entail that trust is an intangible concept that lacks any relation to reflective deliberation and reason, yet it shows that dealing with trust cannot be reduced to providing information or decreasing risk levels”).

<sup>113</sup> See Eisenberg, *supra* note 47, at 214. Because of limits on time, money, and the inability of the human mind to process a lot of information, individuals do not look for the best solutions as suggest by economic models, but merely solutions that will work. *Id.* at 214. Eisenberg emphasizes that individuals “will not process information perfectly even if they wish to do so, because human ability to calculate consequences, understand implications, and make comparative judgments on complex alternatives is limited.” *Id.* at 216. Eisenberg further states that individuals “often fail to make rational decisions even within the bounds of the information they have acquired,” in part because they tend to be “unrealistically optimistic,” believing, for example, that they can drive well enough to avoid accidents, and that their homes have an

consumers do not consider all of their product alternatives and then rationally decide which product to buy; they tend to examine one product and disregard the benefits and drawbacks of other products.<sup>114</sup> Even if brands are very similar, consumers may favor one brand if they have more information about it. Additionally, customers often gather product information in a way that supports their original ideas about the product and leads them to be even more certain of their beliefs.<sup>115</sup>

Consumers also have problems interpreting the value of product information, and tend to think any new product information will be important in their decision, regardless of whether that information should factor in the choice. Putting weight on new information rationalizes finding the information in the first place, but results in consumers considering factors that should not be included in the decision-making process.<sup>116</sup>

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average or below average risk of damage. *Id.* at 216. See Jonah Lehrer, *Driven to Market* 443 NATURE, 502 (2006). Neuroeconomics uses experimental techniques in neuroscience to investigate how the brain makes economic decisions. Through neuroeconomics scientists have devised the dual process model, which suggests the brain is capable of logic and irrational emotion, and emotion tends to trump logic. Other scientists disagree with this theory, but neuroeconomists claim they have triumphed regardless because they can explain consumer actions while economists cannot. Scientists have also discovered the areas of the brain that control emotions are associated with immediate gratification, while areas of the brain that control logic are associated with delayed gratification. Some researchers hypothesize emotions were useful in the distant past to help humans make decisions, but now we need to devise ways to control those emotional biases since they can affect our judgment. *Id.* at 504.

<sup>114</sup> See Frank Kardes, David M. Sanbonmatsu, Maria Cronley, David Houghton, *Consideration Set Overvaluation: When Impossibly Favorable Ratings of a Set of Brands are Observed*, 12 J. CONSUMER PSYCHOL. 353 (2002). See also Ralph I. Allison & Kenneth P. Uhl, *Impact of Beer Brand Identification on Taste Perception*, 1 J. OF MARKETING RES. 36 (1964). After conducting a blind taste-test among men who drank beer at least three times a week, Allison and Uhl found that participants could not tell the difference among five kinds of beer. *Id.*

<sup>115</sup> See Kardes et al., *supra* note 114, at 354.

<sup>116</sup> See Anthony Bastardi & Eldar Shafir, *Nonconsequential Reasoning and Its Consequences* 9 CURRENT DIRECTIONS PSYCHOL. SCI. 216, 217-18 (2000) ("People. . .are often unaware of pursuing noninstrumental information. Instead, they misconstrue such pursuit as an indication that the information is likely to prove instrumental"). See David L. Schwartzkopf, *The Effects of Attraction on Investment Decisions*, 4 J. BEHAV. FIN. 96, 97 (2003). If preferences are stable, then introducing a third product into a set of two should

## 6. Emotional Decisions

Also, consumers often have emotional reasons to make purchases, including tradition, social trends, and belonging in certain social groups.<sup>117</sup> Buying decisions can also be emotional in nature because consumers connect their emotions to decisions they need to make, so “people in a good mood may be more optimistic, and people in a bad mood more pessimistic,” regardless of the choice at hand.<sup>118</sup> Studies further suggest that a customer’s mood can affect what she thinks about a product.<sup>119</sup> She may have a better opinion about the good in question when she is happy and a worse opinion when she is sad,<sup>120</sup> contradicting economists’ assumptions regarding a rational consumer with fixed and unchanging preferences.

John Nofsinger argues that the economy has a strong emotional component because it is composed of many human interactions. While economists argue that individuals rationally consider the consequences of many options before they make a decision, Nofsinger states that individuals considering these many consequences “[anticipate] the emotions of experiencing those outcomes.”<sup>121</sup> People can spread emotion through

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not affect what a consumer thinks about the first two products. However, if the consumer weighs two products, A and B, equally, but notices that product A is better in some respect than product C, she will tend to prefer product A. Product C gives her a reason to prefer product A because she changes how much weight she places on a characteristic product A has that product C lacks. *Id.* at 98. This study suggests consumer preferences can shift relatively easily.

<sup>117</sup> See Keep, *supra* note 97, at 347.

<sup>118</sup> See John Nofsinger, *Social Mood and Financial Economies*, 6 J. BEHAV. FIN. 144, 146 (2005). People often make decisions based on “subtle feelings” they may not realize they are experiencing. “Using [this] affective impression to make decisions can be easier than weighing the pros, cons, and outcome probabilities. This is especially true when the decision is complex.” *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Georgios A. Bakamitsos & George J. Siomkos, *Context Effects in Marketing Practice: The Case of Mood*, 3 J. CONSUMER BEHAV. 304, 307 (2004). Because of mood, “different types of advertisements may evoke different types of processing by consumers and may have different effects on consumers’ attitudes towards the advertised product/service.” *Id.* at 306.

<sup>121</sup> *Id.* at 145. See *id.* at 146 (“At times, emotional reactions diverge from cognitive evaluations and dominate the decision process. . .The greater the complexity and uncertainty of a situation, the more emotions influence the

interactions and change how others act within the economy. For example, if society is optimistic, investors and company executives may also be optimistic, leading more people to buy stock and underestimate risk.<sup>122</sup>

## 7. Cognitive Biases

Human beings are also subject to several different biases and emotional responses that prevent us from acting “rationally.”<sup>123</sup> For example, the availability bias describes an individual’s propensity to decide how probable an event is based on how easy it is to recall.<sup>124</sup> The overconfidence bias suggests individuals are more certain of the correctness of their decisions than is merited.<sup>125</sup> The hindsight bias refers to an individual’s

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decision”).

<sup>122</sup> See Nofsinger, *supra* note 119, at 144. Nofsinger suggests that while optimism can help the economy, overconfidence can cause a stock market bubble and lead to overinvestment. He also argues social mood affects how we feel about businesses—we like CEO’s when the social mood is high, we call them devils when the social mood is low. *Id.* at 147.

<sup>123</sup> See generally Trout, *supra* note 53. See generally Eisenberg, *supra* note 47. See Andrew Colman, *Cooperation, Psychological Game Theory, and Limitations of Rationality in Social Interaction*, 26 BEHAV. & BRAIN SCI. 139, 140 (2003). Coleman argues that rationality is far more complex than behaving reasonably and logically. Individuals often use bounded rationality, employing “rules of thumb” when making decisions. While these simple rules lead to errors, they also allow individuals to solve problems quickly. See Pat Barclay and Martin Daly, *Humans Should be Individualistic and Utility-Maximizing, but Not Necessarily Rational*, 26 BEHAV. & BRAIN SCI. 154 (2003). Barclay and Daly argue that individuals should not always be expected to make choices that would seem the most logical and rational. Individuals’ decisions are often affected by “incomplete information, errors, concern for the welfare of others (such as friends or relatives), or manipulation by others.” *Id.*

<sup>124</sup> See Trout, *supra* note 53, at 399-400. If an event is surprising, individuals tend to overestimate the likelihood of such an event happening again. Trout suggests the availability bias can move attention to sensationalized issues and away from more pragmatic and pressing ones.

<sup>125</sup> *Id.* at 400. Trout suggests this bias is especially relevant when considering an individual’s confidence in her financial decisions. See Janet Metcalfe, *Cognitive Optimism: Self-Deception or Memory-Based Processing Heuristics?*, 2 PERSONALITY & SOC. PSYCHOL. REV. 100 (1998). Individuals tend to overestimate how well they performed or will perform on cognitive tasks. People believe they will be able to solve problems when they won’t, think they are going finding the right answer right before they make a mistake, believe they know answers when they do not, and think they understand new information when they have not mastered the concepts. Studies suggest this

tendency to overestimate how likely she thought something was to happen after the event has occurred.<sup>126</sup>

The framing bias suggests that individuals often base their decisions on the way problems are presented, as opposed to focusing solely on the details of the problem.<sup>127</sup> The status quo bias describes an individual's preference to remain in her present condition as opposed to making changes, even if the changes may be positive.<sup>128</sup> Finally, the anchoring and adjustment bias suggests consumers may use unimportant information as a reference point for making a decision, such as basing an offer for a good on an initial asking price instead of doing research to see what a good is worth.<sup>129</sup> These biases contribute to consumer misuse of information in a self-regulating market.

#### 8. Defining the Role of Government: More or Less?

J.D. Trout argues that cognitive biases are so pervasive that they threaten individuals' long-term goals. He states that even when the government requires sellers to provide certain information to consumers to help them make rational decisions, the information is generally not helpful because consumers cannot make sense of it.<sup>130</sup> Trout suggests the problem of cognitive biases merits government intervention to help individuals make sensible decisions.<sup>131</sup> He argues institutional decisions made for the common good will be more beneficial than decisions made by individuals. Further, he claims that such social policies are not paternalistic when they are made to improve the

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bias is due to individuals basing decisions on information they have and how they feel when they make the decision. Individuals use whatever information they can recall to make a judgment, regardless of whether that information is correct.

<sup>126</sup> See Trout, *supra* note 53, at 402 (discussing how individuals tend to forget how uncertain they were of the probability of an event's occurrence before the event happened).

<sup>127</sup> *Id.* at 404.

<sup>128</sup> *Id.* at 405 (discussing how individuals fail to consider the benefits and drawbacks of their current situation, and instead focus on the drawbacks of changing their condition).

<sup>129</sup> *Id.* at 406-07.

<sup>130</sup> *Id.* at 394.

<sup>131</sup> *Id.* at 422 (arguing that while we tend to blame individuals for making bad decisions, we must remember that it is very difficult for humans to defy their cognitive biases because these biases are biological and enforced by habit).

well-being of the community, not targeting any specific person.<sup>132</sup>

Trout asserts cognitive biases are separate from an individual's will and can pose a danger to others, so there is no moral question about instituting policies to counteract cognitive biases.<sup>133</sup> One such policy he proposes involves the government painting chevron markers on roads to make lanes seem to be narrowing so drivers slow down.<sup>134</sup> Trout suggests this practice is merited because it fulfills the driver's goal of living a longer life, and defeats the cognitive bias that would harm that goal.<sup>135</sup>

Many scholars argue that our society must reexamine its goals and focus on actions that promote the collective good, since even as individuals, we cannot act without affecting others. Robert Solo asserts that the state has an important role to play in this collective society, yet Americans tend to be wary of state intervention because the government has performed poorly in the past. Solo argues this failure is result of the United States government lacking the proper resources, structure, and personnel to succeed in its duties.<sup>136</sup> Agencies designated to oversee government programs are ill-equipped to perform their tasks, and as a result they are often derided by politicians who are supposed to support collective activities.<sup>137</sup>

Solo further argues that economists have wrongly tried to interpret government behavior and its duties through market logic and economic theories of profit and loss, which is an inappropriate means of measuring government activities.<sup>138</sup> He

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<sup>132</sup> See *Id.* at 412-13 ("The common good calls for the participation of individuals even if it is not in their individual interests to participate, but rather in the interests of other people, and in the public interest, to participate").

<sup>133</sup> *Id.* at 416.

<sup>134</sup> *Id.* at 426.

<sup>135</sup> *Id.* at 428. Another example of a helpful policy to defeat cognitive biases would be retirement plans that ask employees if they want to start saving more in three months. Employees tend to enroll in these delayed plans because the deduction in their paycheck will not begin for a number of weeks. Additionally, employees tend to stay in these plans because individuals have a bias not to change their current conditions.

<sup>136</sup> See SOLO, *supra* note 80, at 63-64.

<sup>137</sup> *Id.* at 81 ("Our agencies (and systems) of collective action, organization, innovation, and control. . .are in a general state of disarray. . .The state has extended its activities far beyond the scope for which society is ideologically prepared").

<sup>138</sup> See SOLO, *supra* note 80, at 84 ("Given the unfortunate but alas general proclivity of the expert to deny the reality of that which his theory does not

asserts the government needs its own theory and its own plan to organize collective energy.<sup>139</sup> Among other ideas, Solo suggests the government should play a greater role in monitoring the activities of businesses.<sup>140</sup> Further, the government can assist in economic development by promoting resources that can be made accessible to all people, such as an archive that would make research and development information public.<sup>141</sup> If this data is easily available, it can be distributed to many people and used to increase productivity in the market.<sup>142</sup>

## V. CONCLUSION

A Chinese proverb reminds us that one generation plants the trees; another generation gets the shade. If we approach buying and selling as relational activities where the seeds of trust are sowed by assisting one another in decision making, and are later harvested by subsequent commercial activity, we can take advantage of the promise of markets. That promise encourages diligence, prudential planning, efficiency, and enlarges the arena where reflective autonomy can guide us. But resistance to such an attitude of cooperation and honesty among buyers and sellers

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explain, and to reason by false analogy from that with which he is familiar to that with which he is not, the ingrained outlook and accepted doctrines of the economists have served as a profoundly distorting lens through which the role and tasks of the positive state are seen and evaluated”).

<sup>139</sup> *Id.* at 87. Solo emphasizes that we cannot “borrow” businesspeople from Wall Street to run the state, because those individuals will arrive with ideas that are helpful on Wall Street but not in the positive state. Solo argues that we must train people with ideas and strategies to help them competently operate the positive state. *Id.* at 88.

<sup>140</sup> *Id.* at 89 (arguing that we need to have dual corporate management, involving both public and private corporation managers). *Id.* at 100-01 (discussing that public managers would report to Congress on behalf of their industry).

<sup>141</sup> *See* SOLO, *supra* note 80, at 129-134. *See* Bollier, *supra* note 93. Bollier argues privatizing information is dangerous, because that information is then controlled by companies and out of the public domain. Such commodification is rampant, as corporations are funding university research and deciding who can have access to the data, a practice that harms the university’s valuable role in finding and disseminating knowledge. He also argues drug companies must be stopped from gaining free access to federal research, especially if corporations use that research to develop drugs and charge high prices to consumers. *Id.* at 164.

<sup>142</sup> *See* Bollier, *supra* note 93.

creates an atmosphere of distrust that poisons important, legitimate efforts by businesspeople to meet human wants.

When asked to picture the average adult consumer, do we see a logical, rational person who has a clear grasp on her preferences and is aware of the benefits and drawbacks of all her purchases? Conversely, do we imagine an individual who has difficulties making the best decision because she does not have correct information? Should we consider consumers to be autonomous individuals or vulnerable people who need help to choose the best goods and services?

As individuals, we answer those questions based on cultural values, reflection, and observations of a very small number of consumers. In the United States, while children are considered vulnerable and in need of protections, adult consumers are expected to be fully autonomous and able to independently find the product information they need.

The libertarian response to such a statement is understandably, "Do not treat adults as infants." By all means we should base our legal regulatory regime on the desire to encourage as much agency and reflective autonomy *as the ontology of our humanity and the structure of our markets permit*. But we can achieve that objective more fully if we refuse to engage in the wishful thinking that just because we are bigger and older than those we deem "children," that we have necessarily left behind all of the decision-making inadequacies that we see so clearly in those younger than we are.