# BOOK REVIEW

# EXPOSING THE MYTH OF *HOMO ECONOMICUS*

MORAL MARKETS: THE CRITICAL ROLE OF VALUES
IN THE ECONOMY. EDITED BY PAUL J. ZAK.
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RONALD J. COLOMBO*

*The prevalence of the* Homo economicus *model of humanity has crowded out considerations of important noneconomic aspects of human nature—most importantly the moral dimension of human thought and conduct. As a result, our understanding of the present ills besetting the business world and the market economy is incomplete, and the policy prescriptions flowing therefrom are often suboptimal (if not counterproductive).*

*This Book Review situates* Moral Markets *within the larger debate over human nature generally, and shows how, through the presentation of biological evidence and evolutionary theory,* Moral Markets *repudiates the* Homo economicus *model and supports the Aristotelian position that human beings are fundamentally moral creatures. After demonstrating that free markets cannot thrive in the absence of virtue,* Moral Markets *concludes that free markets must generally be populated by virtuous actors. This Book Review asks whether another conclusion might be drawn: that the free markets of today lack a critical mass of virtuous actors, hence the current spate of corporate scandals and economic woes.*

## INTRODUCTION

Enron. ImClone. Global Crossing. Tyco. WorldCom. Several prominent commentators have concluded that the scandals these names have come to represent are not mere market aberrations, but rather symptoms of a deep, systemic problem with capitalism today.[1] As this Book Review goes to press, other

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* Associate Professor of Law, Hofstra University School of Law.

1. *See, e.g.*, William J. Bennett, Op-Ed., *Capitalism and a moral education*, CHI. TRIB., July 28, 2002, § 2, at 9; Editorial, *Helluva problem*, FIN. TIMES, Sept. 18, 2002, at 18;

names are becoming synonyms for scandal—Samuel Israel, Marc Dreier, Bernard Madoff, and surely more with them—leading to a renewed focus on the market's shortcomings.[2]

To understand this problem fully, and to select an appropriate means of treating it, we must first accurately diagnose its root cause. As I and others have suggested, this cause is essentially moral in nature: "a loss of belief in objective ethical standards," as one commentator summarized it;[3] "a mentality . . . [of] putting profits ahead of all principle," in the words of another;[4] and a rejection of the commandment to "love thy neighbor," according to the former President and CEO of the Federal Reserve Bank of New York.[5] And a problem that is fundamentally moral in nature counsels in favor of a solution that is, at least in part, also moral in nature.

To others, morality does not enter into the equation. Or, even if it does, morality certainly does not enter into the solution. To them, the problem is merely one of properly aligning cost and benefit structures in such a way as to punish wrongdoing more severely, reward appropriate conduct more generously, or both.[6]

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John Plender, *Morals pay dividends*, FIN. TIMES, Sept. 18, 2002, at 15; Michael Prowse, *Why plastering over capitalism's cracks won't work*, FIN. TIMES, July 13/14, 2002, at II; William J. McDonough, President and CEO, Fed. Reserve Bank of N.Y., Remarks at the September 11 Commemorative Service at Trinity Church (Sept. 11, 2002), *available at* http://www.newyorkfed.org/newsevents/speeches/2002/mcd020911.html.

2. *See, e.g.*, Tina Brown, *Did We All Go Mad?*, DAILY BEAST, Dec. 15, 2008, http://www.thedailybeast.com/blogs-and-stories/2008-12-15/did-we-all-go-mad/; Posting of Frank Pasquale to Concurring Opinions, http://www.concurringopinions.com (Dec. 13, 2008, 15:40 EST).

3. Prowse, *supra* note 1.

4. Bennett, *supra* note 1.

5. McDonough, *supra* note 1; *see also* Ronald J. Colombo, *Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives*, 73 BROOK. L. REV. 91, 147 (2007) (observing that, from a natural law perspective, the research analyst scandal would be viewed as a fundamentally moral problem).

6. An example of this approach would be the Sarbanes-Oxley Act of 2002, passed by the U.S. Congress and signed into law by President George W. Bush in direct response to some of the aforementioned scandals (primarily Enron). Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and elsewhere). Among other things, the Sarbanes-Oxley Act requires CEOs and CFOs personally to certify the accuracy of their companies' filings with the Securities and Exchange Commission. It attaches a penalty of up to a $1 million fine or ten years imprisonment, or both, in the event of a knowingly false certification, and up to $5 million and twenty years imprisonment in the event of a willfully false certification. *Id.* § 1350 (codified at 18 U.S.C. § 1350 (2004)).

Adherents to a law-and-economics perspective, among others, take this approach.[7]

What becomes clear is that, at its core, the dispute over what ails the modern market economy (and what ought to be done to address it) turns on our understanding of human nature.[8] And the prevailing modern understanding (at least within the context of economic thinking) is that human beings are little more than rational wealth-maximizers.[9] It is assumed that *Homo economicus*—"economic man"—populates the roles of consumer, entrepreneur, stockholder, employee, director, and officer in our modern economy.[10] *Homo economicus* "is cold and calculating, worries only about himself, and pursues whatever course brings him the greatest material advantage."[11] *Homo economicus* is a single-minded, wealth-maximizing automaton, who does not take into account "morality, ethics, or other people."[12] Not surprisingly, subscribing to the *Homo economicus* model of humankind leads to characterizing problems and framing solutions in economic terms of benefits and costs, incentives and disincentives.[13]

Many have doubted the existence of *Homo economicus*, challenging whether the evidence of actual human behavior fits the theoretical model.[14] And, if *Homo economicus* does indeed exist, some have argued that he is to blame for what ails contemporary capitalism.[15]

Into this fray steps *Moral Markets: The Critical Role of Values in the Economy*.[16] Over the course of fifteen powerful essays, *Moral*

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7. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

8. *Cf.* JAMES Q. WILSON, THE MORAL SENSE 235 (1993) ("Moral and political philosophy must begin with a statement about human nature. We may disagree about what is natural, but we cannot escape the fact that we have a nature—that is, a set of traits and predispositions that set limits to what we may do and suggest guides to what we must do.").

9. *See* Lynn A. Stout, *Taking Conscience Seriously*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 157, 158 (Paul J. Zak ed., 2008).

10. *See id.*

11. *Id.*

12. *Id.*

13. *See* Basant K. Kapur, *Harmonization Between Communitarian Ethics and Market Economics*, 2 J. MARKETS & MORALITY 35, 36–38 (1999).

14. *See, e.g.*, Lynn A. Stout, *On the Proper Motives of the Corporate Directors (Or, Why You Don't Want to Invite* Homo Economicus *to Join Your Board),* 28 DEL. J. CORP. L. 1 (2003). In furtherance of the evolutionary metaphor, one could attack *Homo economicus* as a modern-day Piltdown Man hoax. *See, e.g.*, Don Herzog, *Liberalism Stumbles in Tennessee*, 96 MICH. L. REV. 1898, 1899 (1998).

15. *See, e.g.*, Norman Barry, *Ethics, Conventions and Capitalism*, *in* CAPITALISM, MORALITY AND MARKETS 57, 57–58 (2001).

16. MORAL MARKETS, *supra* note 9.

*Markets* marshals some of the strongest evidence, and lays out some of the strongest philosophical, evolutionary, and biological arguments against the existence of *Homo economicus.* The contributors to *Moral Markets* compellingly assert that human beings are fundamentally moral by nature and that the free market economy would not function if things were otherwise.

The full range of repercussions that follow is not entirely discernable, but seems difficult to overstate. For, if correct, the conclusions reached in *Moral Markets* call into question the merits of economic analysis of the law and suggest that solutions to corporate wrongdoing (and other economic ailments) heavily take into account the moral dimensions of humankind.[17] In short, *Moral Markets* exposes the myth of *Homo economicus*.

This Review summarizes and critiques the evidence and arguments set forth in *Moral Markets*. In doing so, it does not provide fifteen separate analyses of the fifteen separate essays, but rather reviews the book thematically. This thematic approach is particularly appropriate given that the essays in *Moral Markets* are not completely independent of each other, but rather reference and build upon one another.

Part I of the Review briefly sketches the work that went into the publication of *Moral Markets*. This sketch is necessary to appreciate the volume fully, for *Moral Markets* is not merely a collection of related essays, but rather the fruit of a two-year collaborative project among several distinguished contributors. The resulting product is therefore much more coherent and consistent than most multi-authored volumes.

Part II addresses the claim that human beings are fundamentally moral in nature. To be clear, the assertion here is not that all people act properly all the time, but rather that the vast majority of people possess the ability to recognize the difference between conduct that is good and conduct that is bad. Although not everyone with this ability elects to do right instead of wrong, the overwhelming majority of individuals do indeed make this salutary election. Additionally, this Part points out the happy confluence of Aristotle's conceptualization of human nature and the empirical evidence of human nature derived from modern science.

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17. *See also* Katja Rost et al., *The Corporate Governance of Benedictine Abbeys* 2 (May 25, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1137090 (asserting that the "narrow [*Homo economicus*] view of human motivation may severely limit progress in understanding incentives").

Part III considers the claim that individual morality is an essential precondition to the free market economy. It is here that *Moral Markets* is most vulnerable to criticism. *Moral Markets* makes an unjustifiable leap from the theory that individual morality is a precondition of the free market economy to the implicit (and sometimes explicit) conclusion that today's free market actors do in fact behave in morally appropriate ways. Such a conclusion is by no means unreasonable, but it does not inevitably follow. An alternative, and quite worrisome conclusion, could also follow: Today's market participants no longer behave in morally appropriate ways, and thus our free market economy is living on borrowed time—subsisting on the remnant of essential but vanishing values. Such a theory could, perhaps, explain the market breakdowns identified in the opening paragraph of this Review.

An interesting debate that some of the contributors to *Moral Markets* address is whether the free market promotes, rather than undermines, the moral values essential to its existence. At one extreme, some argue that free markets not only promote but generate the values and preconditions required for their existence.[18] Others insist that markets do not create the values necessary for their existence and are, indeed, inadequate at moral self-policing.[19] Still others go so far as to argue that free markets are parasitic and serve to destroy slowly the very values that their existence requires.[20] Part IV addresses *Moral Markets*'s contribution to this debate.

Part V explores the policy implications that flow from the insights and data presented in *Moral Markets*—some of which are noted and amplified by the volume's contributors, and some of which the book does not consider.

The Conclusion suggests that *Moral Markets* is required reading for anyone interested in behavioral economics and economic regulation. Even if one disagrees with each and every conclusion its contributors reach, *Moral Markets* brings together, in one convenient and accessible volume, the very latest research and thinking on the fundamental relationship between human nature and the market economy. One would be hard-pressed to

18. *See, e.g.*, Barry, *supra* note 15, at 57–77.
19. *See* WILHELM RÖPKE, A HUMANE ECONOMY 125 (Elizabeth Henderson trans., 1960).
20. *See* Kapur, *supra* note 13, at 46–47.

participate in today's broad public discourse if ignorant of the facts and scholarship assembled in *Moral Markets*.

## I. *MORAL MARKETS*: THE PROJECT

*Moral Markets* is more than simply a book. As explained in its introduction, the work "is the culmination of more than two years of research by a transdisciplinary group of scholars."[21] Its authors met six times over two and a half years, and "[e]ach chapter evolved through the process of presentation, critique, and rewriting."[22] The resulting product is not merely a collection of fifteen essays related by a common theme, but rather a coherent, albeit multi-authored, whole. Editor Paul J. Zak rightfully boasts that the "approach produced a high degree of cross-fertilization across both individual contributors and fields," which is vividly underscored by the "extensively cross-reference[d]" chapters.[23]

The authors of *Moral Markets* include prominent biologists, anthropologists, economists, and philosophers; professors of business and law; and a winner of the Nobel Memorial Prize in Economic Sciences.[24] The project was spearheaded by Paul J. Zak, the founding director of the Center for Neuroeconomics Studies at Claremont Graduate University.[25]

Zak and the other contributors shared a preconceived belief that "values might play an important role in supporting economic exchange," yet "did not know if this was supported by solid evidence."[26] Indeed, they remained open to the opposite possibility and wondered whether "markets and market participants might be inherently immoral" and whether "markets devalue human beings and degrade their dignity."[27] They brought their diverse skills and training to bear upon these questions.

The consensus they reached was consistent with the authors' professed suspicion that "the commonly held view that the

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21. Paul J. Zak, *Introduction* to MORAL MARKETS, *supra* note 9, at xv.
22. *Id.* at xvi.
23. *Id.*
24. *See Contributors* to MORAL MARKETS, *supra* note 9, at xxxiii–xli.
25. *See id.* at xl.
26. Zak, *supra* note 21, at xv.
27. *Id.* at xv–xvi.

economy is dominated by greed and selfishness" is inaccurate.[28] Instead, the group's research and analysis revealed "that most economic exchange, whether with strangers or known individuals, relies on character values such as honesty, trust, reliability, and fairness."[29]

## II. *HOMO MORALIS*

The evidence and arguments set forth in *Moral Markets* strongly suggest that human beings are inherently moral creatures. Although they usually prefer more wealth to less, moral considerations constrain this preference. Thus, to use a term not coined by *Moral Markets*, one could say that *Homo moralis* ("moral man"), rather than *Homo economicus*, ought to be the model employed when considering the problems and predicaments of humankind.

A long and illustrious chain of philosophers have argued that human beings are fundamentally moral by nature.[30] What this means is that certain moral laws apply to human behavior, just as certain physical laws apply to the behavior of all physical bodies.[31] As Aristotle taught, human action in accord with these moral laws results in happiness and flourishing; human action not in accord with these moral laws poses an obstacle to happiness and flourishing.[32] For this reason, Aristotelian philosophers have oftentimes labeled as "good," "virtuous," or "natural" those actions that comport with the natural moral law, and as "evil," "vice," or "unnatural" those actions that violate the natural moral law.[33] Through the use of right reason, individuals are ordinarily capable of distinguishing good from evil and naturally gravitate toward that which is good.[34] That said, as we are all well aware, human

28. *Id.* at xvi.
29. *Id.* at xvii.
30. *See id.* at xii ("Aristotle, Plato, Jesus, Buddha, and Mohammed all recognized that values are the foundation for happiness, and their wisdom has stood the test of time."); *see also* ANTHONY J. LISSKA, AQUINAS'S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION 108–09 (1996); WILSON, *supra* note 8, at 225.
31. *See* LISSKA, *supra* note 30, at 108.
32. *See id.*; *see also* WILSON, *supra* note 8, at 244.
33. *See* Colombo, *supra* note 5, at 140–42.
34. *See* THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 94, art. 2.

beings do not invariably choose to do good over evil. "To say that people have a moral sense is not the same thing as saying that they are innately good."[35] Human beings sometimes err in their moral reasoning: they sometimes incorrectly identify as "good" something that is not good.[36] Additionally, individuals sometimes consciously elect to override their moral inclinations, due to lack of self-control.[37] The likelihood of such error can be increased by certain negative societal and cultural influences, thus giving rise to a degree of moral disorientation or weakening of the will, or both.[38]

Not only individual happiness but also the flourishing of society as a whole has been thought to depend upon habitual compliance with moral law.[39] This is not surprising when one considers that most of the traditionally articulated virtues are social in nature.[40] Consider, for example, the virtues identified by Aristotle: courage, temperance, liberality, magnificence, proper pride, good temper, modesty, and friendliness;[41] or Benjamin Franklin: temperance, silence, order, resolution, frugality, industry, sincerity, justice, moderation, cleanliness, tranquility, chastity, and humility.[42] Because market exchange is a form of social interaction, it stands to reason that these

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35. WILSON, *supra* note 8, at 12.

36. *See* AQUINAS, *supra* note 34, at I-II, Q. 94, art. 6; *see also* J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 71–75 (1997).

37. *See* Richard Holton & Stephen Shute, *Self-Control in the Modern Provocation Defence*, 27 OXFORD J. LEGAL STUD. 49, 53 (2007) ("For Aristotle, the continent person (the *enkrates*) feels the pull of temptation or anger or whatever, but resists acting on it as a result of her judgment that such action would not be best; the incontinent person (the *akrates*) does not resist.").

38. *See* WILSON, *supra* note 8, at 25–26, 218–19; *see also* Zak, *supra* note 21, at xx (opining that in corporate scandals such as Enron, "the particular corporate culture and likely physiologic state of employees conspired to overcome their innate sense of moral values").

39. *See* Luigino Bruni, *The "Technology of Happiness" and the Tradition of Economic Science*, 26 J. HIST. ECON. THOUGHT 24, 26–27 & n.13 (2004).

40. *See* AQUINAS, *supra* note 34, at I-II, Q. 61, art. 5; *see also* Robert C. Solomon, *Free Enterprise, Sympathy, and Virtue*, *in* MORAL MARKETS, *supra* note 9, at 16, 35 ("The central feature of all [Aristotle's] virtues . . . is that they aim at solidifying our social relationships and our aspirations to *excellence* . . . .").

41. Paul J. Zak, *Values and Value: Moral Economics*, *in* MORAL MARKETS, *supra* note 9, at 259, 261.

42. *Id.*

virtues play a role in the economic sphere of society as well as in its non-economic spheres.[43]

As Robert Solomon emphasizes in his contribution to *Moral Markets* entitled *Free Enterprise, Sympathy, and Virtue*, Adam Smith himself believed that virtue played a critical role in the free market system.[44] Contrary to the usual characterization of Smith's argument—that the free market's success is driven by individual pursuit of raw self-interest—Solomon points out that Smith instead believed that "[o]ther-interest, not self-interest, is the engine of a healthy free market system."[45] This fits well within the Aristotelian tradition, as rampant self-interest has commonly been recognized as "a perversion . . . of human nature,"[46] whereas empathy and the "desire to please" others are consistent with human nature.[47] In other words, human beings are naturally other-regarding, and the success of the free market system is dependent upon this particular aspect of human nature.[48] Indeed, within the Aristotelian framework, a successful societal institution—such as the free market—would have to be grounded upon virtuous human behavior because happiness and flourishing (success) are only possible when predicated upon virtue.[49]

The essays that immediately follow Solomon's contribution take into account various advances since the advent of Aristotelian reasoning. These essays attempt to ascertain, via the science of evolution, whether there is evidence to support the view that human beings are biologically inclined toward virtue—or, more specifically, whether human beings are indeed other-regarding and truly possess moral virtues such as empathy and fairness. And, in most respects, Aristotle's insights "precisely anticipate the findings of modern science."[50]

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43. *See* Zak, *supra* note 21, at xv; *see also* RAJENDRA S. SISODIA ET AL., FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE 31 (2007).

44. *See* Solomon, *supra* note 40, at 17.

45. *Id*. at 34.

46. *Id.* at 17.

47. *Id.* at 25–26.

48. *See id.* at 17–18.

49. *See supra* text accompanying notes 32–39.

50. WILSON, *supra* note 8, at 236.

Robert Frank considers the evolutionary basis for empathy, trustworthiness, and "moral emotions" in general.[51] Although "[m]oral sentiments often motivate people to incur costs that they could avoid," he remains open to the possibility that natural selection favors moral individuals because of the societal benefits that flow from moral behavior.[52] He posits that certain moral miscalculations that individuals tend to make today possibly result from our morality evolving in a different environment—namely, prehistoric society—than that in which humankind finds itself today—namely, modern civilization.[53] Thus, individuals today are sometimes confronted with quandaries that human morality is ill-equipped to handle instinctively.[54] Frank adds, however, that human moral intuitions nevertheless "provide useful guidance more often than not," and that the quandaries he speaks of are exceptions to the general rule of their helpfulness.[55]

Peter Richerson and Robert Boyd expand upon Frank's evolutionary hypothesis.[56] They commence their article by noting Charles Darwin's conclusion that "all human populations have essentially the same 'mental and moral faculities.'"[57] Like Smith, Darwin believed that human beings were, among other things, naturally endowed with empathy and sympathy.[58] This is necessary because "without the other-regarding virtue of sympathy, the social life humans enjoy today would not be possible."[59] As for the tension that Frank observed, between an

51. Robert H. Frank, *The Status of Moral Emotions in Consequentialist Moral Reasoning*, *in* MORAL MARKETS, *supra* note 9.

52. *Id.* at 46–54.

53. *See id.* at 55–57.

54. *See id.* An example Frank provides is the much greater willingness of human beings to kill one another from afar via long-ranged weapons than in close quarters; he speculates that the norm against killing most likely evolved within the context of face-to-face interactions, and thus the strength of its application outside of that context is weakened. *See id.* at 56–57.

55. *Id.* at 56–57.

56. *See* Peter J. Richerson & Robert Boyd, *The Evolution of Free Enterprise Values*, *in* MORAL MARKETS, *supra* note 9, at 107.

57. *Id.* (quoting CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX (D. Appleton & Co. 1909) (1874)).

58. *See id.* at 117.

59. *Id.*; *see also* Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 966–67 (2007) ("[M]oral judgments help to promote and reinforce the cooperative behavior necessary for humans to survive and flourish.").

individual's strategic best interest and those of society generally, Richerson and Boyd present Darwin in his own words, concluding that natural selection comes out in favor of those virtues that favor society:

> It must not be forgotten that although a high standard of morality gives but a slight or no advantage to each individual man and his children over other men of the same tribe, yet that an increase in the number of well-endowed men and an advancement in the standard of morality will certainly give an immense advancement in the standard of morality to one tribe over another. A tribe including many members who, from possessing in a high degree the spirit of patriotism, fidelity, obedience, courage, and sympathy, were always ready to aid one another, and to sacrifice themselves for the common good, would be victorious over most other tribes; and this would be natural selection.[60]

Frans B.M. de Waal in *How Selfish an Animal?*[61] and Sarah Brosnan in *Fairness and Other-Regarding Preferences in Nonhuman Primates*[62] offer empirical evidence to support the assertion that virtue is a product of natural selection. Their essays describe experiments revealing strong altruistic tendencies,[63] and strongly negative reactions to inequity,[64] on the part of monkeys and apes across a variety of situations. Brosnan stresses that the animals' objection to unfairness *per se* is particularly revealing because, unlike humans, their reactions "are not constrained by complex cultural phenomena such as religions, schools, and governments."[65] In humans, these constraints affect experimental responses and, consequently, make it more difficult to assess raw human nature.[66] The natural conclusion is that these tendencies are biologically innate to monkeys and apes.[67] If one assumes that human beings and these nonhuman

60. Richerson & Boyd, *supra* note 56, at 107 (quoting DARWIN, *supra* note 57, at 134–35).

61. Frans B.M. de Waal, *How Selfish an Animal? The Case of Primate Cooperation, in* MORAL MARKETS, *supra* note 9, at 63.

62. Sarah F. Brosnan, *Fairness and Other-Regarding Preferences in Nonhuman Primates, in* MORAL MARKETS, *supra* note 9, at 77.

63. *See* de Waal, *supra* note 61, at 75.

64. *See* Brosnan, *supra* note 62, at 77–78.

65. *Id.* at 79.

66. *See id.*

67. *But see id.*

primates are descended from a shared ancestor, then these experiments might tell us something about behavioral traits we have in common.[68]

Rounding out the scientific examination of morality is Paul Zak's own essay, *Values and Value: Moral Economics*.[69] Zak's essay begins by observing the phenomenon of anonymous charitable giving and the fact that most marketplace participants refrain from misconduct, even in circumstances where getting caught is highly unlikely;[70] both strongly suggest that something other than self-interest motivates human behavior.[71] Zak proceeds to set forth the biological basis of morality, arguing that "[s]everal brain mechanisms seem to function together as a moral compass, guiding us on appropriate modes of behavior in our daily interactions with other humans."[72] Primary among these mechanisms seems to be the role played by the hormone oxytocin, which "appears to induce a temporary attachment to others" within both human and rodent populations, and may generate the tendencies of fairness and altruism witnessed in nonhuman primates.[73] Although cultural and social influences can undeniably affect human morality, some moral values "appear to be universal"[74] and "difficult to suppress" neurologically.[75] Zak suggests that these values serve as important biological "constraints on utility maximization."[76]

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68. *See id.* at 78–79.

69. Zak, *supra* note 41, at 259.

70. *Id.* at 260–61.

71. *See id.* At this point, it is helpful to define the terms "self-interest" and "other-regarding." At a very high level of generality, one could say that all human action is "self-interested," if by that term we mean that it is undertaken because of some net benefit it provides to its undertaker. Even the most charitable or altruistic behavior could be deemed self-interested because, in economic terms, the utility gained by engaging in such behavior exceeds the cost of such behavior. *Cf.* de Waal, *supra* note 61, at 74 (pointing out that any behavior can be deemed selfish in the sense that it "evolved to benefit its performer"). A dividing line could (and shall) be drawn based upon the primary motivation of the actor: An actor's actions are "self-interested" when he acts primarily (and consciously) for personal gain; an actor's actions are "other-regarding" when he acts primarily (and consciously) for the benefit of another.

72. Zak, *supra* note 41, at 266.

73. *Id.* at 267–69.

74. *Id.* at 262.

75. *Id.* at 270–71.

76. *Id.*

*Moral Markets* does an excellent job in pulling together the most recent scientific data regarding human morality and nicely ties the data to traditional philosophical arguments regarding the nature of humankind. What emerges is an image of man not as *Homo economicus*, but instead as *Homo moralis*: a creature with an innate understanding of right versus wrong and an inclination toward morally appropriate conduct. Although Aristotle reached this conclusion through contemplation of the purpose of individuals within society,[77] and although "a divine, designing power would have good reason as a matter of mechanism design to put such a capacity into humans, a gift as essential to their eventual well-being as sight and locomotion,"[78] *Moral Markets* supports this conclusion with empirical evidence. Although a more exhaustive exploration of the science may have been possible, such an approach would have transformed *Moral Markets* into a reference book instead of the accessible, readable volume that it is.

There are, however, a few important possibilities that *Moral Markets* overlooks. With regard to the evolutionary argument, the book would benefit from a deeper analysis of the tension between the advantages that morality offers to society as a whole and the disadvantages that morality arguably places upon the individual. As Darwin pointed out, it is not difficult to see why a society with a more moral populace would have a comparative advantage over a society with a less moral populace.[79] But within any given society—especially within one with a highly moral populace—a significant free-rider problem presents itself. A selfish, immoral individual could do quite well for himself in a town of selfless, morally upright neighbors. He would enjoy all the benefits of such a society without bearing the costs and sacrifices that come with morally appropriate behavior.[80] It would appear, therefore, that natural selection

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77. *See supra* notes 32–34 and accompanying text.

78. Oliver R. Goodenough, *Values, Mechanism Design, and Fairness*, *in* MORAL MARKETS, *supra* note 9, at 228, 239.

79. *See supra* note 60 and accompanying text.

80. It should be noted that, when referring to the "costs and sacrifices" of moral behavior, I am speaking within the very specific contexts of economics and evolutionary biology. Outside of those specific contexts, and within the broader realm of human existence in its totality, I would not, and do not, claim that morality imposes costs and sacrifices on its practitioners, but rather would assert, with

would favor such individuals, who would prosper at the expense of others.

*Moral Markets* does not, however, completely overlook this subject. Robert Frank's essay addresses it, arguing that natural selection would indeed favor moral individuals because of the benefits that societies bestow upon their trustworthy members,[81] but also recognizing that the difficulty of sorting the trustworthy from the untrustworthy will lead, in equilibrium, to a population containing both.[82] Ultimately, it is only *apparent* morality that society could reward, as society has no means of exploring the inner recesses of an individual's heart or mind. This gives rise to both false positives and false negatives, for there are many individuals who appear to be moral but in fact are not, and there are also many individuals who do not appear to be moral but in fact are. Although Frank suggests that there are some observable, involuntary characteristics of morality,[83] overall, society's ability to discern individual morality seems weak at best.

Finally, regardless of humanity's potential evolutionary past, genetics is certainly not the only thing that makes a human being a human being; culture and environment play a tremendously important role as well. Thus, Brosnan's remark, that by studying nonhuman primates we can isolate human nature stripped of "complex cultural phenomena such as religions, schools, and governments,"[84] reveals both the promise and the pitfalls of such an approach. For, although such a study might give insight into our biological nature as human beings, the effect of nurture might be substantially more significant. As philosophers (and others) have observed, human beings have an unfortunate tendency to make moral miscalculations and, at times, disregard what their better judgment would suggest, engaging in conduct that runs contrary to their natural inclinations toward the good.[85]

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Aristotle, that morality is the key to true human happiness and flourishing. *See supra* note 32 and accompanying text.

81. *See* Frank, *supra* note 51, at 50.

82. *See id.* at 49.

83. *See id.* at 50.

84. Brosnan, *supra* note 62, at 79.

85. *See supra* notes 36–38 and accompanying text.

External, environmental crises can also cause human beings to stray from their better judgments.[86] As Zak discusses, there are biological explanations for this phenomenon as well:

> Oxytocin appears to facilitate a representation of what another is feeling. These mechanisms are automatic and largely beyond our conscious control. That is not to say that these mechanisms are not modulated by the external and internal environment. For example, during episodes of extreme stress, other-regarding behavior is typically suppressed as survival of the individual becomes paramount. . . . This may be one explanation for the lack of moral behavior by those at Enron—the enduring stress of "making the numbers" caused them, at some point, to make up the numbers. This moral violation appears to be modulated when others nearby are doing the same thing. This explanation is given for "ordinary" German citizens who tortured and killed Jews under the Nazi regime—their neighbors were doing the same thing so it became acceptable. . . . Social psychologist James Waller (2002) calls this "moral disengagement."[87]

This, in turn, raises a critically important question: Does the free market foster, or undermine, humanity's natural moral impulses? All of our purported biologically based goodness as human beings amounts to very little if we labor within an economy that systematically suppresses it. Part IV addresses this issue, but first it is necessary to examine the claim that the free market is dependent upon human morality—regardless of whether the market promotes or dampens that morality.

## III. MORALITY AND THE MARKET

The second major theme of *Moral Markets* is that individual morality is necessary for the proper functioning of the free market. As the volume's preface proclaims, "our open, self-organizing economic system . . . is effective only because most of the time most of its participants abide by internally motivated 'positive' values, such as trustworthiness, fairness, and honesty."[88] Most directly propounding this theme are the previously

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86. *See id.*

87. Zak, *supra* note 41, at 267 (quoting JAMES WALLER, BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING (2002)).

88. Oliver Goodenough & Monika Gruter Cheney, *Preface* to MORAL MARKETS, *supra* note 9, at xxiii, xiii.

considered contributions of Robert Solomon, Peter Richerson, and Robert Boyd, along with an essay by Oliver Goodenough.

Solomon, as previously indicated, reminds us that Adam Smith was a moral philosopher.[89] Smith shared with Aristotle the belief that "nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren."[90] Although human beings certainly possess a substantial desire to pursue their own material self-interest, this desire is "greatly qualified and restricted" by this natural endowment of morality.[91] It is upon the basis of self-interest restrained by and coupled with morality that the successful free market economy is founded.[92] "Other-interest, not self-interest, is the engine of a healthy free market system."[93] This should not be surprising, as "[e]xchange is inherently other-regarding—both you and I must benefit if exchange is to occur."[94]

Moreover, as Richerson and Boyd argue, our "sophisticated systems of cooperation such as businesses" are made possible only by "evolutionary forces that build cultural systems of morality and convention."[95] Empirical research has shown that "most economic exchange, whether with strangers or known individuals, relies on character values such as honesty, trust, reliability, and fairness."[96]

Without such values, monitoring needs would raise transaction costs and might even make commerce prohibitively expensive.[97] After all, "because a policeman does not lurk on every corner, our economic system cannot be—and is not—maintained solely by coercive enforcement."[98] Thus, as Goodenough argues,

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89. *See* Solomon, *supra* note 40, at 17.

90. *Id.* at 25 (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759) (internal quotation marks omitted)).

91. *Id.* at 34.

92. *See id.*

93. *Id*.

94. Zak, *supra* note 21, at xv.

95. Richerson & Boyd, *supra* note 56, at 114–15 (emphasis omitted); *see also id.* at 116 ("[T]he moral hidden hand deriving from our tribal social instincts is one foundation upon which our immensely successful free enterprise systems rest.").

96. Goodenough & Cheney, *supra* note 88, at xvii; *see also* Richerson & Boyd, *supra* note 56, at 118.

97. *See* Goodenough, *supra* note 78, at 239.

98. Goodenough & Cheney, *supra* note 88, at xxiv.

"[v]alues don't just lower transaction *costs* . . . ; in many contexts, values make transactions *possible*."[99]

The importance of honesty, trust, and reliability to commercial exchange is not difficult to grasp. Even with strong and sophisticated laws and enforcement mechanisms governing trade, resort to private litigation rarely appeals to anyone. But fairness, too, is something essential to the free market system according to Goodenough.[100] More than "just a nice add-on, . . . [f]airness is a value that free enterprise . . . must have at its heart."[101] Without fairness, the economy risks both instability and coercive redistribution.[102]

In sum, *Moral Markets* echoes and amplifies what many have asserted for some time: Virtue is most salutary, if not indispensable, to a free market economy.[103] Although this assertion may seem novel to generations reared on law and economics,[104] it actually restores the understanding of free market economics as originally expounded by Adam Smith.[105]

Just because a successful free market relies upon a certain degree of virtue does not, however, mean that the participants in our current free market system contain the requisite degree of virtue. This is where *Moral Markets* falters. For *Moral Markets* leaves its reader with the impression that our existing free market economy overflows with virtuous actors because free market economies require virtuous actors.[106] This reasoning overlooks the possibilities that our free market system operates deficiently, or that our free market system, although perhaps currently successful, lives on borrowed time because the well of virtue upon which it depends is running dry.

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99. Goodenough, *supra* note 78, at 239.

100. *Id.* at 246.

101. *Id.*

102. *See id.*

103. *See, e.g.*, Colombo, *supra* note 5, at 147–49.

104. *Cf.* Richerson & Boyd, *supra* note 56, at 117 ("Some business management scholars believe that the influence of neoclassical economists with their rational-selfish models and intuitions has crowded out the moral hidden hand in the behavior of management school graduates.").

105. *See supra* text accompanying notes 89–93.

106. *Cf.* Zak, *supra* note 21, at xxii ("Our collective view is that the characterization of market actors as greedy and selfish is farcical and egregiously needs to be remedied by the verity of moral markets.").

Although invoked frequently, the adjective "successful" in the phrase "successful free market system" is not defined in *Moral Markets*. Presumably, a "successful" free market system is one that allocates goods and services well and efficiently.[107] A good allocation of goods and services would be one that avoids the twin disasters of surpluses and shortages, by steering goods and services to those who most desire them. Efficiency in allocation would mean maximizing society's production and output given its limited supply of resources. On both measures, it is undeniable that free market economies perform better than economies that are not free.[108] But another, more difficult question must be asked: Are the free market economies of the twenty-first century performing as successfully as they could? In other words, are today's free market economies suffering from significantly diminished efficiency and significant misallocations? For example, studies have identified "the apparent decline in the ability to rely on the honesty of other people (including employees) as a factor in reduced U.S. productivity growth in the late 1970s."[109] Is such a phenomenon at work today?

The fall of Rome did not occur overnight, and an argument could be made that our free market economies, although currently successful, are on their way to becoming "unsuccessful" because of a decline in the virtue of market participants. Indeed, the seemingly greater and greater need for government intervention to control vice and limit greed suggests the decreasing ability of our market economies to sustain themselves as "free."[110] At a certain point, the legal and regulatory regimes within which our markets operate may become so dense that it is no longer accurate to speak of our economies as "free market economies" as that term was previously understood.[111] Although the contributors to *Moral Markets* recognize the need for legal and governmental support of free market economies,[112]

107. *See, e.g.*, MICHAEL PARKIN, MACROECONOMICS 536–37 (1990).

108. *See, e.g.*, Richerson & Boyd, *supra* note 56, at 108 ("[T]oday, the democratic, free enterprise society, usually with a more or less generous welfare safety net, has outcompeted all challengers and is spreading rapidly across the globe.").

109. Kapur, *supra* note 13, at 36–37 (internal quotation marks omitted).

110. *See supra* note 6.

111. *Cf.* Goodenough, *supra* note 78, at 239 (observing that the "free enterprise system" is "dedicated to a relatively low level of governmental involvement").

112. *See, e.g.*, Goodenough & Cheney, *supra* note 88, at xxiii.

they do not address whether that need has increased in recent decades, nor, *a fortiori,* do they consider the causes and repercussions of such a development.

Some have argued that, regardless of whether it was successful in the past, the free market economy is not working today.[113] Of these, many have identified as the culprit a lack of virtue on the part of market participants.[114] *Moral Markets* inadvertently suggests that these critics may be on to something, for if market participants today are indeed less virtuous than in the past, the successful operation of the free market economy would be in serious jeopardy.

Regardless of whether market participants today lack virtue compared with years past, the full panoply of causes for such a phenomenon stretches well beyond the scope of this Review. That said, one potential cause deserves discussion: whether the free market economy itself undermines the very virtues upon which its existence depends.

## IV. THE MARKET: A VIRTUE PRODUCER OR A VIRTUE CONSUMER?

Wilhelm Röpke, one of the most influential economists of post-World War II Europe, was a staunch defender of the free market economy.[115] Nevertheless, he was wary of those who would ignore the limitations of the free market.[116] One major limitation, according to Röpke, was that the free market required a foundation of virtuous participants—a foundation that the market could neither build nor maintain on its own:

> The market, competition and the play of supply and demand do not create these ethical reserves; they presuppose and consume them. These reserves have to come from outside the market . . . . Self-discipline, a sense of justice, honesty, fairness, chivalry, moderation, public spirit, respect for human dignity, firm ethical norms—all of these are things

113. *See supra* notes 1–2 and accompanying text.

114. *See supra* text accompanying notes 3–5.

115. *See generally* JOHN ZMIRAK, WILHELM RÖPKE: SWISS LOCALIST, GLOBAL ECONOMIST (2001).

116. *See id.*

> which people must possess before they go to the market and compete with each other.[117]

As we have seen, the contributors to *Moral Markets* agree with Röpke insofar as he identifies virtue as essential to the free market's successful operation.[118] Yet, without mentioning Röpke by name, a number of the contributors part company with him over the market's ability to foster or maintain the prerequisite of virtue. Instead, they assert that the free market supports, if not generates, the virtues and values necessary for its existence.[119] Because the market rewards honesty, fairness, integrity, and other virtues (via an increased volume of business), the market inculcates and promotes these virtues.[120] Additional support comes from the internal development of private institutions that provide third-party monitoring of virtue, as the existence of these institutions further incentivizes correct conduct.[121]

As previously discussed within the context of natural selection, this reasoning fails to consider whether the market rewards true virtue as opposed to merely the appearance of virtue.[122] Barring the advent of an accurate crystal ball, the market cannot directly ascertain a participant's moral makeup, but must instead rely upon external signs of morality—signs that potentially could be mimicked. Thus, it could very well be the case that markets do not promote virtue, but rather promote

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117. RÖPKE, *supra* note 19, at 125.

118. *See supra* Part III.

119. *See* Zak, *supra* note 21, at xvii ("Markets are moral in two senses. Moral behavior is necessary for exchange in moderately regulated markets, for example, to reduce cheating without exorbitant transactions costs. Market exchange itself can also lead to an understanding of fair exchange and in this way build social capital in non-market settings."); *see also* Carl Bergstrom et al., *Building Trust by Wasting Time*, *in* MORAL MARKETS, *supra* note 9, at 142, 142 ("We argue that markets need not *rest upon* values that arose before them; instead, markets may *create* the values that allow them to function effectively."); William D. Casebeer, *The Stories Markets Tell: Affordances for Ethical Behavior in Free Exchange*, *in* MORAL MARKETS, *supra* note 9, at 3, 12 ("Exchange environments afford incentives to develop and maintain moral standards."); David Schwab & Elinor Ostrom, *The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies*, *in* MORAL MARKETS, *supra* note 9, at 204, 207 (discussing the advent and role of "trust-enhancing institutions" in market economies).

120. *See* Bergstrom et al., *supra* note 119, at 149.

121. *See* Schwab & Ostrom, *supra* note 119, at 207 (discussing the advent and role of "trust-enhancing institutions" in market economies).

122. *See supra* text accompanying notes 80–83.

the simulacrum of virtue.[123] Consideration of this possibility would have improved *Moral Markets*.

Nevertheless, both Röpke's work and *Moral Markets* likely contain elements of truth. As the market economy is situated within a broader societal framework, it stands to reason that the values present in the market would come, or at least derive in part, from society at large. Similarly, the free market does appear to reward, to a degree, many of the virtues identified as such.[124] For even if one can reap many of these same rewards by merely appearing virtuous, one of the most effective ways to appear virtuous is to, in fact, behave virtuously.[125]

There is, however, a darker proposition that none of the contributors to *Moral Markets* tackle: that the market economy actually consumes the virtues it relies upon. This argument proceeds as follows: Businesses in market economies are dependent upon sales to succeed; marketing and advertising are employed to increase sales; marketing and advertising encourage greater consumption; the desire for greater consumption fuels a desire for greater wealth; and the desire for greater wealth leads to a

123. Some may wonder whether this distinction is relevant; does it really matter *why* someone is behaving in a virtuous manner, so long as his conduct comports with virtuous behavior? It matters for at least three reasons. First, to argue that the free market promotes virtue is rhetorically quite powerful and serves to place a halo over the heads of market participants and the market's defenders. For it suggests that the free market best serves not only our economic interests, but broader social interests as well—a suggestion not lost upon the editor of *Moral Markets*, Paul Zak. *See* Zak, *supra* note 21, at xvii ("Market exchange itself can also lead to an understanding of fair exchange and in this way build social capital in non-market settings."). Second, someone who is mimicking virtue may decide, at some point in time, to "cash in" on his virtuous reputation by taking advantage of his counterparties in one final transaction. Consider the recent example of Bernard Madoff, who enjoyed a sterling reputation until his arrest. *See* Jenny Strasburg, *'Dr. Doom' Didn't Predict Madoff Blowup*, WALL ST. J., Dec. 31, 2008, at C1 (quoting Henry "Dr. Doom" Kaufman on Madoff: "You ask yourself, how could that happen? He was a reputable individual."). An individual who is truly (intrinsically) virtuous is, by definition, unlikely to do such a thing. *Cf.* AQUINAS, *supra* note 34, at I-II, Q. 55, art. 1 (defining virtue as the "habit" of doing good). Third, to the extent that we care about individual happiness and flourishing, and to the extent that we accept Aristotelian philosophy, happiness and flourishing can only be achieved by living a life of *actual,* as opposed to misrepresented, virtue; thus it matters whether the market promotes the former versus the latter. *See supra* text accompanying note 32.

124. *See supra* text accompanying notes 41–42.

125. *Cf. supra* note 123.

materialistic, dollar-driven culture.[126] So, what might start out as the opening of a shoe shop to *fulfill* a pre-existing need (namely, the need for shoes) transforms, over time, into an enterprise that attempts to *create* illusory needs via marketing and advertising for heretofore unnecessary goods and services (hence, for example, the phenomenon of ever-changing styles to encourage the purchase of additional clothing and accessories before one's existing wardrobe has been worn out). To profit by fulfilling a neighbor's needs is indeed "other-regarding" behavior (at least in part); to profit by convincing one's neighbor that he needs an unnecessary item is not other-regarding at all. Add to this the sale and promotion of harmful goods and services that people most certainly do not need, but might want or be made to want (for example, cigarettes and tanning salons), and we have moved even further away from commercial exchange as an exercise in virtue. So what might have started as a desire to profit by serving one's neighbor quickly grows into a desire to profit at the expense of one's neighbor.[127] Thus, as explained by economist Basant Kapur, market economies appear ultimately to undermine the very virtues that *Moral Markets* identifies as prerequisites to the successful functioning of the economy:

> [T]here is an inherent long-term contradiction in the capitalist system, namely, the mentality of self-interest that it tends to engender, or perhaps facilitate, due to growing affluence, becomes, over time, increasingly pervasive in society, and eventually undermines the institutional framework that is necessary for the success of capitalism.[128]

Kapur cites to others who have made similar observations:

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126. *Cf.* Patricia Donohue-White, *Controversy: Does the Free Market Undermine Culture? A Response to D. Eric Schansberg,* 2 J. MARKETS & MORALITY 132, 133 (1999) (arguing that markets give rise to certain virtues as well as "corresponding vices").

127. Some commentators are heralding an "entirely new stage of capitalism" referred to as "capitalism with a conscience." SISODIA, *supra* note 43, at 30. To them, twenty-first century society demands, and businesses are recognizing, the need for "a more human face for capitalism" based on "environmental integrity and the needs of people rather than on the contrived needs of companies (narrowly defined as maximizing profits)." *Id.* Although there is some evidence of this, there is also much evidence to the contrary; only time will tell whether we are truly in such a "new stage."

128. Kapur, *supra* note 13, at 46.

> Sociologist Daniel Bell maintains that our society comprises two conflicting sets of values. On the one hand, there are the values of the Puritan ethic: hard work, thriftiness, and sobriety, these are the values upon which capitalism was built. On the other hand, there are the values of hedonism: immediate gratification, personal pleasure, and expressiveness, these are the values of corporate capitalism, *working to undermine the very values that made capitalism a success*. . . . Sociologist Robert Bellah also blames capitalism. It used to be that the Protestant ethic ruled the land, holding society together. Capitalism, with its "get-ahead" individualism, destroyed the social fabric by releasing the individual from the grasp of kinship, community, and inherited status.[129]

Although the contributors of *Moral Markets* do not confront this dilemma, some of them do acknowledge that economics and business school training tends to diminish other-regarding behavior.[130] Herbert Gintis and Rakesh Khurama bluntly state that "current business school teachings socialize students into an ethic of selfishness and limited accountability."[131] It seems, therefore, that merely proffering the *Homo economicus* model gives rise to its existence; if we teach and believe that individuals are self-interested wealth-maximizers, we become and create individuals that are self-interested wealth-maximizers.[132] And if, as *Moral Markets* contributor William Casebeer points out, the "story" of capitalism conjures up images of "selfish and insensitive robber barons,"[133] that too will have profound societal consequences. For Casebeer asserts that "stories"—how an individual or society packages an idea—are "foundational to thought."[134] Conceding that some might consider this theory a "stretch," Casebeer proceeds to point out that there is

129. *Id.* (alteration in original) (citation omitted).

130. *E.g.*, Frank, *supra* note 51, at 54 ("[E]conomics training—both its duration and content—affects the likelihood that undergraduate students will defect in prisoner's dilemma games."); Richerson & Boyd, *supra* note 56, at 117 ("Some business management scholars believe that the influence of neoclassical economists with their rational-selfish models and intuitions has crowded out the moral hidden hand in the behavior of management school graduates.").

131. Herbert Gintis & Rakesh Khurana, *Corporate Honesty and Business Education: A Behavioral Model*, in MORAL MARKETS, *supra* note 9, at 300–01.

132. *See id.*

133. Casebeer, *supra* note 119, at 3.

134. *Id.* at 6.

"*ample* evidence that stories influence our ability to recall events, motivate people to act, modulate our emotional reactions to events, cue certain heuristics and biases, structure our problem-solving capabilities, and ultimately, perhaps, even constitute our very identity."[135]

This discussion—namely, how our *understanding* of the free market affects our conduct—is removed from the potential role that free market plays in undermining virtue. *Moral Markets* would have benefited from such a discussion.

## V. POLICY IMPLICATIONS

*Moral Markets* does not overlook the implications that flow from its findings and conclusions. Once one departs from the *Homo economicus* model of human behavior, numerous policy considerations present themselves. These considerations largely revolve around the use of law and policy "as a means of reinforcing values which are internally motivated."[136] The better we understand these values (in terms of their substance and their importance), the more we may improve the public and private "institutions that support markets."[137]

The significance of this understanding is difficult to overestimate. Coercion (economic or otherwise) has serious limitations in its ability to deter wrongdoing and protect the innocent. A society that understands the moral dimension of human nature, however, frees itself from these limitations; such a society has access to a broader array of tools with which to influence desirable individual behavior.

We should first pause to consider why coercive solutions to undesirable behavior are so often unsatisfactory. For starters, most law is reactionary, passed in reaction to some specific wrongdoing in an effort to prevent a recurrence of such wrongdoing.[138] Consequently, the reach of such laws is largely limited to the particular acts of wrongdoing addressed. Moreover, even the most forward-looking legislation cannot sufficiently foresee the myriad ways that an individual might evade

135. *Id.*

136. Goodenough & Cheney, *supra* note 88, at xxiii.

137. *See id.* at xxiii–iv.

138. *See, e.g.,* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and elsewhere).

its dictates; because the creativity of fraudsters is seemingly inexhaustible, we can be sure that someone, somewhere, someday will find a way to circumvent both the letter and the spirit of any law passed to deter circumscribed misconduct.[139] For this and other reasons, the use of law to curtail wrongdoing—although undoubtedly essential—suffers from serious and problematic limitations regarding both efficacy and desirability:

> Even in an ideal world with perfectly unbiased decision-making processes, legal sanctions can never be made sufficiently precise to deter or condemn all undesirable activity because we lack perfect information and cannot perfectly define or adjudicate undesirable activity. Trying to eliminate those imperfections in information and adjudication would be not only unfeasible and costly but also undesirable in principle because of the harms that perfect surveillance would impose. Even if we could eliminate imperfect information by constantly videotaping everyone at zero financial cost, we probably would not find it worth the harm to privacy and the resulting deterrence of innovation and desirable spontaneous interaction.[140]

For similar reasons, financial incentives and disincentives based upon a regime of material punishments and rewards have demonstrated themselves to be limited in their ability to influence human behavior.[141] Taken together, this explains the difficulty in relying on solutions proffered from legal, economic, and law and economics perspectives alone.

On the other hand, policy prescriptions based upon an understanding of individual morality offer great promise. As Goodenough and Cheney note in *Moral Markets*, "[v]alues-

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139. This is abundantly clear from the spate of corporate scandals that have broken since the enactment of the Sarbanes-Oxley Act (designed to address corporate fraud in the wake of the Enron scandal, *see supra* note 6): the market-timing scandal, the late-trading scandal, the research analysts scandal, and the options-backdating scandal, in addition to the fraud of unprecedented scale allegedly committed by Bernard Madoff. *See generally*, Brown, *supra* note 2; Nancy Kestenbaum et al., *When is Dating Illegal? Stock Options Investigations: Cases and Issues*, B-1599 PLC/CORP 27 (2007) (discussing stock option backdating); Edwin G. Schallert, *Variable Annuities and Enforcement Issues*, A-893 PLI/COMM 487 (2007) (discussing market timing and bid-rigging).

140. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 748 (2005) (footnotes omitted).

141. *Cf.* Kapur, *supra* note 13, at 37 (noting that the self-interest model generates errors when attempting to predict human behavior).

based approaches, where they work, provide private, internal institutions that come at a far lower monetary cost than governmentally enforced laws and other externally enforced institutions."[142] Richerson and Boyd echo these sentiments, writing that "[b]usinesses and other modern organizations are complex cooperative systems that function best when the moral hidden hand is operating most freely."[143]

Other implications follow as well. As Richerson and Boyd observe, "attempts to control individual behavior by the use of power to set up incentives designed to appeal to selfish motives risk 'crowding out'" the "moral hidden hand" of values at work.[144] In other words, not only are the typical solutions derived from law and economics fundamentally limited for the reasons set forth above, but, moreover, such solutions could actually interfere with the natural operation of virtue and morality. Zak provides a stunning and concrete example of this—one that is most counterintuitive to those reared on law and economics reasoning:

> In a recent experiment at two day care centers in Israel, both with a rule in place that parents must pick up their children no later than 4:00 PM, one imposed a fine of $3 for each time the child was picked up late. The other simply depended on the parents' following the rule with no sanction for failing to do so. At the center that imposed a fine, parents' mind-set apparently changed; the fine seemed to remove the implicit social sanction associated with being late, because now one just had to pay a penalty. Over a three-week period, the day care center with the fine saw twice as many parents arriving late, and the proportion of latecomers remained steady thereafter . . . .[145]

Zak concluded that "[t]he lesson . . . is that oversight and penalties may crowd out the good behaviors that most people, most of the time, follow."[146] This is not to say that financial

142. Goodenough & Cheney, *supra* note 88, at xxiv; *see also* Regan, *supra* note 59, at 970–71 (explaining that values-based approaches to ethics trigger an individual's natural moral responses, whereas external strictures do not).

143. Richerson & Boyd, *supra* note 56, at 118.

144. *Id*. at 116.

145. Zak, *supra* note 41, at 265; *accord* Regan, *supra* note 59, at 973 (noting how the presence of extrinsic sanctions can cause an individual to substitute his or her moral reasoning with cost-benefit calculations).

146. Zak, *supra* note 41, at 265.

disincentives (and the threat of other forms of punishment) do not play a role in the proper ordering of our economy (and our society as a whole), for they certainly do; "[t]he trick is to get the balance right."[147]

In addition to the efficacy of appealing to human values and the potential for undermining such appeals through economic-coercive disincentives, a third policy implication flows from the data presented in *Moral Markets*: society's need to protect and promote human virtue, as a critical component of our free market economy.[148]

Although, as the contributors to *Moral Markets* point out, human values are an innate, evolutionary, biological phenomenon,[149] human beings are a complex mix of both nature and nurture.[150] Our culture, upbringing, and training play an important role in the development and transmission of our values.[151] In short, "values can be learned."[152] This suggests that values should be taught. In the concluding essay to *Moral Markets*, titled *Corporate Honesty and Business Education*, Herbert Gintis and Rakesh Khurana suggest this very thing.[153] They suggest that:

> [B]usiness schools should develop and teach a professional code of ethics similar to that promoted in law, education, science, and medicine; that the staffing of managerial positions be guided by considerations of moral character and ethical performance; and that a corporate culture based on character virtues, together with stockholder-managerial relationships predicated in part on reciprocity and mutual

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147. Richerson & Boyd, *supra* note 56, at 116.

148. *See supra* Part III.

149. *See supra* Part II.

150. *See supra* text accompanying notes 83–86.

151. *See id.* As James Q. Wilson eloquently put it:

> Mankind's moral sense is not a strong beacon light, radiating outward to illuminate in sharp outline all that it touches. It is, rather, a small candle flame, casting vague and multiple shadows, flickering and sputtering in the strong winds of power and passion, greed and ideology. But brought close to the heart and cupped in one's hands, it dispels the darkness and warms the soul.

WILSON, *supra* note 8, at 251.

152. Zak, *supra* note 41, at 270; *see also* SISODIA, *supra* note 43, at 197–234 (addressing the ability of firms to influence the behavior of their members via the establishment of a corporate "culture").

153. *See* Gintis & Khurana, *supra* note 131.

> regard, could improve both the moral character of business and the profitability of corporate enterprise.[154]

Enhancing the prospects of such proposals' success is that virtue and morality are already part of humanity's makeup.[155] Thus, these proposals are not attempting to create something new out of whole cloth, but rather, more modestly, they are attempting to draw out and reinforce pre-existing human tendencies.[156]

Of course, the promotion of virtue need not stop with education alone—the law itself can play a role here.[157] This is not a possibility that the contributors of *Moral Markets* examine at length, although some of them do touch upon it.[158]

In sum, therefore, in confronting misconduct in the marketplace, we need not limit ourselves to a set of solutions that is imperfect and incomplete at best. Instead, policymakers can take into account both the moral promise and the moral shortcomings of modern men and women, affording access to important supplementary solutions to the problems affecting contemporary capitalism and society. And such moral solutions, predicated upon our knowledge and understanding of human morality, arguably hold far greater potential, as they could remedy not only the wrongdoings specifically identified as problematic, but also future, unrelated wrongdoings.[159] This strongly suggests that society ought to undertake independent measures to shore up humanity's moral capital by inculcating virtue as best and most appropriately it can. Lastly, we ought to be careful not to undermine virtue by reliance on methods and solutions that impair its operation.

## CONCLUSION

*Moral Markets* has been published in the wake of several corporate scandals and at the beginning of what appears to be a major global economic recession. Its timing could not be better.

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154. *Id.* at 301.
155. *See id.*
156. *See id.*
157. *See, e.g.,* ROBERT P. GEORGE, MAKING MEN MORAL (1993); BUDZISZEWSKI, *supra* note 36, at 44–48.
158. *See* Erin Ann O'Hara, *Trustworthiness and Contract*, *in* MORAL MARKETS, *supra* note 9, at 173, 173; Stout, *supra* note 9, at 170.
159. *See id.*

As criticism of the free market economy escalates, those who would attack the market economy, those who would defend it, and everyone in between need to understand how markets really work and how people really act. *Moral Markets* sheds new light on these two questions and, in doing so, challenges much of the conventional wisdom. Given its important subject matter, its short length, and its superb readability, there are few good excuses for not reading this book.

Additionally, *Moral Markets* helps resituate the science of economics where it belongs: within the larger framework of moral philosophy. People and societies are human beings and cultures first, consumers and economies second. *Moral Markets* makes clear not merely that this is how things should be, but also how things actually are. Generations of law and economics scholars have obscured this fact (in the academy, at least), and have given rise to the myth, if not the subspecies, of *Homo economicus. Moral Markets* is the most significant effort taken to date to dispel this myth. In short, *Moral Markets* reminds us that our planet is, and cautions us that it had better remain, populated not by *Homo economicus*, but by *Homo sapiens.*