

BUYING GOODS AND DOING GOOD: TRADEMARKS AND SOCIAL COMPETITION

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ABSTRACT	980
INTRODUCTION	980
I. SOCIAL COMPETITION OVER MATERIAL POSSESSIONS.....	983
II. CONSEQUENCES OF SOCIAL COMPETITION OVER MATERIAL POSSESSIONS	987
III. DISCOURAGING CONSUMPTION-BASED COMPETITION THROUGH REGULATION.....	994
IV. COMPETITIVE ALTRUISM AS AN ALTERNATIVE TO CONSUMPTION- BASED COMPETITION.....	997
V. DISCOURAGING CONSUMPTION-BASED COMPETITION	1002
VI. ENCOURAGING COMPETITIVE ALTRUISM.....	1009
CONCLUSION.....	1016

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ABSTRACT

This Article focuses on social competition and the role of the legal system in regulating it. While competition for status is universal, the values that confer status differ greatly across cultures and over time. In contemporary Western societies, material possessions serve as one of the most important determinants of personal status. This social reality results in consumption being a significant site of social competition.

Yet, competition over who can consume the most comes at a high price in both environmental and human terms. It also imposes high costs for those who engage in it, both winners and losers. Consumption-based competition emerges as an instance of the prisoner's dilemma: while society would be better off if consumption races stopped, rational individuals do their best to excel in these races so long as they continue. This Article proposes using trademark law to undermine excessive social competition over consumption and channel interpersonal competition toward socially beneficial goals. Specifically, it proposes encouraging "competitive altruism"—a tournament over good deeds that can yield benefits for its participants as well as society at large. It envisions this tournament as a partial replacement for competition over consumption, particularly the wasteful kind, and posits a system of "ethical consumption signs" to help bring this about.

And there is, deep down within all of us, an instinct. It's a kind of drum major instinct[—]a desire to be out front, a desire to lead the parade, a desire to be first. . . . We all want to be important, to surpass others, to achieve distinction. . . . [D]on't give up this instinct. It's a good instinct if you use it right. . . . Keep feeling the need for being first. But I want you to be first in love, I want you to be first in moral[] excellence. I want you to be first in generosity. That is what I want you to do.

— Martin Luther King, Jr.¹

INTRODUCTION

Every reader is familiar with minor movie stars and wannabes who parade in front of photographers wearing furs, sometimes borrowed, and luxury cars, often rented. We are all familiar, as well, with everyday pressures to "keep up with the Joneses" and one-up our rivals at work by

1. Dr. Martin Luther King, Jr., *The Drum Major Instinct* (Feb. 4, 1968), <http://www.thekingcenter.org/archive/document/drum-major-instinct-ebenezer-baptist-church> (internal quotation marks omitted).

appearing wealthier, better dressed, and more thoroughly equipped with the latest technological innovations than we really are and need to be. This Article explores the role of the legal system in supporting and spurring this form of consumer arms race. While the human tendency to compete for high status is universal, the forms such competition takes vary greatly from one social group to another. One of the most prominent forms of social competition in today's Western societies revolves around material possessions. Consumption races come at a high cost in terms of slave labor in developing countries, environmental destruction, and animal abuse. They impose costs on their participants as well, resulting in misallocation of resources, reducing personal well-being, and conveying connotations of self-interest and coldness in interpersonal relations.

All types of social competition necessitate a reliable signaling system. In particular, competition over economic status requires wealth-connoting signs that are easy to demonstrate and difficult to fake. But consumption-based competition finds itself in a constant tension with technological progress. Sooner or later, developing technologies enable the imitation of virtually any symbol of wealth, condemning it to obsolescence. Thus, for instance, gold, diamonds, furs, and other expensive materials largely lost their capacity to signal high status as soon as their cheap imitations became indistinguishable from the original.

Contemporary imitation technologies develop so quickly that new status symbols often hardly enjoy a meaningful period of exclusivity, and reliable signals of wealth are therefore increasingly difficult to craft. It is against this backdrop that brands have evolved into today's main symbols of economic status. Although counterfeits of luxury brands are available on the market, the legal protection against imitation enables brand owners and marketers to keep their volume low. In addition, the illegal status of counterfeits makes them a dubious choice for both the risk-averse and the morally concerned consumer. Accordingly, in Western countries, counterfeits remain the exception rather than the rule, allowing brands to serve as reliable symbols of economic status.

The legal system currently plays a crucial role in the arena of social competition for economic status. Without prohibitions against imitation, trustworthy signals of wealth would be difficult to create and maintain. This kind of legal protection is undesirable. Given the significant drawbacks of consumption-based competition, there is little reason to secure it through legal tools. This Article therefore suggests that imitations of luxury brands that do not confuse the immediate consumer should be allowed.

Consumers often willingly purchase such imitations with the intention of convincing others that they own the genuine article. This type of confusion should not be considered a legal wrong. Consumers who are

willing to buy a counterfeit article should be able to do so in a reliable shopping environment and without the legal jeopardy that accompanies participation in a counterfeit operation. Adopting this approach is likely to increase counterfeit brand consumption, ultimately destroying the status-signaling capacity of luxury brands and obstructing consumption-based competition.

Once the legal system ceases protecting status symbols in this fashion, consumption-based competition would be difficult to conduct. Although owning large swaths of land, luxury yachts, or private jets may still serve as reliable indicators of wealth, opportunities to demonstrate them in public are relatively rare. Any material status symbol that is easy to produce and display in public will be quickly copied and become obsolete. Ultimately, there will be no incentive to display and, consequently, to produce either symbols of economic status or their imitations. Under these circumstances, social competition will ineluctably take another turn.

A highly advantageous form of social competition is a tournament for good deeds. The social phenomenon of competitive altruism has indeed been extensively documented. In contrast to consumption-based competition, competitive altruism introduces many positive rather than negative externalities, including enhanced self-esteem, life satisfaction, physical and mental health, and longevity. Unlike consumerism, helping others improves interpersonal relations, promoting trust, willingness to help, and moral behavior. Given the benefits of competitive altruism, using legal tools to promote it is very good policy.

As a first step, I propose promoting altruism in the arena of consumption. Such a step would be an easy one because much social competition currently takes this form. More specifically, my suggestion is to promote competition around ethical dimensions of consumption, such as ecology, human rights, and humane animal treatment. This would require a signaling system that provides the consumer with easily grasped, reliable information about the ethical parameters of products, as a few marketers do now. In addition, to be able to serve as signals of status, signs related to the ethical dimensions of a product should be legally protected against fakery, just like brands are today.

The Article proceeds as follows. Part I describes the phenomenon of social competition over material possessions. Part II outlines the deleterious consequences that accompany the phenomenon. Part III argues that consumption-based competition should be discouraged and overviews scholarly proposals for possible ways of doing so. Part IV suggests competitive altruism as a viable alternative to competitive consumption, arguing that legal tools may be used to shift the societal focus from consumption to altruism. To this extent, the legal system should discourage

consumption-based competition while encouraging competitive altruism as a replacement.

Part V suggests modifying trademark law so as to disempower symbols of economic status, thereby curtailing social competition over wealth. Part VI suggests how a system of signs similar to trademark, which would provide information on the ethical dimensions of products, could encourage competitive altruism. A conclusion summarizes the argument and reviews the reasons supporting reform.

I. SOCIAL COMPETITION OVER MATERIAL POSSESSIONS

Competition is an innate characteristic of every human society.² The struggle to improve one's relative position is commonly explained in evolutionary terms of competition for limited resources.³ The desire for status appears to be a near-universal human characteristic.⁴ Indeed, high status may bring respect and admiration, facilitate access to physical assets, increase one's power and influence in social relations, and improve one's mating opportunities.⁵ In addition, individuals evaluate their own abilities, build their self-image, and acquire self-confidence through a constant process of comparison to others.⁶ Social position is a significant factor of human well-being. One's perceived status has been found to affect biochemical processes in the nervous system and in reward-related brain areas.⁷ In addition, social status correlates strongly with one's physical and mental health.⁸

While competition for status is universal, qualities that are socially valued, and consequently status enhancing, vary greatly across cultures, social settings, and over time.⁹ Thus, a person's relative position in a social group may be a function of factors as diverse as caste, skin color, number

2. See James E. Driskell & Brian Mullen, *Status, Expectations, and Behavior: A Meta-Analytic Review and Test of the Theory*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 541 (1990); Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31 (1962); H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q. J. ECON. 183 (1950).

3. Vladas Griskevicius et al., *The Evolutionary Bases for Sustainable Behavior: Implications for Marketing, Policy, and Social Entrepreneurship*, 31 J. PUB. POL'Y & MARKETING 115, 117 (2012).

4. *Id.* at 120.

5. Driskell & Mullen, *supra* note 2, at 541–42; Bernardo A. Huberman et al., *Status as a Valued Resource*, 67 SOC. PSYCHOL. Q. 103, 104–05 (2004).

6. Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117, 118–19 (1954).

7. Keise Izuma et al., *Processing of Social and Monetary Rewards in the Human Striatum*, 58 NEURON 284, 284 (2008).

8. ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 142–43 (1999).

9. ALAIN DE BOTTON, *STATUS ANXIETY* 175 (2004); Rob M.A. Nelissen & Marijn H.C. Meijers, *Social Benefits of Luxury Brands as Costly Signals of Wealth and Status*, 32 EVOLUTION & HUM. BEHAV. 343, 352 (2011).

of children, religiosity, virtue, physical power, cooking skills, sense of humor, education, social relations, and wealth.¹⁰ These values develop in complex social dynamics that include a great deal of randomness. One study demonstrated the arbitrariness of status-enhancing social values by crowning some participants as “stars” based on their performance in a transparently meaningless quiz. In an exchange game that followed, those “stars” received considerably better suggestions—i.e., enjoyed higher status—than other participants.¹¹

Being part of a society or a group, individuals naturally absorb the group’s values as reliable indicators of personal worth and are generally unaware of their arbitrariness.¹² Moreover, since purposeful actions to enhance one’s status are condemned in most social settings, individuals tend to underestimate these motives in their everyday behavior.¹³ Therefore, as individuals invest efforts in striving to improve or preserve their status, they usually believe themselves to be engaging in activities of objective and incontrovertible value.¹⁴

Throughout human history, material possessions have served as an important measure of social status and value.¹⁵ This is hardly surprising, given that scarcity of food and other essential resources were for centuries among the major challenges that human society faced, hence material possessions greatly improved one’s prospects of survival.¹⁶

To participate successfully in a social competition based on possessions, simply accumulating property is obviously not enough—people need ways of signaling their wealth to others.¹⁷ By the same token, signals of wealth must be difficult to falsify since the incentive to cheat and acquire high status is great.¹⁸ For that reason, human societies have developed various practices designed to demonstrate an individual’s ability to sacrifice valuable assets.¹⁹ Examples include building extravagant

10. DE BOTTON, *supra* note 9.

11. See Sheryl B. Ball & Catherine C. Eckel, *Stars Upon Thars: Status and Discrimination in Ultimatum Games* (Jan. 15, 1998) (unpublished manuscript), <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.130.2412>.

12. George Loewenstein & Karl Moene, *On Mattering Maps*, in UNDERSTANDING CHOICE, EXPLAINING BEHAVIOUR: ESSAYS IN HONOUR OF OLE-JØRGEN SKOG 153–75 (Jon Elster et al. eds., 2006).

13. *Id.*

14. *Id.*

15. Griskevicius et al., *supra* note 3, at 120.

16. Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AM. ECON. REV. 137, 138 (2005).

17. THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 24 (Dover Publ’ns 1994) (1899) (“In order to gain and to hold the esteem of men it is not sufficient merely to possess wealth or power. The wealth or power must be put in evidence, for esteem is awarded only on evidence.”).

18. Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 799–800 (2012).

19. Griskevicius et al., *supra* note 3, at 120.

structures (such as pyramids), keeping collections of rare objects,²⁰ gift-giving customs, and even destruction rituals.²¹ Animals display similar behavior, as with peacocks strutting their otherwise useless tails as signals of reproductive fitness.²²

At times, ostentatious displays of wealth became subject to state regulation. Attempts to control material-status manifestations in order to avoid misrepresentation, preserve social hierarchy, and prevent wasteful spending date back to ancient Greece²³ and Rome.²⁴ For instance, Roman law only allowed citizens to wear a toga—the augurs to wear a saffron variety, and consuls to wear one with purple stripes, the number indicating their rank.²⁵ “Sumptuary laws” of this kind became common in Europe and Asia in the Middle Ages²⁶ but fell by the wayside with the advent of the Industrial Revolution and the democratization of the Western world.²⁷ The resulting reality of social mobility enabled individuals to improve their inborn social status by accumulating capital.²⁸

Studying exhibitions of affluence by economic elites in late-nineteenth-century Europe and America, the sociologist Thorstein Veblen famously coined the term “conspicuous consumption.”²⁹ But it was not until the mid-twentieth century that conspicuous consumption ceased to be a prerogative of elites and turned into a widespread social phenomenon across the Western world. Television advertisements promoting the vision of social advancement through consumption, combined with evolving technologies of mass production, paved the way for an increased demand for status-conferring goods.³⁰

Until this day, wealth remains one of the central objects of social competition among all layers of Western society.³¹ In this social climate, no

20. *Id.*

21. MARCEL MAUSS, *THE GIFT* 71–78 (W.D. Halls trans., Routledge 1990) (1954).

22. AMOTZ ZAHAVI & AVISHAG ZAHAVI, *THE HANDICAP PRINCIPLE: A MISSING PIECE OF DARWIN'S PUZZLE* 82–83 (1997).

23. Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 115 (Peter K. Yu ed., 2007).

24. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 *HARV. L. REV.* 809, 810–11 (2010).

25. AILEEN REBEIRO, *DRESS AND MORALITY* 22, 29 (1986).

26. See Beebe, *supra* note 24, at 811.

27. ALAN HUNT, *GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW* 39 (1996).

28. Georgios Patsiaouras & James A. Fitchett, *The Evolution of Conspicuous Consumption*, 4 *J. HIST. RES. MARKETING* 154, 156 (2012).

29. *Id.* at 154.

30. *Id.* at 161.

31. See generally, e.g., FRANK, *supra* note 8; GEOFFREY MILLER, *SPENT: SEX, EVOLUTION, AND CONSUMER BEHAVIOR* (2009); JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* (1998); Nelissen & Meijers, *supra* note 9, at 343

one is entirely free to refrain from participating in this type of competition. As Robert Frank convincingly argues, individual attempts to improve one's status through consumption shape social reality for everyone.³² For instance, individuals buying larger cars while competing with their acquaintances may create a trend toward an increased car size. Failing to follow this trend may result in not only a diminished social status, but also a higher risk of being killed in a collision.

Similarly, by purchasing an expensive suit in order to impress potential employers, individuals create a new standard under which everyone wishing to get a job must spend more money on an outfit.³³ As mentioned, people tend to internalize values that social competition reinforces and are usually unaware of their own status-seeking motives. Thus, while performing acts of conspicuous consumption, they may believe that they genuinely need a larger car, new clothes, or the latest cell phone.³⁴ Moreover, the act of consumption itself is often perceived in terms of pleasure and self-reward.³⁵ The prominence of social competition over wealth thus promotes and strengthens the cultural significance of consumption, and there is indeed much evidence that Western societies are highly materialistic.³⁶

("Contemporary consumer culture can be characterized by its primacy on material expenditure as a means of establishing and defining social relationships.")

32. See Frank, *supra* note 16, at 139–41; Robert H. Frank, *The Frame of Reference as a Public Good*, 107 *ECON. J.* 1832, 1844 (1997) [hereinafter Frank, *The Frame of Reference*]; Robert H. Frank, Are Positional Externalities Different from Other Externalities? 1–2, 15 (unpublished manuscript), <http://www.brookings.edu/gs/events/externalities.pdf> [hereinafter Frank, *Are Positional Externalities Different from Other Externalities?*].

33. Frank, *The Frame of Reference*, *supra* note 32, at 31; Frank, *Are Positional Externalities Different from Other Externalities?*, *supra* note 32, at 1.

34. Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 42–43 (1992).

35. See, e.g., Peter H. Bloch & Grady D. Bruce, *Product Involvement as Leisure Behavior*, 11 *ADVANCES CONSUMER RES.* 197 (Thomas C. Kinnear & Ann Arbor eds., 1984); Elizabeth C. Hirschman & Morris B. Holbrook, *Hedonic Consumption: Emerging Concepts, Methods and Propositions*, 46 *J. MARKETING* 92 (1982); Morris B. Holbrook & Elizabeth C. Hirschman, *The Experiential Aspects of Consumption: Consumer Fantasies, Feelings, and Fun*, 9 *J. CONSUMER RES.* 132 (1982).

36. See BRUNO S. FREY & ALOIS STUTZER, *HAPPINESS & ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING* 29 (2002) ("The material standard of living is regularly mentioned by a majority of respondents as being one of the most important elements of well-being. Consumption has become one of the central activities of modern life."); Russell W. Belk & Richard W. Pollay, *Images of Ourselves: The Good Life in Twentieth Century Advertising*, 11 *J. CONSUMER RES.* 887, 887 (1985) ("[T]he . . . view, which defines the good life as an end rather than a means, and as focusing on the material rather than the spiritual world, appears to be increasingly prevalent in the values and aspirations of Americans."); Jean-Francois Bettingen & Marius K. Luedicke, *Can Brands Make Us Happy? A Research Framework for the Study of Brands and Their Effects on Happiness*, 36 *ADVANCES CONSUMER RES.* 308, 309 (2009) ("However, it is evident that American consumers accept the 'pursuit of happiness' since the Declaration of Independence in 1776 as a salient life goal and consumption as a central means for leveraging it."); Nelissen & Meijers, *supra* note 9, at 343; Robert J. Samuelson, *Shop 'Til We Drop?*, 28 *WILSON Q.* 22 (2004).

II. CONSEQUENCES OF SOCIAL COMPETITION OVER MATERIAL POSSESSIONS

From a social perspective, all types of status races are ultimately zero-sum games.³⁷ Since relative position is by definition scarce and cannot be shared by all members of society, competing investments in status-enhancing goods inevitably nullify each other.³⁸ This situation is analogous to military arms races that deadlock countries in perpetual and ultimately futile struggles.³⁹ Given the human predisposition towards competition, this result seems largely unavoidable. Yet, various types of social competition may differently affect the competing parties and the general public. Let us consider social competition based on consumption in this light.

A notable positive side of such competition is stimulation of economic growth and technological development.⁴⁰ When individuals jettison perfectly functioning devices in favor of more advanced ones,⁴¹ eagerly pursue ever faster changing fashion trends,⁴² and regard the shopping experience as intrinsically valuable,⁴³ this obviously benefits the marketing economy. On the darker side, spurring economic growth in this fashion introduces adverse consequences such as environmental pollution, destruction of natural resources, unethical employment practices, and animal abuse.⁴⁴

In addition, though intensive consumption might stimulate technological development and enable economic growth, it seems not to make people happier.⁴⁵ Research shows that once one acquires a certain amount of basic goods, additional consumption does not make one any happier.⁴⁶ “People who go to work in their overalls and on the bus are just

37. See Robert H. Frank, *How Not To Buy Happiness*, 133 DÆDALUS 69, 78 (2004); McAdams, *supra* note 34, at 5, 54–55.

38. McAdams, *supra* note 34, at 5, 54–55.

39. Frank, *supra* note 16, at 137–38, 140–44; Frank, *The Frame of Reference*, *supra* note 32, at 1841.

40. See GARY S. BECKER & KEVIN M. MURPHY, SOCIAL ECONOMICS 124–25 (2000); WERNER SOMBART, LUXURY AND CAPITALISM 113–14 (W. R. Dittmar trans., Univ. of Mich. 1967) (1913).

41. See ANNIE LEONARD, THE STORY OF STUFF 182–85 (2010).

42. See *id.*

43. See Bloch & Bruce, *supra* note 35.

44. See generally, e.g., LEONARD, *supra* note 41, *passim*.

45. Mihaly Csikszentmihalyi, *If We Are So Rich, Why Aren't We Happy?*, 54 AM. PSYCHOLOGIST 821, 821 (1999); J. Ian Norris & Jeff T. Larsen, *Wanting More than You Have and Its Consequences for Well-Being*, 12 J. HAPPINESS STUD. 877, 878 (2011).

46. See, e.g., David G. Myers, *The Funds, Friends, and Faith of Happy People*, 55 AM. PSYCHOLOGIST 56, 59 (2000). For a review, see Liselot Hudders & Mario Pandelaere, *The Silver Lining of Materialism: The Impact of Luxury Consumption on Subjective Well-Being*, 13 J. HAPPINESS STUD. 411, 415 (2012) (“After one’s basic needs are satisfied, additional income does little to advance one’s subjective well-being. In fact, a number of studies found a very weak or even negative relationship between *consumption* and subjective well-being.”).

as happy, on the average, as those in suits who drive to work in their own Mercedes.”⁴⁷

Moreover, materialistic values associated with consumerism have significant negative effects on one’s personal well-being. A large body of research has found that individuals focused on consumption and pursuit of wealth report lower life satisfaction, experience more negative and less positive emotions, spend more time being unhappy, and are less healthy, both physically and mentally.⁴⁸ Thus, while pursuing the “good life” through consumption, people actually stroll away from genuine happiness.

Further, consumption-based competition is often cited as a cause of resource misallocation.⁴⁹ It leads individuals to overinvest in status-enhancing goods—such as big houses, luxury cars, and high-end clothes—at the expense of less visible goods—such as health insurances, pension funds, and savings.⁵⁰ This misallocation problem is especially common among working class people and the poor, who invest significantly greater percentages of their resources in status goods,⁵¹ presumably because of the frustration and diminished sense of self-worth associated with low status.⁵² Under-investment in non-positional goods may naturally have especially dire consequences for those consumers.⁵³

Another misallocation problem stemming from status races is the overinvestment of time and energy in pursuing material possessions at the

47. DAVID LYKKEN, HAPPINESS: THE NATURE AND NURTURE OF JOY AND CONTENTMENT 17 (1999).

48. See, e.g., TIM KASSER, THE HIGH PRICE OF MATERIALISM 5–22 (2002); James E. Burroughs & Aric Rindfleisch, *Materialism and Well-Being: A Conflicting Values Perspective*, 29 J. CONSUMER RES. 348 (2002); Andrew N. Christopher et al., *Materialism, Defensive and Assertive Self-Presentational Tactics, and Life Satisfaction*, 26 J. SOC. & CLINICAL PSYCHOL. 1145 (2007); Todd B. Kashdan & William E. Breen, *Materialism and Diminished Well-Being: Experiential Avoidance as a Mediating Mechanism*, 26 J. SOC. & CLINICAL PSYCHOL. 521 (2007); Marsha L. Richins & Scott Dawson, *A Consumer Values Orientation for Materialism and Its Measurement: Scale Development and Validation*, 19 J. CONSUMER RES. 303 (1992).

49. See McAdams, *supra* note 34, at 20.

50. Robert H. Frank, *Envy and the Optimal Purchase of Unobservable Commodities: The Case of Safety*, in THE VALUE OF LIFE AND SAFETY 145, 146–49 (M.W. Jones-Lee ed., 1982); Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 786–87 (2009); Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 109 (1985).

51. JAMES S. DUESENBERY, INCOME, SAVING, AND THE THEORY OF CONSUMER BEHAVIOR 77 (1949); Abhijit V. Banerjee & Esther Duflo, *The Economic Lives of the Poor*, 21 J. ECON. PERSP. 141, 145–51, 163 (2007); Samuel Bowles & Yongjin Park, *Emulation, Inequality, and Work Hours: Was Thorsten Veblen Right?*, 115 ECON. J. 397, 398 (2005); Niro Sivanathan & Nathan C. Pettit, *Protecting the Self Through Consumption: Status Goods as Affirmational Commodities*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 564, 565, 569 (2010).

52. See DUESENBERY, *supra* note 51, at 28–32; Banerjee & Duflo, *supra* note 51, at 163; Bowles & Park, *supra* note 51; Sivanathan & Pettit, *supra* note 51.

53. Insaf Bekir et al., *(Deceptive) Status Seeking Strategies in France and Tunisia*, 45 J. ECON. ISSUES 717, 720 (2011) (“Several studies documented the fact that some individuals can deprive themselves and their families from very basic needs to satisfy status aspirations.”).

expense of non-material goods.⁵⁴ For instance, an individual may choose to work longer hours in order to buy a better car. Yet, once her acquaintances purchase similar cars, the relative advantage from the new car largely disappears.⁵⁵ Meanwhile, longer working hours undermine opportunities for leisure, personal development, and socializing with family and friends, which are much more significant components of well-being.⁵⁶

Another notable consequence of consumption races is envy. The reality of increasingly diminishing physical scarcity gave rise to the phenomenon of “luxury,” which refers to perceived rather than actual rarity.⁵⁷ When a large portion of the public associates a certain product with the privilege of belonging to a superior class, this product acquires the status of luxury and the ability to signal status.⁵⁸ To this extent, admiration and envy from non-owners are crucial elements of luxury.⁵⁹ These sentiments naturally stimulate willingness among non-owners to emulate the product. And since emulation has grown progressively easier with technological advances, creating and maintaining luxury is increasingly challenging. It is perhaps for this reason that in today’s marketplace, the notion of luxury comes to be identified with certain brands. Their current legal protection enables brands to embody the notion of scarcity. Indeed, luxury brands are said to “perform an illusion where actual scarcity is replaced by a perceived rarity.”⁶⁰

Accordingly, marketing experts admit that the core characteristic of luxury brands is not excellent quality, high price, or physical scarcity; the crucial feature of luxury brands is rather that they “must be desired by all but consumed only by the happy few.”⁶¹ To that end, advertising must

54. Sara J. Solnick & David Hemenway, *Are Positional Concerns Stronger in Some Domains than in Others?*, 95 AM. ECON. REV. 147, 149–50 (2005).

55. Davidson, *supra* note 50, at 798.

56. *Id.* at 806; Samuelson, *supra* note 36, at 27 (“Meanwhile, over-consumption—homes that are too big, cars that are too glitzy—actually detracts from people’s happiness and society’s well-being . . . Striving to maximize their incomes, workers sacrifice time with family and friends—time that, according to surveys, they would prize highly.”); Solnick & Hemenway, *supra* note 54.

57. Bernard Catry, *The Great Pretenders: The Magic of Luxury Goods*, BUS. STRATEGY REV., Autumn 2003, at 10, 11 (“[E]xclusivity . . . [is] central to luxury appeal . . .”); Anita Radón, *Luxury Brand Exclusivity Strategies – An Illustration of a Cultural Collaboration*, 1 J. BUS. ADMIN. RES. 106, 107 (2012) (arguing that “luxury” has to “be widely desired and perceived as exclusive and scarce”).

58. Jean-Noël Kapferer, *Abundant Rarity: The Key to Luxury Growth*, 55 BUS. HORIZONS 453, 456 (2012) (explaining that a necessary characteristic of luxury is recognition by non-owners); Jean-Noël Kapferer & Vincent Bastien, *The Specificity of Luxury Management: Turning Marketing Upside Down*, 16 J. BRAND MGMT. 311, 319 (2009) (“In luxury, if somebody is looking at somebody else and fails to recognise the brand of his watch, and to *have an idea of* (know) the price that goes with it, part of its value is lost.”).

59. Kapferer & Bastien, *supra* note 58, at 314 (“The DNA of luxury, therefore, is the symbolic desire (albeit often repressed) to belong to a superior class . . .”); Radón, *supra* note 57.

60. Catry, *supra* note 57.

61. Radón, *supra* note 57; see Suraj Commuri, *The Impact of Counterfeiting on Genuine-Item Consumers’ Brand Relationships*, 73 J. MARKETING 86, 86 (2009) (“For [luxury] brands to be

convince as many consumers as possible that products of the brand are worth striving for, regardless of one's social position.⁶² Slogans such as “indulge yourself” and “because you're worth it”⁶³ illustrate this point; the product appears as something everyone should crave.⁶⁴ Accordingly, advertisements for luxury brands are usually directed towards the general public; in other words, far beyond their actual target group.⁶⁵

On the other hand, luxury brands must remain exclusive—that is, beyond the reach of most consumers.⁶⁶ Once a brand becomes accessible to large segments of the consuming public, it loses its luxury aura, stops serving as an object of envy, and thus may no longer communicate high status.⁶⁷ Marketing experts warn against the so-called “democratization” of luxury; since the middle class constantly gets richer, to remain its dream, luxury brands should always increase their prices beyond its members' reach.⁶⁸ In other words, the luxury brands industry essentially engages in the business of large-scale production of envy.⁶⁹

Envy, however, is a powerful negative emotion, associated with feelings of inferiority and injustice.⁷⁰ Envy plagues and torments people⁷¹:

perceived as such, they must be widely popular but not widely accessible.”); Kapferer, *supra* note 58, at 458 (“The brand, its products, and its prices must be known by many even though only a few should be able to buy.”).

62. Radón, *supra* note 57, at 106 (“Luxury intrigues and allures and the word is used in every other advertisement, often indicating something positive, something worth striving after, something worth desiring.”).

63. Both slogans are used by L’Oreal. See *id.* (indulge yourself); *Because You’re Worth It*, L’OREAL PARIS, <http://www.lorealparisusa.com/en/about-loreal-paris/because-youre-worth-it.aspx> (last visited Mar. 9, 2016).

64. Kapferer & Bastien, *supra* note 58.

65. Kapferer, *supra* note 58, at 458 (“To construct the dream, the luxury brand must communicate far beyond its actual target.”); Kapferer & Bastien, *supra* note 58 (“It is essential to spread brand and worth awareness far beyond the target group.”).

66. Commuri, *supra* note 61, at 87 (“Underlying such a thesis of signaling is the requirement that only a few consumers have access to the brand.”); Kapferer, *supra* note 58, at 459 (“[W]hen luxury brands are too mass-marketed and go after all consumers through the so-called democratization of luxury, they lose their cachet.”); Kapferer & Bastien, *supra* note 58, at 320–21 (explaining that brands that have targeted the middle-class consumers have lost their luxury appeal).

67. See Commuri, *supra* note 61, at 87; Kapferer, *supra* note 58, at 459; Kapferer & Bastien, *supra* note 58, at 320–21.

68. Kapferer, *supra* note 58 (suggesting that brand owners should “[a]lways increase the average price[, and s]ince the middle class gets richer, to remain its dream, the luxury brand should never trade down nor cut its prices”); Commuri, *supra* note 61, at 87 (“From a marketer’s standpoint, price premium plays a crucial role in communicating and preserving exclusivity and prestige, as well as keeping the brand out of mass consumption. . . . Prices of prestigious brands likely rise disproportionately in the face of growing spending power because of the necessity to maintain their distinction.”).

69. See, e.g., Niels Van de Ven et al., *The Envy Premium in Product Evaluation*, 37 J. CONSUMER RES. 984 (2011).

70. See, e.g., Hanna Majjala et al., *Feeling of ‘Lacking’ as the Core of Envy: A Conceptual Analysis of Envy*, 31 J. ADVANCED NURSING 1342, 1348 (2000) (“The results of this study [show that] [f]eelings of discomfort, dissatisfaction with oneself and comparison to others [are] related to envy”); Richard H. Smith & Sung Hee Kim, *Comprehending Envy*, 133 PSYCHOL. BULL. 46, 47

neuroscience research suggests that the experience of envy is largely equivalent to one of physical pain.⁷² The “green-eyed monster”⁷³ reduces the desire for friendship with the envied individuals and makes the envier unwilling to come to their aid. Envy can increase hostility, resentment, and unethical and sometimes even violent and criminal behavior.⁷⁴ A destructive emotion, envy often entails frustration with one’s own performance, low self-esteem, reduced life satisfaction, depressive tendencies, and even impaired mental health.⁷⁵ Moreover, since social and religious norms strongly condemn envy,⁷⁶ this emotion is likely to be suppressed and cause shame.⁷⁷

It might be argued that envy associated with consumption-based competition is not sufficient reason to deem this kind of competition overall socially undesirable. Following the logic of standard economic analysis, we should inquire whether the adverse consequences of envy may be counterbalanced by the positive emotions enjoyed by the envied individuals.

The human desire to arouse envy in others has indeed been historically well-documented.⁷⁸ In addition, psychological experiments reveal that some people are ready to give up significant amounts of money in order to be envied by others.⁷⁹ Nevertheless, being envied by others is a mixed

(2007) (“Definitions of envy emphasize that it is an unpleasant, often painful emotion characterized by feelings of inferiority, hostility, and resentment . . .”); *id.* at 48 (“[T]he envious person often feels a sense of injustice because the envied person’s advantage violates what ‘ought to be.’”).

71. See Kenneth Tai et al., *Envy as Pain: Rethinking the Nature of Envy and Its Implications for Employers and Organizations*, 37 ACAD. MGMT. REV. 107, 108 (2012).

72. *Id.*

73. WILLIAM SHAKESPEARE, *THE TRAGEDY OF OTHELLO, THE MOOR OF VENICE* act 3, sc. 3.

74. Stephanie C. Henagan, *The Perils of Workplace Recognition: Antecedents to Discomfort Associated with Being the Target of Upward Comparisons*, 32 BASIC & APPLIED SOC. PSYCHOL. 57, 60 (2010) (“[T]he emotions involved in upward comparison threat may be related to frustrations with one’s own performance or to resentment at a comparison target for performing better than oneself.”); Smith & Kim, *supra* note 70, at 46 (“One reason that envy is important to understand is that it appears to be a hostile emotion that often prompts aggressive behaviors. Its antagonistic nature is exemplified by the many publicized crimes . . .”); Tai et al., *supra* note 71 (“[E]nvy predicts greater hostility toward and reduced desire for friendship with envied parties, reduced openness to sharing information with them, and a stronger desire to harm them. Episodic envy also predicts unethical behaviors, such as acting dishonestly to hurt envied parties [and] not helping them.” (citations omitted)).

75. Tai et al., *supra* note 71 (“[E]nvy predicts depressive tendencies[,] poor mental health, [and] lower job and group satisfaction . . .” (citation omitted)); Smith & Kim, *supra* note 70; Henagan, *supra* note 74.

76. Envy is forbidden by the Ten Commandments, see *Exodus* 20:17, and it is one of the deadly sins as well, see Lawrence S. Cunningham, *THE SEVEN DEADLY SINS* (2012).

77. Smith & Kim, *supra* note 70, at 48–49.

78. See, e.g., SCHOR, *supra* note 31, at 8 (“Seventeenth- and eighteenth-century Italian nobles built opulent palaces with beautiful facades and, within those facades, placed tiles engraved with the words *Pro Invidia* (To Be Envied).”).

79. Gilles Grolleau, Naoufel Mzoughi, & Angela Sutan, *How Much Are You Willing To Pay To Be Envied?*, 41 CAHIERS DU CEREN (2013).

blessing. A large body of research demonstrates that most envied individuals simultaneously experience both pleasurable emotions—such as personal satisfaction, increased self-confidence, and internal pride—and stressful sentiments—such as discomfort associated with interpersonal strain, fear of retaliation, sense of guilt, concern for injustice, and empathic sadness.⁸⁰ Individuals with interpersonally attuned, empathic, and justice-sensitive personalities experience the latter emotions especially intensely and may even purposefully refrain from status-enhancing behavior so as to avoid becoming targets of envy.⁸¹

Nevertheless, for most individuals participating in envy-laden social competitions, it is perfectly rational to strive for a better position, since for most people, the experience of being envied is far less negative than the experience of envying.⁸² Thus, although interpersonal comparisons of emotions are hardly possible, the findings cited here suggest that overall the envy entailed in social competitions is detrimental.

While all types of social competition may stimulate envy to a certain extent, the consumption-based kind is particularly pernicious. This is because the emotion of envy stems from the fundamental desire for equal treatment.⁸³ Envy is defined as a sense of injustice based on perceived inequality between oneself and a better situated other.⁸⁴ Thus, people tend to react positively and not to experience envy when they regard others'

80. See Henagan, *supra* note 74, at 57–58 (noting that “uneasiness or sense of guilt [is] associated with outperforming others” and that “even though outperformers may experience positive consequences such as internal pride in their achievements and overall subjective well-being, they may simultaneously experience emotional discomfort due to a concern for how such achievements affect others” (citation omitted)); Julie Juola Exline & Marci Lobel, *The Perils of Outperformance: Sensitivity About Being the Target of a Threatening Upward Comparison*, 125 PSYCHOL. BULL. 307, 308 (1999) (“[I]n spite of their private satisfaction, these outperformers also show signs of ambivalence or distress.”); *id.* at 330 (“A large body of evidence demonstrates that outperforming others, although often satisfying, can be a source of strain and ambivalence. Feelings of happiness or relief about outperformance may coexist with relationship conflict and negative emotional states such as guilt, empathic sadness, embarrassment, and fears of retaliation or exclusion.” (citation omitted)); Tai et al., *supra* note 71, at 119 (“[B]eing the target of envy may be privately satisfying for a number of reasons, but it may also be a source of interpersonal strain.”).

81. Henagan, *supra* note 74, at 57, 59; Erika J. Koch & Kathleen P. Metcalfe, *The Bittersweet Taste of Success: Daily and Recalled Experiences of Being an Upward Social Comparison Target*, 33 BASIC & APPLIED SOC. PSYCHOL. 47, 56 (2011).

82. Robert P. Vecchio, *Explorations in Employee Envy: Feeling Envious and Feeling Envied*, 19 COGNITION & EMOTION 69, 79 (2005) (“From the results of the present study, it is apparent that being envied by others is generally less negative an experience than feeling envy toward others.”).

83. Smith & Kim, *supra* note 70, at 49 (“[E]nvy emerges from a basic desire for equal treatment . . . [E]nvy creates the desire for justice . . .”).

84. Justin D’Arms, *Envy*, STAN. ENCYCLOPEDIA PHIL. (Dec. 18, 2002), <http://stanford.library.usyd.edu.au/entries/envy/> (“A recurring suggestion in the history of philosophical and political thought has been that envy supplies the psychological foundations of the concern for justice, and, especially, of egalitarian conceptions of justice.”); see also Eva Illouz, *Emotions, Imagination and Consumption: A New Research Agenda*, 9 J. CONSUMER CULTURE 377, 391 (2009) (“Envy is an emotion whose chief concern is inequality.”); Smith & Kim, *supra* note 70, at 49 (“[A] sense of injustice . . . is a core feature of the experience of envy.”).

greater achievements as fair and deserved.⁸⁵ Combining a strong democratic ethos promising equal opportunities for everyone with great economic inequality, the American social climate supplies fertile soil for feelings of injustice in the arena of consumption.⁸⁶ Advertising that presents luxury goods as something every individual should strive to acquire naturally enhances those feelings.

Moreover, by foregrounding one's income, consumption-based competition makes economic inequality especially painful. Research shows that people genuinely feel deprived and frustrated when others obtain a greater amount of a socially desired good, even when their own absolute position remains unchanged.⁸⁷ Accordingly, although poverty is a relative and constantly changing measure,⁸⁸ being poor is strongly linked with unhappiness, depression, and many other ills.⁸⁹ Weakening the societal focus on consumption might alleviate some of them.

A further drawback of consumption races is the character of interpersonal interactions they create. On the one hand, individuals displaying luxury brands enjoy a higher status, which is associated with various benefits in social interactions.⁹⁰ Such individuals are perceived as competent workers,⁹¹ as being able to exert control,⁹² and as desirable partners for cooperation and exchange.⁹³ When encountering conspicuous displays of wealth, people assert more social restraint and compliance and

85. Juola & Lobel, *supra* note 80, at 309 (“Others may indeed react positively to an outperformer’s achievement, particularly if it was fair and deserved . . .”).

86. Illouz, *supra* note 84 (“[E]nvy is likely to be particularly predominant in . . . consumer societies[,] which have both a strong democratic ethos and yet are sustained by social and economic inequalities and by an intense work of social distinction.”).

87. See generally Heather J. Smith et al., *Relative Deprivation: A Theoretical and Meta-Analytic Review*, 16 PERSONALITY & SOC. PSYCHOL. REV. 203 (2012).

88. McAdams, *supra* note 34, at 35–36 (“Both official and unofficial meanings of poverty have historically been relative, so that the poverty level in various societies rises as the average income rises.”).

89. See Ben Winegard & Cortne Jai Winegard, *The Awful Revolution: Is Neoliberalism a Public Health Risk?*, DISSIDENT VOICE (Apr. 19, 2011), <http://dissentvoice.org/2011/04/the-awful-revolution-is-neoliberalism-a-public-health-risk/>.

90. Nelissen & Meijers, *supra* note 9, at 348 (“[I]n four studies we have shown that conspicuous consumption by means of displaying luxury-brand labels on clothing increases perceived status and produces benefits in social interactions that are apparently associated with higher status perceptions of a person wearing brand-labeled clothes compared to a person wearing non-labeled clothes.”).

91. *Id.* at 351 (“[A]pplicants wearing a brand-labeled shirt were perceived as more competent and were offered higher wages for a job as laboratory assistant.”); see Maura L. Scott et al., *Judging the Book by Its Cover? How Consumers Decode Conspicuous Consumption Cues in Buyer–Seller Relationships*, 50 J. MARKETING RES. 334, 334 (2013) (“[C]onspicuous consumption . . . increases competence inferences . . .”).

92. Helga Dittmar et al., *Fine Feathers Make Fine Birds: A Comparative Study of the Impact of Material Wealth on Perceived Identities in England and Italy*, 4 SOC. BEHAV. 195, 199 (1989).

93. Nelissen & Meijers, *supra* note 9, at 344 (“[P]eople are more compliant and generous to people who display luxury and are even willing to pay a cost to affiliate with them.”).

tend to be more generous and less aggressive.⁹⁴ On the other hand, luxury brands connote one's focus on self-interest, self-image, and profit maximization.⁹⁵ They communicate reduced warmth, kindness, helpfulness, and concern for the well-being of others.⁹⁶

III. DISCOURAGING CONSUMPTION-BASED COMPETITION THROUGH REGULATION

Given the severe drawbacks of consumption races, it might seem puzzling that people continue to compete on this dimension. Indeed, although social competition over wealth is rather common, it is by no means a universal trait of human societies.⁹⁷ Today, this type of competition can no longer be explained in evolutionary terms. Contemporary Western societies are characterized by affluence rather than scarcity; more people die of obesity than of hunger; most individuals have all their basic material needs fulfilled and live into old age.⁹⁸ At the same time, natural resources, time for social interactions, leisure, and personal development are growing increasingly scarce; material wealth is thus no longer a major contributor to human fitness.⁹⁹ Following Maslow's hierarchy of needs, Western societies should presumably be shifting their focus to love and friendship, self-esteem, self-actualization, morality, and creativity.¹⁰⁰

Yet, once consumption-based competition has established itself, the change is not easy to make. The main obstacle probably lies in a person's inherent difficulty in seeing the weaknesses of the value system she lives

94. *Id.*; *id.* at 345 ("Other research suggests that people show more social restraint when they face others who display luxury. For instance, people do not honk as quickly when the traffic light turns green if the car ahead of them is more expensive.").

95. See Dittmar et al., *supra* note 92; Scott et al., *supra* note 91, at 335.

96. See Dittmar et al., *supra* note 92; Scott et al., *supra* note 91, at 341 ("[C]onspicuous consumption decreases warmth inferences . . .").

97. See Patsiaouras & Fitchett, *supra* note 28, at 155 ("From a cross-cultural perspective, it can be observed that the importance of conspicuous economic display to social stratification of the community or group was defined to a great extent by environmental/political conditions and cultural norms. For example, in the traditional social caste system of India, prestige and social status were attributed primarily in terms of hereditary group membership and occupational categorisation, with status consumption playing a minor role in the arena of social competition.").

98. Paul Blumberg, *The Decline and Fall of the Status Symbol: Some Thoughts on Status in a Post-Industrial Society*, 21 SOC. PROBS. 480, 480 (1974) ("One characteristic of so-called post-industrial societies is the decline of material scarcity."); Mikko Manner & John Gowdy, *The Evolution of Social and Moral Behavior: Evolutionary Insights for Public Policy*, 69 ECOLOGICAL ECON. 753, 758 (2010) ("[I]n Western societies . . . survival is virtually guaranteed for most individuals.").

99. Herbert A. Simon, *Altruism and Economics*, 83 AM. ECON. REV. 156, 158 (1993) ("Perhaps in earlier centuries wealth was a major contributor to fitness, and one could regard desire for economic gain as adaptive during that period. There is no such connection today.").

100. See generally A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370 (1943).

by and is used to.¹⁰¹ In our society, this inherent difficulty is greatly reinforced by the mass media that are saturated with information related to shopping and material possessions.¹⁰² As Loewenstein and Moene note, “by reporting exclusively on the feats of bourgeois success stories, [the media] insidiously undermines the worth of any alternative ambitions.”¹⁰³ Many scholars suggest that the institution of advertising is one of the most important factors contributing to the creation and maintenance of the contemporary consumer culture.¹⁰⁴ Sparking a longing for the good life it depicts and suggesting that this “good life” should be pursued through the possession of luxury, advertising promotes the pursuit of material goods as the central human value.¹⁰⁵ The ever-accelerating rates of luxury consumption¹⁰⁶ evidence the success of these commercial efforts.

Numerous cultural movements, as well as scholars from a variety of disciplines, ceaselessly make attempts to challenge the values of consumerism and to shift the focus of our society to more important and more well-being-enhancing goals.¹⁰⁷ It has been repeatedly argued that consumption-based competition is analogous to the prisoner’s dilemma: while society would be better off if consumption races stopped, it is perfectly rational for individuals to do their best to excel in these races as long as they continue.¹⁰⁸

In addition, materialistic values associated with consumerism capture individuals in a so-called hedonic trap, which is hard to escape.¹⁰⁹ One of the traits of materialism is a constant desire for new possessions.¹¹⁰ Yet, while material acquisitions provide pleasure, as a rule, they do not lead to any lasting sort of happiness; once a person gets used to the new possession, it ceases to please her.¹¹¹ As soon as this happens, a materialistic state of mind will lead to craving another possession that

101. Loewenstein & Moene, *supra* note 12, at 153–175, 164–65.

102. Davidson, *supra* note 50, at 787–88 (“And in our consumer culture, information relating to property is all the more intense because of a variety of cultural and market institutions generating and reinforcing that information. Everything from magazines and entire cable channels devoted to shopping to the internet to the pervasive advertising that saturates so much of our daily lives revolves around communication through material goods. We are bombarded by messages about property, and there is evidence that we internalize those messages from an early age.”).

103. Loewenstein & Moene, *supra* note 12, at 172.

104. For an overview, see Belk & Pollay, *supra* note 36, at 887–88.

105. *Id.*; Rosalind Williams, *Corrupting the Public Imagination*, CHRISTIAN SCI. MONITOR, Mar. 20, 1981, at 22, 22.

106. See Samuelson, *supra* note 36, at 22.

107. See Blumberg, *supra* note 98, at 496–97; sources cited *supra* notes 104–106.

108. Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 327 (2001).

109. Belk & Pollay, *supra* note 36, at 889; Hudders & Pandelaere, *supra* note 46, at 412, 415–17.

110. Hudders & Pandelaere, *supra* note 46, at 413–14; Norris & Larsen, *supra* note 45, at 878–79.

111. Norris & Larsen, *supra* note 45, at 878–79.

similarly will provide only short-lived gratification.¹¹² The constant longing for more creates a gap between one's actual and desirable state. Meanwhile, gaps of this kind are a major source of human unhappiness.¹¹³ This overall destructive cycle is expected to persist unendingly, since the expectation of the pleasure associated with the next acquisition captures the materialistically oriented person in a "hedonic trap." Hence, some scholars regard consumerism as an addiction—a harmful behavioral pattern that is hard to abandon.¹¹⁴

All this has led several scholars to argue that consumption-based competition presents a classical case of market failure and, as such, requires regulative intervention.¹¹⁵ Conspicuous consumption has been analogized to environmental pollution: both activities produce significant negative externalities, and hence both could arguably be reduced by an effective tax system forcing the relevant market players to internalize the public costs of their behavior.¹¹⁶ Suggested solutions include introducing a general progressive consumption tax,¹¹⁷ taxing positional goods more heavily than non-positional ones,¹¹⁸ and establishing high taxes specifically for amply positional goods.¹¹⁹

The efficacy of such solutions is highly questionable. Unlike a polluting factory that can be disincentivized by taxation, producers of positional goods are not expected to be discouraged by high taxes. On the contrary, high taxes would ensure that the prices of positional goods remain high, thereby reinforcing their ability to serve as status identifiers and preserving the demand for them.¹²⁰ High taxation may of course push certain goods beyond some consumers' reach, thus altering the modes of

112. *Id.*

113. *Id.*

114. *See id.* at 878–79, 884.

115. Francisco Alvarez-Cuadrado, *Envy, Leisure, and Restrictions on Working Hours*, 40 CAN. J. ECON. 1286, 1287–88 (2007); McAdams, *supra* note 34, at 69–70; Frank, *Are Positional Externalities Different from Other Externalities?*, *supra* note 32, at 23–27.

116. Frank, *The Frame of Reference*, *supra* note 32, at 1843–44; Frank, *Are Positional Externalities Different from Other Externalities?*, *supra* note 32, at 24–25; *see* Dimitrios Diamantaras, *Envy-Free and Efficient Allocations in Large Public Good Economies*, 36 ECON. LETTERS 227, 228 (1991). *See generally* Alvarez-Cuadrado, *supra* note 115, at 1295–1308; Yukihiro Nishimura, *Optimal Non-Linear Income Taxation for Reduction of Envy*, 87 J. PUB. ECON. 363 (2003).

117. Frank, *The Frame of Reference*, *supra* note 32, at 1841–42; *see* Bowles & Park, *supra* note 51, at 408–11.

118. Fredrik Carlsson et al., *Do You Enjoy Having More than Others? Survey Evidence of Positional Goods*, 74 ECONOMICA 586, 586–87 (2007).

119. McAdams, *supra* note 34, at 74–75.

120. Davidson, *supra* note 50, at 813 (“Merely taxing the inputs to status races does little to disrupt the dynamics that generate them and could, under certain circumstances, even reinforce the status aspects of certain kinds of possessions, given that high price can be one reason that goods convey status.”); McAdams, *supra* note 34, at 75–76.

consumption races, but will probably do little to weaken the prominence of these races in our society.

Several scholars attack the same problem from another angle, proposing that the law should prescribe minimal levels of consumption of non-positional goods, such as safety, health, and savings.¹²¹ Although such suggestions may be effective in better allocating the resources wasted on positional goods, they do not target the main problem, which is the centrality of consumption-based competition in contemporary society.

IV. COMPETITIVE ALTRUISM AS AN ALTERNATIVE TO CONSUMPTION-BASED COMPETITION

An alternative vein of writing suggests that our natural tendency to compete should be diverted away from consumerism towards more useful goals.¹²² All status competitions have external beneficiaries; for instance, while exhibiting long and colorful tails as signals of fitness, birds unintentionally benefit the population of snakes and other predators.¹²³ Similarly, while people exhibit their status using luxury brands, they obviously benefit the corporations that own these brands.¹²⁴ It has been suggested that the human urge to compete could be channeled into more socially beneficial efforts, particularly into pro-social modes of conduct, such as charitable giving, volunteering, and environmentally conscious behavior.¹²⁵

The social phenomenon of “competitive altruism” has in fact been extensively documented in social science;¹²⁶ it is defined as “the process through which individuals attempt to outcompete each other in terms of

121. ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985); see McAdams, *supra* note 34, at 77–78.

122. See, e.g., Vladas Griskevicius et al., *Blatant Benevolence and Conspicuous Consumption: When Romantic Motives Elicit Strategic Costly Signals*, 93 J. PERSONALITY & SOC. PSYCHOL. 85 (2007); Bill Tomlinson, *A Call for Pro-Environmental Conspicuous Consumption in the Online World*, 15 INTERACTIONS 42 (2008).

123. Tomlinson, *supra* note 122, at 44.

124. *Id.*

125. See Loewenstein & Moene, *supra* note 12, at 166–167; Griskevicius et al., *supra* note 122, at 99; Griskevicius et al., *supra* note 3, at 119; Gilles Grolleau et al., *Escaping the Zero-Sum Game of Positional Races*, 65 KYKLOS 464 (2012); Tomlinson, *supra* note 122, at 44; Joseph A. Cazier & Brandy E. Hopkins, *Doing The Right Thing for the Environment Just Got Easier with a Little Help from Information Systems*, 4–5 (Sprouts, Working Paper No. 438, 2011), http://aisel.aisnet.org/sprouts_all/438.

126. See generally John Duffy & Tatiana Kornienko, *Does Competition Affect Giving?*, 74 J. ECON. BEHAV. & ORG. 82, 82–103 (2010); Griskevicius et al., *supra* note 3, at 120–21; Charlie L. Hardy & Mark Van Vugt, *Nice Guys Finish First: The Competitive Altruism Hypothesis*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 1402, 1402–12 (2006); Lorianne D. Mitchell & Wesley D. Ramey, *Look How Green I Am! An Individual-Level Explanation for Greenwashing*, 12 J. APPLIED BUS. & ECON. 40, 40–44 (2011); Gilbert Roberts, *Competitive Altruism: From Reciprocity to the Handicap Principle*, 265 PROC. ROYAL SOC'Y LONDON B. 427, 427–31 (1998).

generosity.”¹²⁷ Being costly either in terms of time, energy, attention, money, or other resources, altruistic behavior may serve as a trustworthy indicator of individual fitness and is thus well-suited to signal status.¹²⁸ Competitive altruism has been observed across a wide range of cultures.¹²⁹ Psychological studies indicate that many common forms of altruistic behavior—such as donating blood, helping in natural disasters and emergencies, giving money to charities, volunteering in nonprofit organizations, and undertaking efforts to preserve the environment—may be partly explained in terms of competition for social status.¹³⁰ Field research in various developed countries confirms that conspicuous displays of altruism may build and maintain valuable social reputation.¹³¹ Laboratory experiments demonstrate the ease of creating social situations in which individuals compete for status through self-sacrifice.¹³² All this suggests that diverting social competition away from consumerism into the field of good deeds might be feasible. Any move in this direction could be highly beneficial, for several reasons.

First and most obviously, while consumption-based competition is conducted at a high price in terms of ecology, as well as human and animal well-being, competitive altruism has strong potential for enhancing public welfare. Depending on the form it wears, an altruistic tournament may benefit non-participating persons, contribute to the preservation of natural resources, or otherwise advance public interests.¹³³ Altruistic behavior often contributes to public goods, which otherwise suffer from undersupply because of the disproportionately large positive externalities they create.¹³⁴ Moreover, some benefits of altruistic behavior cannot be achieved through

127. Hardy & Van Vugt, *supra* note 126, at 1403.

128. See Tomlinson, *supra* note 122, at 43; Andreas Bergh & Peter Engfeld, *The Problem of Cooperation and Reputation Based Choice* (Lund Univ. Dep’t of Econ., Working Paper No. 2005:27, 2005), http://swopec.hhs.se/lunewp/abs/lunewp2005_027.htm.

129. Griskevicius et al., *supra* note 3, at 121; Eric A. Smith & Rebecca Bliege Bird, *Costly Signaling and Cooperative Behavior*, in *MORAL SENTIMENTS AND MATERIAL INTERESTS* 115, 126 (Herbert Gintis et al. eds., 2005); accord Mark Van Vugt & Charlotte L. Hardy, *Cooperation for Reputation: Wasteful Contributions as Costly Signals in Public Goods*, 13 *GROUP PROCESSES & INTERGROUP REL.* 101, 108 (2010).

130. See Wendy Iredale & Mark van Vugt, *Altruism as Showing Off: A Signalling Perspective on Promoting Green Behaviour and Acts of Kindness*, in *APPLIED EVOLUTIONARY PSYCHOLOGY* 173 (S. Craig Roberts ed., 2012); Steven E. Sexton & Alison L. Sexton, *Conspicuous Conservation: The Prius Halo and Willingness to Pay for Environmental Bona Fides*, 67 *J. ENVTL. ECON. & MGMT.* 303, 315–16 (2014).

131. See Insaf Bekir et al., *(Deceptive) Status Seeking Strategies in France and Tunisia*, 45 *J. ECON. ISSUES* 717, 729 (2011) (“[E]xperiments conducted in different developed countries support the fact that conspicuous displays of altruism can lead to build and sustain costly pro-social reputations.”).

132. See Pat Barclay, *Trustworthiness and Competitive Altruism Can Also Solve the “Tragedy of the Commons”*, 25 *EVOLUTION & HUM. BEHAV.* 209, 210–11 (2004); Martin A. Nowak & Karl Sigmund, *Evolution of Indirect Reciprocity by Image Scoring*, 393 *NATURE* 573 (1998).

133. See, e.g., Sexton & Sexton, *supra* note 130, at 316.

134. See McAdams, *supra* note 34, at 60–61.

any other means. Specifically, encountering unconditional giving is a most powerful and memorable positive experience that may inspire, bring relief, significantly improve one's well-being, change one's perceptions about the world to be more positive, and even serve some therapeutic needs.¹³⁵

Second, altruistic competition is likely to be considerably less associated with envy than consumption-based competition. Although altruistic acts do inspire the desire to behave similarly,¹³⁶ this desire fosters positive rather than negative emotions.¹³⁷ As one scholar has noted, altruism can hardly arouse any negative emotions, since "[i]t is difficult to be angry, resentful, or fearful[] when one is showing selfless love towards another person."¹³⁸ Furthermore, envy is not likely to arise in the context of altruism, since this emotion is strongly connected to the feeling of injustice.¹³⁹ This feeling is prevalent in consumption-based competition, as it accentuates the economic inequality existing in present-day society.¹⁴⁰ By contrast, altruistic acts are much more accessible to everyone, and hence social competition on this dimension is likely to bring society closer to genuine equality of opportunity.¹⁴¹ It has been suggested that the envy-laden zero-sum game of social competition may be avoided if society accepts numerous status dimensions, thus allowing individuals to acquire status by excelling in different fields.¹⁴² Moving from consumer races to competitive altruism is undoubtedly a step in this direction, since altruism offers far more possibilities for revealing one's skills than does consumption.

Third, altruistic competition is likely to be much more beneficial for the competing parties than the kind that turns on consumption. As

135. See generally Debbie Haski-Leventhal et al., *What Money Cannot Buy: The Distinctive and Multidimensional Impact of Volunteers*, 19 J. COMMUNITY PRAC. 138 (2011); Natti Ronel, *When Good Overcomes Bad: The Impact of Volunteers on Those They Help*, 59 HUM. REL. 1133 (2006).

136. Haski-Leventhal et al., *supra* note 135, at 140, 155; Ronel, *supra* note 135, at 1147–48.

137. See Manner & Gowdy, *supra* note 98 ("A recent study examining neural activity showed that . . . observing a charity getting money . . . activated similar neural substrates for pleasure as getting a monetary payoff to oneself."); Stephen G. Post, *Altruism, Happiness, and Health: It's Good to Be Good*, 12 INT'L J. BEHAV. MED. 66, 71–72 (2005) ("Students who were simply asked to watch a film about Mother Teresa's work with the poor and sick in Calcutta showed significant increases in the protective antibody salivary immunoglobulin[, which is associated with positive feelings].").

138. SAMUEL P. OLINER, *ALTRUISM INTERGROUP APOLOGY FORGIVENESS AND RECONCILIATION* 28 (2008).

139. See *supra* Part II.

140. See *supra* Part II.

141. For similar ideas, see Blumberg, *supra* note 98, at 497 ("If status in the future comes to depend upon the personal intellectual, esthetic, and creative achievements of each individual rather than upon inheritance of family position and family wealth, we will have moved closer to a genuine equality of opportunity."); Griskevicius et al., *supra* note 122, at 87 ("Even a poor person could do public volunteer work in the community, donate blood, or solicit donations for noble causes in a crowded mall—all of which are types of publicly visible prosocial behavior called *blatant benevolence*.").

142. See Grolleau et al., *supra* note 125, at 467–68.

mentioned previously, people participating in social competitions are ordinarily unaware that their behavior is motivated by status-seeking. They internalize the social norm as intrinsically valuable.¹⁴³ Hence, just as consumer races make people true believers in materialistic values, social competition for good deeds is likely to make people genuinely believe in the value of altruism. And while materialism has significant adverse effects on human well-being,¹⁴⁴ altruism correlates strongly with pleasurable emotions (“the warm glow effect”), enhanced self-esteem, life satisfaction, longevity, and physical and mental health.¹⁴⁵ A large body of research confirms that giving—money, time, efforts, etc.—has much greater effects on happiness and health than receiving a comparable amount of any of these resources.¹⁴⁶ Moreover, altruistic deeds were found to offset the unhappiness associated with low socioeconomic status, making happier rich and poor alike.¹⁴⁷

Finally, shifting the focus from materialism to altruism is likely to positively impact social relations. While conspicuous consumption connotes selfishness, altruism reveals virtuous characteristics, such as kindness, sympathy, and helpfulness.¹⁴⁸ Indeed, while consumption-based competition stimulates distant and profit-oriented social relations, altruistic competition promotes trust, willingness to help, and moral behavior.¹⁴⁹ Interestingly, the latter type of competition entails far less competitive vigor than the former, since altruism reduces self-centeredness and status anxiety.¹⁵⁰ This fact may be socially beneficial in itself, since competitive environments are known to be stressful, unpleasant, and destructive for human relations.¹⁵¹

All this indicates that a shift from consumption races to altruistic competition is highly desirable. Notably, promoting such a shift is justified in terms of economic efficiency, since competitive altruism entails greater

143. See *supra* Part I.

144. See *supra* Part III.

145. See Francesca Borgonovi, *Doing Well by Doing Good: The Relationship Between Formal Volunteering and Self-Reported Health and Happiness*, 66 SOC. SCI. & MED. 2321, 2331 (2008); Manner & Gowdy, *supra* note 98, at 758–59; Post, *supra* note 137, at 69–70; Ronel, *supra* note 135, at 1135–36.

146. See Lara B. Aknin et al., *Prosocial Spending and Well-Being: Cross-Cultural Evidence for a Psychological Universal*, 104 J. PERSONALITY & SOC. PSYCHOL. 635, 636 (2013); Elizabeth W. Dunn et al., *Spending Money on Others Promotes Happiness*, 319 SCI. 1687, 1687–88 (2008); Post, *supra* note 137, at 70.

147. See Aknin, *supra* note 146, at 643; Borgonovi, *supra* note 145, at 2330–31.

148. See Griskevicius et al., *supra* note 122, at 87; Van Vugt & Hardy, *supra* note 129.

149. See Sebastian Fehrler & Wojtek Przepiorka, *Charitable Giving as a Signal of Trustworthiness: Disentangling the Signaling Benefits of Altruistic Acts*, 34 EVOLUTION & HUM. BEHAV. 139, 140–41 (2013); Griskevicius et al., *supra* note 3, at 121.

150. See Manner & Gowdy, *supra* note 98; Ronel, *supra* note 135, at 1148.

151. See Henagan, *supra* note 74, at 59 (“[C]ompetitive academic settings [are] positively related to increased stress, strain, and physical symptoms.”).

aggregate social welfare than consumption-based competition. Although disinterested altruism, such as anonymous donations, may be nobler and possibly even more beneficial for altruists and society, competitive altruism is a good alternative to competition based on wealth. Scholars have so far suggested promoting altruistic tournaments either by measures that private parties can undertake—such as visibly marking environmentally friendly products,¹⁵² awarding non-monetary prizes to individuals who contribute to a nonprofit organization,¹⁵³ and creating or fostering institutions that encourage commitment to social goals¹⁵⁴—or by educating the public about the importance and advantages of altruism.¹⁵⁵ While such measures will probably have some effect, taken alone, they are unlikely to bring about a major change.

As one of the most powerful institutions of shaping, maintaining, and altering social norms,¹⁵⁶ legal regulation seems a natural source of tools for further efforts in this direction. Of course, the legal system is unable to determine which forms interpersonal competition would take; it is but one of numerous factors influencing the social dynamics. In addition, as one scholar has noted, “[t]here is reason . . . to believe that the state would tend to be a particularly clumsy symbolic regulator when it comes to status, given the complexity and social embeddedness of signals associated with status.”¹⁵⁷

Nonetheless, the fact that today’s most prominent symbols of economic status—brands—constitute legally protected property allows the legal system reasonable access to this complex and delicate field. The following discussion ponders the possible legal tools that might contribute to a shift away from competitive consumerism toward competitive altruism. Such efforts can take two directions: (1) discouraging consumption-based competition; and (2) encouraging competitive altruism. Each direction is discussed below, in turn.

152. See, e.g., Rebecca Elliott, *The Taste for Green: The Possibilities and Dynamics of Status Differentiation Through “Green” Consumption*, 41 *POETICS* 294, 298–99 (2013); Iredale & van Vugt, *supra* note 130, at 180.

153. See, e.g., Mark Van Vugt, *Averting the Tragedy of the Commons: Using Social Psychological Science to Protect the Environment*, 18 *CURRENT DIRECTIONS PSYCHOL. SCI.* 169, 171 (2009).

154. See, e.g., STEFANO ZAMAGNI, *THE ECONOMICS OF ALTRUISM* (1995).

155. See, e.g., Post, *supra* note 137, at 72.

156. See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

157. Davidson, *supra* note 50, at 814–15.

V. DISCOURAGING CONSUMPTION-BASED COMPETITION

As mentioned above, one of the major tools enabling individuals to signal their economic status today is brands.¹⁵⁸ To see how this signaling system may be discouraged, we should first understand how it functions and what role the legal system currently plays in its maintenance.

Throughout history, social competition over wealth has fomented envy among the lower economic classes, occasionally resulting in attempts to present oneself as richer than one actually was.¹⁵⁹ Since the revocation of the sumptuary laws,¹⁶⁰ such attempts are no longer considered illegal. The view that people must be required to accurately disclose their economic status in public lost its appeal with the advent of the egalitarian ethos throughout the Western world.¹⁶¹ This liberation naturally created a great demand for imitations of material status symbols. Technological progress gradually enabled convincing replicas to be produced of many status-signifying articles.¹⁶² And as soon as those articles became vulnerable to low-cost and credible imitation, they naturally lost their ability to indicate their owner's high status. Thus, for example, the widespread imitation of gold, diamonds, pearls, and fur has deprived all these materials of their status-signifying quality.¹⁶³ This process leads economic elites to abandon the disempowered status symbol and seek new signs of distinction that are harder to imitate.¹⁶⁴ Sooner or later, though, new technologies make any scarce natural material vulnerable to imitation. And while splendid houses, yachts, private jets, and the like are essentially unfakeable status symbols, they are not very practical, because the occasions to display them are relatively rare; moreover, the number of those capable of purchasing such goods is very small.

It is against this backdrop that the fashion industry has emerged as the major source of status signifiers.¹⁶⁵ According to the "trickle-down" theory, fashion novelties adopted by the elites enjoy a certain period of exclusivity before they are copied by the lower classes. Once this happens, the higher

158. See *supra* Part II.

159. See Beebe, *supra* note 24, at 834.

160. See *supra* Part I.

161. See Blumberg, *supra* note 98, at 491 ("Moreover, unlike the making of counterfeit money, there is no legal proscription against the manufacture of counterfeit status symbols today; and, in fact, the egalitarian ethos of contemporary society might even be seen as favoring it.").

162. See *id.*

163. See *id.*

164. See VEBLEN, *supra* note 17, at 108–09; Georg Simmel, *Fashion*, 62 AM. J. SOC. 541, 545 (1957).

165. See Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1386–87 (2005); McAdams, *supra* note 34, at 40–41.

class switches to a new style, which again remains its prerogative until the style disseminates downward.¹⁶⁶ Although the trickle-down theory is unable to capture all the complexity of fashion dynamics,¹⁶⁷ it does explain some of its phenomena and is especially applicable to the status-signifying capacity of fashion.¹⁶⁸

Over time, technological developments shorten the period of exclusivity even more, constantly accelerating the fashion cycle.¹⁶⁹ Currently, technology has already reached the point at which imitations are available on the market simultaneously with the original.¹⁷⁰ Some of these imitations are of such high quality that they are essentially indistinguishable from the original.¹⁷¹

The U.S. legal system does not intervene in these lifecycles of fashion. No right of Intellectual Property provides meaningful protection for fashion designs.¹⁷² Moreover, the judicial practice generally regards imitation as a very positive phenomenon—“the life blood of competition”¹⁷³—consistently allowing distribution of fashion replicas.¹⁷⁴ Several scholars regard this situation as a serious threat to the fashion industry, which arguably loses incentives to innovate in the face of rapid imitation.¹⁷⁵ They further suggest that since brand logos are the only observable product feature that is legally protected against imitation, brands have become the chief signifiers of material status nowadays.¹⁷⁶ Indeed, it has been observed that the fashion industry is undergoing a process of “logoification,” with brand logos becoming ever larger and more prominent elements of fashion

166. See Simmel, *supra* note 164.

167. See, e.g., Herbert Blumer, *Fashion: From Class Differentiation to Collective Selection*, 10 SOC. Q. 275, 277–78 (1969).

168. See, e.g., Kapferer & Bastien, *supra* note 58, at 315.

169. See Kevin V. Tu, *Counterfeit Fashion: The Interplay Between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 TEX. INTELL. PROP. L.J. 419, 448–49 (2010).

170. *Id.*

171. See Viet Dung Trinh & Ian Phau, *Influence of Materialism and Life Satisfaction on Consumer Willingness to Buy Counterfeit Luxury Brands 2* (June 9–10, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911106 (“[T]he quality of counterfeit luxury brands has improved dramatically . . .”).

172. See Scafidi, *supra* note 23, at 121–23; Tu, *supra* note 169, at 423.

173. *Am. Safety Table Co., Inc. v. Schreiber*, 269 F.2d 255, 272 (2d Cir. 1959).

174. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968); *Societe Comptoir De L’Industrie Cotonniere Etablissements Boussac v. Alexander’s Dep’t Stores, Inc.*, 299 F.2d 33 (2d Cir. 1962); *Diversified Mktg., Inc. v. Estee Lauder, Inc.*, 705 F. Supp. 128 (S.D.N.Y. 1988).

175. See, e.g., C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1176–80 (2009); Lauren Howard, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS 333, 343–44 (2009); Scafidi, *supra* note 23, at 124–25; Tu, *supra* note 169, at 449.

176. See Hemphill & Suk, *supra* note 175, at 1179–80; Patsiaouras & Fitchett, *supra* note 28, at 169; Sheff, *supra* note 18, at 802.

designs.¹⁷⁷ Many scholars bemoan this phenomenon and advocate granting legal protection to fashion designs.¹⁷⁸ The European Union already does so, but an attempt to introduce a similar provision into U.S. law failed.¹⁷⁹

Legally protecting fashion innovation against imitation is undesirable. If granted, such protection would again enable fashion items to function as reliable status signifiers, thereby reinforcing consumption races. Instead, the legal system can discourage social competition over material status by allowing the use of brands to misrepresent one's status. Should brand imitation become legal, brands will no longer be able to function as reliable status signifiers, and today's most prevalent wealth-signaling system will lose sway. Like gold and diamonds, without legal protection against imitation, brands will no longer be able to connote status. And since technology allows such easy copying, new signifiers of material wealth would be hard to create. Consequently, allowing counterfeits of branded products might undermine the effectiveness of consumption-based competition altogether.

This suggestion does not create any difficulties in terms of the logic of trademark law. Trademarks are traditionally designed to function as indications of origin. The main purpose of trademark law is to prevent consumer confusion as to the source of goods.¹⁸⁰ Functioning as a reliable symbol of origin, a trademark encourages its owner to invest in the quality of her goods, thereby building valuable business goodwill.¹⁸¹

As brands evolved into symbols of economic status, courts expanded trademark protection so as to safeguard this additional function, introducing the doctrine of post-sale confusion.¹⁸² The doctrine holds that selling counterfeit goods to consumers who knowingly wish to purchase an imitation rather than the original constitutes trademark infringement.¹⁸³ Although confusion does not occur at the point of sale, counterfeit goods are later seen by third parties, who may mistakenly assume that the counterfeit purchaser owns an original trademarked product.¹⁸⁴

177. See Hemphill & Suk, *supra* note 175, at 1176–78; Howard, *supra* note 175, at 336; Scafidi, *supra* note 23, at 121.

178. See generally Hemphill & Suk, *supra* note 175; Howard, *supra* note 175; Scafidi, *supra* note 23.

179. See H.R. 5055, 109th Cong. (2006).

180. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 3:8–3:9 (4th ed. 2013).

181. See *id.* § 2:3.

182. See *id.* § 23:5; see also *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955).

183. See MCCARTHY, *supra* note 180, § 23:5.

184. See, e.g., *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 549 (6th Cir. 2005); *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000); *Chrysler Corp. v. Silva*, 118 F.3d 56, 59 (1st Cir. 1997).

The doctrine of post-sale confusion prevents consumers from intentionally purchasing a fake Rolex,¹⁸⁵ Reebok,¹⁸⁶ or pair of Levi's.¹⁸⁷ Even customizing kits designed to turn one's car into a Ferrari¹⁸⁸ or a Rolls Royce¹⁸⁹ have been enjoined. These decisions obviously depart from trademark law's primary purpose protecting the mark when the purchaser is not confused as to the source of the goods.

To be sure, it is perfectly possible to allow trademark counterfeits while preserving the informative function of the mark. Similarly, it is possible to prevent consumer confusion on the market for gold-plated as opposed to pure gold jewelry and for cultivated as opposed to natural diamonds. The distinction between brands that are used to signal status—prominently appearing on the front of a product—and brands used to signal product origin—typically appearing on an inconspicuous part of the product, such as its inner label—does not seem difficult to draw. The doctrine of aesthetic functionality is a useful analytical tool that may allow such a distinction in the framework of trademark law. This doctrine exempts from liability use of another's trademark made for the purpose of decoration rather than for the purpose of indicating the origin of a product.¹⁹⁰ To exclude the possibility of consumer confusion, it may be useful to require the clear marking of all counterfeit products as such, with a label that can be removed after the purchase. In this way, the legal system would preserve trademarks as reliable indications of origin while at the same time undermining their status-signifying function.

Courts and scholars list several reasons why trademark law should extend to non-confusing counterfeits. The most serious accusation against the counterfeit industry holds it responsible for significant loss of tax revenues and the associated damage to the national economy, for supporting organized crime, and even for supplying funds to terrorist organizations.¹⁹¹ However, these practices will cease, or at least decline considerably, once the counterfeit industry is no longer considered illegal.

Another oft-mentioned justification for the post-sale confusion doctrine points out that the value of the original trademark, which derives in part

185. See *United States v. Torkington*, 812 F.2d 1347, 1352–53 (11th Cir. 1987); *Rolex Watch U.S.A., Inc. v. Canner*, 645 F. Supp. 484, 493–95 (S.D. Fla. 1986).

186. See *Payless Shoesource, Inc. v. Reebok Int'l Ltd.*, 998 F.2d 985, 989–90 (Fed. Cir. 1993).

187. See *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 822 (9th Cir. 1980).

188. See *Ferrari v. McBurnie*, No. 86-1812-B(IEG), 1989 WL 298658, at *5–7 (S.D. Cal. June 1, 1989).

189. See *Rolls-Royce Motors Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689, 694–95 (N.D. Ga. 1977).

190. See MCCARTHY, *supra* note 180, § 7:79.

191. See Boonghee Yoo & Seung-Hee Lee, *Asymmetrical Effects of Past Experiences with Genuine Fashion Luxury Brands and Their Counterfeits on Purchase Intention of Each*, 65 J. BUS. RES. 1507, 1507–08 (2012).

from its scarcity, is likely to be diminished by widespread counterfeits.¹⁹² Under this rhetoric, courts turn trademark law into a mechanism for creating material scarcity, thereby enabling and reinforcing social competition over wealth. Furthermore, the legal protection granted to brands in their capacity as status symbols naturally encourages their owners to create and maintain the status-signaling dimension of brands. This position is undesirable. The legal system should act to diminish rather than protect the social competition over wealth.

Finally, courts and scholars have repeatedly argued that non-confusing counterfeits allow the purchasers to pass themselves off as owners of a genuine article and thus to misrepresent their economic status.¹⁹³ This *raison d'être* of the post-sale confusion doctrine is especially difficult to accept. Nothing supports a broad duty to disclose one's material status in social relations. As mentioned above, displaying symbols of wealth may indeed bring some advantages in social settings.¹⁹⁴ Another way to put this is that when socializing, people tend to discriminate against individuals with lower economic status.¹⁹⁵ The legal system should counteract rather than encourage this form of discrimination. By way of analogy, to counteract illegal discrimination in employment, the German law permits lying in response to an illegitimate question posed to a (potential) employee.¹⁹⁶

Having embraced confusion of third parties by a counterfeit purchaser as an actionable wrong, trademark law essentially turned itself into a tool of social-status competition over wealth.¹⁹⁷ Although non-confusing counterfeits are available on the market in spite of their unlawfulness, the legal ban does allow trademark owners to keep their volume under control, so that the absolute majority of branded products on the market are original.¹⁹⁸

192. See, e.g., *Gen. Motors Corp. v. Keystone Auto. Indus., Inc.*, 453 F.3d 351, 358 (6th Cir. 2006); *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000); *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1457 (9th Cir. 1991); *Ferrari*, 1989 WL 298658, at *7.

193. See, e.g., *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955); *Ferrari*, 1989 WL 298658, at *5; William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987).

194. See *supra* Part II.

195. See Tressie McMillan Cottom, *The Logic of Stupid Poor People*, TRESSIEMC.COM (Oct. 29, 2013), <http://tressiemc.com/2013/10/29/the-logic-of-stupid-poor-people> (discussing use of status goods to signal acceptability and to avoid being dismissed out of hand).

196. See HANS-JOACHIM MUSIELAK & WOLFGANG HAU, GRUNDKURS BGB § 471, at 150 (13th ed. 2013).

197. See Beebe, *supra* note 24, at 851–55; Mark P. McKenna, *Probabilistic Knowledge of Third-Party Trademark Infringement*, 2011 STAN. TECH. L. REV. 10, 32–33; Sheff, *supra* note 18, at 793, 803.

198. For instance, in 2008, counterfeits (of all IP rights) were estimated to account for 10% of world trade. Nadine Hennigs et al., *Selling Dreams or Empty Promises: Customer Perceived Values in the Trade-Off Between Genuine Luxury and Counterfeit Goods 1* (unpublished manuscript),

The legal ban on non-confusing counterfeits makes a counterfeit purchase a dubious choice. For obvious reasons, these goods are not available in regular stores to which most consumers are accustomed and which provide a secure purchasing environment as well as reasonable expectations in terms of product quality and the distributor's guarantee.¹⁹⁹ Moreover, although consumers may not be legally punished for purchasing counterfeits,²⁰⁰ the legal ban on selling them taints the purchasing experience with a flavor of misbehavior.²⁰¹ Many consumers regard a willful purchase of counterfeits as a non-ethical act;²⁰² most have to justify such a decision to themselves,²⁰³ and highly moral individuals are disinclined to buy counterfeits.²⁰⁴

Furthermore, the illegal status of counterfeits creates a strong ethos of authenticity around the original brands. Authenticity has been noted as one of the most important sites of cultural meaning in modern Western societies.²⁰⁵ Arising from the anxiety over the credibility of individual existence,²⁰⁶ authenticity is strongly linked to the notions of sincerity and self-worth.²⁰⁷ Contemporary cultural perceptions suggest that these ideals may be approached through possession of authentic artifacts.²⁰⁸

In the field of brands, research has demonstrated that authenticity is the key factor that distinguishes a luxury-branded product from a counterfeit

<https://web.archive.org/web/20121224081116/http://anzmac.org/conference/2011/Papers%20by%20Presenting%20Author/Klarmann,%20Christiane%20Paper%20150.pdf> (last visited Mar. 9, 2016).

199. See Chow-Hou Wee et al., *Non-Price Determinants of Intention to Purchase Counterfeit Goods*, INT'L MARKETING REV., 1995, at 19, 22 ("[C]onsumers who are averse to financial, product, and social risks are less likely to purchase counterfeit products.").

200. This is different in France and certain other European countries. See Beebe, *supra* note 24, at 817–18.

201. See Victor V. Cordell et al., *Counterfeit Purchase Intentions: Role of Lawfulness Attitudes and Product Traits as Determinants*, 35 J. BUS. RES. 41, 42 (1996) ("Willing purchase of counterfeits falls in the class of nonnormative consumer behaviors."); Elfriede Penz & Barbara Stöttinger, *Forget the "Real" Thing—Take the Copy! An Explanatory Model for the Volitional Purchase of Counterfeit Products*, 32 ADVANCES CONSUMER RES. 568, 568 (2005) ("[T]he intentional purchase of counterfeits is considered consumer misbehavior, which violates the generally accepted norms of conduct in exchange and is therefore held in disrepute by marketers and by most consumers." (internal quotation marks omitted)).

202. See Jungkeun Kim et al., *Effects of Cognitive Resource Availability on Consumer Decisions Involving Counterfeit Products: The Role of Perceived Justification*, 23 MARKETING LETTERS 869, 871 (2012).

203. See *id.* at 878–80.

204. See *id.* at 871.

205. See Richard Handler, *Authenticity*, 2 ANTHROPOLOGY TODAY 2, 2 (1986).

206. See *id.* at 3 ("That the word [authenticity] has become part of the moral slang of our day points to the peculiar nature of our fallen condition, our anxiety over the credibility of existence and of individual existences." (alteration in original) (internal quotation marks omitted)).

207. See *id.*; Sander L. Koole & Julius Kuhl, *In Search of the Real Self: A Functional Perspective on Optimal Self-Esteem and Authenticity*, 14 PSYCHOL. INQUIRY 43, 45–46 (2003).

208. See Aaron C. Ahuvia, *Beyond the Extended Self: Loved Objects and Consumers' Identity Narratives*, 32 J. CONSUMER RES. 171, 182–83 (2005).

one.²⁰⁹ While branded products are perceived as innately authentic, counterfeits are regarded as inevitably lacking authenticity, even if physically indistinguishable from the original.²¹⁰ Meanwhile, luxury brand owners commonly outsource the production of their goods to developing countries and sometimes license their brands far beyond their field of expertise, so that the licensor may not even exert any meaningful quality control over the licensee.²¹¹ The “authenticity” of branded goods produced in that way is highly dubious. Yet, authenticity is not an inherent feature of an object but a social construct.²¹² It is the consumer perception that creates an aura of authenticity around a branded product and distinguishes it from an identical one, even if produced on the same assembly line.²¹³

Restricting counterfeits, the legal system grants its formal approval to this perceived distinction, thereby reinforcing the cultural status of brands as embodiments of authenticity. And because our culture associates authenticity of material possessions with sincerity of their owner, being caught using a fake typically results in feelings of shame and sometimes brings about social sanctions.²¹⁴ One study has even found that counterfeit articles generate within their users the sense of a “counterfeit self,” leading them to behave dishonestly and unethically.²¹⁵

For all these reasons, counterfeit consumption is a relatively limited social phenomenon—the exception rather than the rule. Such a consumption pattern is much more typical for young, low-income

209. Linda Lisa Maria Turunen & Pirjo Laaksonen, *Diffusing the Boundaries Between Luxury and Counterfeits*, 20 J. PRODUCT & BRAND MGMT. 468, 472 (2011).

210. See *id.* (“Among counterfeits, authenticity was something unattainable and missing from the product, whereas in luxury stories, authenticity was a dimension that was proposed to be vital and inseparable from a luxury branded product . . .”); Laura A. Heymann, *Dialogues of Authenticity*, 67 STUD. L. POL. & SOC’Y (SPECIAL ISSUE) 25, 31 (2015) (“[I]n some instances . . . imitations are virtually indistinguishable from the authentic items, leaving the statement of authenticity as indicating little more than its own existence.” (footnote omitted) (citation omitted)).

211. Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 87–89 (2010).

212. See Davidson, *supra* note 50, at 799; Heymann, *supra* note 210, at 6–7; Turunen & Laaksonen, *supra* note 209, at 469; Renée Ann Richardson Gosline, *The Real Value of Fakes: Dynamic Symbolic Boundaries in Socially Embedded Consumption* 76 (May 5, 2009) (unpublished DBA dissertation, Harvard University), <http://gradworks.umi.com/3371273.pdf> (“Authenticity is not necessarily a property of the product itself, but rather, a property of the consumers’ connection/tie to the product . . .”).

213. See Heymann, *supra* note 210, at 31 (“A luxury handbag made off-shift using the same materials and workmanship as the product made an hour earlier (the ‘true fake’) is considered a counterfeit, not only worth much less than its earlier counterpart but also likely illegal.”).

214. See Hennigs et al., *supra* note 198, at 3; Elfriede Penz & Barbara Stöttinger, *A Comparison of the Emotional and Motivational Aspects in the Purchase of Luxury Products Versus Counterfeits*, 19 J. BRAND MGMT. 581, 591 (2012); Turunen & Laaksonen, *supra* note 209; Cleopatra Veloutsou & Xuemei Bian, *A Cross-National Examination of Consumer Perceived Risk in the Context of Non-Deceptive Counterfeit Brands*, 7 J. CONSUMER BEHAV. 3, 4 (2008); Wee et al., *supra* note 199, at 22.

215. See Francesca Gino et al., *The Counterfeit Self: The Deceptive Costs of Faking It*, 21 PSYCHOL. SCI. 712, 712 (2010).

consumers without formal education than for any other social group.²¹⁶ This picture will most probably change once counterfeits are allowed. Just like quasi-gold jewelry and cultivated diamonds, brand counterfeits may become commonplace, available in regular and reliable stores, and lacking connotations of misbehavior, immorality, insincerity, or inauthenticity. One study showed that when the use of counterfeits rises among peers in a social group, the decision to purchase such articles is perceived as an ordinary and guilt-free choice.²¹⁷

VI. ENCOURAGING COMPETITIVE ALTRUISM

Once the legal system ceases protecting symbols of material status, the social competition over wealth will be difficult to maintain. Ever-accelerating technological progress will most probably enable quick copying of most symbols of wealth. And since people are naturally inclined toward competing over status, the social competition is most likely to undergo some transformation and turn to another direction.²¹⁸ Here again, the legal system could intervene and attempt to channel this competition toward desirable goals, such as an altruistic tournament.

To be sure, this aspect of the project is far more challenging. It entails a much greater degree of uncertainty than curtailing the brand-based competition. Since the latter type of competition is close to impossible without imposing a restriction on brand counterfeits, eliminating that restriction will most probably further the desired result. In contrast, further developments of social competition are difficult to foresee and are hard to control. Obviously, the legal system has only a limited influence in the field of complex processes of social dynamics,²¹⁹ but the advantages of altruistic competition are significant enough to try encouraging it through legal tools, even if the result is uncertain.

The legal system could support altruism in a number of ways. For instance, the current laws governing volunteering often fail to grant volunteers adequate protection—such as protection in admission processes

216. Gail Tom et al., *Consumer Demand for Counterfeit Goods*, 15 *PSYCHOL. & MARKETING* 405, 419 (1998) (“Consumer accomplices are younger, less educated, and earn less income than consumers who stated that they have not or do not purchase counterfeit products.”).

217. See James W. Gentry et al., *How Now Ralph Lauren? The Separation of Brand and Product in a Counterfeit Culture*, 28 *ADVANCES CONSUMER RES.* 258, 260 (2001).

218. Similarly, Frey has suggested that discouraging some status-conveying dimensions can encourage people to seek status through other dimensions in “creative and imaginative ways.” BRUNO S. FREY, *HAPPINESS: A REVOLUTION IN ECONOMICS* 172 (2008).

219. See Michal Shur-Ofry, *IP and the Lens of Complexity*, 54 *IDEA* 55, 95–96 (2013) (explaining that complex systems, such the system of IP protection, react non-linearly to changes and that such systems do not exhibit cause–effect reactions, and hence the outcome of a legal reform is largely unpredictable).

against race, gender, disability, or age discrimination²²⁰—while at the same time frequently providing entirely unsuitable protection—such as the option to demand the minimal wage, which volunteers regard as an insult.²²¹ Another example is the doctrine of standing, which prevents access to courts of individuals and organizations attempting to stop law violations that affect public interests rather than their personal interests.²²² Finally, the consideration doctrine in contract law denies legal recognition to obligations undertaken without a monetary trade-off.²²³ All these and many other legal rules disempower altruistic aspirations²²⁴ and should be changed. Yet, it is hard to expect that such measures will significantly affect the direction of social competition.

It seems sensible, at least in the first stage, to start arousing awareness to altruistic goals by encouraging ethical consumption—that is, consumption directed by moral considerations. Since social competition is currently strongly attached to the field of consumption, such a step toward altruistic competition will be the least difficult to make. Consumption is such a significant source of cultural norms in our society that Western culture is often referred to as “consumer culture.” Indeed, the values of hedonism and materialism, so characteristic of advertising and other marketing techniques, are deeply ingrained in our cultural discourse.²²⁵

Meanwhile, hedonism and materialism are not the only values that products of consumption may convey. Rather than perceiving products solely in terms of our own benefit, we may choose to focus on the impact of their production and consumption processes on other people, animals, and the environment.²²⁶ There are good reasons to distinguish between a local product manufactured under decent working conditions and a product of slave labor in a developing country, between a disposable product made in a heavily polluting factory and a durable product manufactured using an

220. See Leda E. Dunn, “Protection” of Volunteers Under the Federal Employment Law: Discouraging Voluntarism?, 61 *FORDHAM L. REV.* 451, 454–63 (1992); Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 *U. PA. J. LAB. & EMP. L.* 147, 152 (2006).

221. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (defining volunteers of a nonprofit religious organization as “employees” subject to the Fair Labor Standards Act’s minimum wage provisions notwithstanding a volunteer’s testimony, according to which “no one ever expected any kind of compensation, and the thought is totally vexing to my soul” (internal quotation marks omitted)).

222. See Katya Assaf, *Capitalism vs. Freedom*, 38 *N.Y.U. REV. L. & SOC. CHANGE* 201, 213–18 (2014).

223. See David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 *U. CHI. L. REV.* 1299, 1299–1300 (2006).

224. This argument is extensively discussed in Assaf, *supra* note 222.

225. See sources cited *supra* notes 35–36.

226. See Assaf, *supra* note 222, at 213–18; see also Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 *HARV. L. REV.* 526, 536–40 (2004).

environmentally sustainable technology, between a product that has been tested on animals and one that has not, etc.

The ethos of consumer culture obscures these issues, defining the cultural meaning of commercially produced goods—such as a diamond ring, chocolate, a hamburger, a body cream, or a pair of sneakers—in terms of aesthetics, taste, connotations of romance, luxury, or excellence, rather than in terms of the history of their production.²²⁷ Meanwhile, the production of these and many other goods we commonly consume frequently involves severe violence and coercion, destruction of natural resources, as well as animal abuse.²²⁸ Although these issues do reach the public awareness from time to time and occasionally result in sporadic improvements, such random events are incapable of significantly curtailing immoral production practices on a vast scale.

It would be most desirable if corporations shift their focus from producing images of luxury to excelling in the morality of their production practices. To this end, consumers should be encouraged to consider the moral dimensions of products as an important contributory factor to their consumption decisions and develop social competition on these margins. Ethical consumption might be regarded as a relatively weak form of altruism as opposed, for instance, to volunteering or donating blood. Nevertheless, a study in the field of green consumption has demonstrated that consuming morally does offer advantages generally associated with altruism, such as higher satisfaction with life, stronger self-esteem, and more positive emotional experiences.²²⁹

The task of spurring this kind of social competition seems feasible. Research consistently shows that most consumers regard ethical considerations as important for a purchasing decision.²³⁰ Yet only a minority of consumers actually take these considerations into account while

227. See MATTHEW P. MCALLISTER, *THE COMMERCIALIZATION OF AMERICAN CULTURE: NEW ADVERTISING, CONTROL AND DEMOCRACY* 60–61 (1996).

228. See, e.g., *Animals Used for Food*, PETA, <http://www.peta.org/issues/animals-used-for-food/> (last visited Mar. 9, 2016) (discussing animal torture for food); BBC Panorama Investigation, *Chocolate-The Bitter Truth 1 of 5-Ivory Coast Child Trafficking*, YOUTUBE (Feb. 2, 2011), <http://www.youtube.com/watch?v=LD85fPzLUjo&list=PLDA49D0BD6B2337F0>; Leila Brillson, *New Study Shows Fashion's Reliance on Slave Labor*, REFINERY29 (Nov. 16, 2012, 9:30 AM), <http://www.refinery29.com/apparel-industry> (discussing slave labor in fashion industry); PHIL MeetsJokerGod, *Blood Diamonds*, YOUTUBE (June 19, 2012), http://www.youtube.com/watch?v=_bzMrxVw174; *Testing Cosmetics and Household Products on Animals*, PETA, <http://www.peta.org/issues/animals-used-for-experimentation/cosmetic-household-products-animal-testing/> (last visited Mar. 9, 2016) (discussing animal torture in cosmetics industry).

229. Lynn De Vlieger & Liselot Hudders, *How "Green" Buying Affects How We Feel: A Study on the Impact of Green Purchases on an Individual's Subjective Well-Being*, 12TH INT'L CON. RES. ADVERTISING (2013), <https://biblio.ugent.be/publication/4094783/file/4094790.pdf>.

230. See Griskevicius et al., *supra* note 3, at 115.

shopping.²³¹ One of the reasons for this discrepancy lies in the untrustworthiness of the available information related to production processes. Lack of clear standards results in great confusion in this field. Thus, “fair trade” or “fairly traded” signs licensed by various entities may connote different things.²³² Claims such as “never tested on animals,” “cruelty-free,” or “against animal testing” may have diverse meanings.²³³ The same is true for labels such as “eco-friendly” or “green.”²³⁴

Moreover, surveys consistently show that claims of ethical production methods found on the market today are misleading in the vast majority of cases.²³⁵ The Federal Trade Commission, an entity responsible for detecting and prosecuting deceptive advertising claims, does little to prevent this type of fraud.²³⁶ Private plaintiffs claiming to have been misled as to a certain aspect of production often fail, being unable to demonstrate an economic loss, which is required to prove standing.²³⁷ And thus, unsurprisingly, today’s consumers perceive ethical production claims with substantial mistrust.²³⁸

Another reason why people fail to express their moral preferences when shopping lies in the cultural connotations of consumption that strongly encourage self-centeredness. These connotations oust ethical

231. See *id.* (“A recent survey shows that while an overwhelming majority of people have great enthusiasm for being green and lowering their carbon footprint, only 9% use any environmentally friendly products . . .”); see also Jeffery Bray et al., *An Exploratory Study into the Factors Impeding Ethical Consumption*, 98 J. BUS. ETHICS 597, 601–05 (2011).

232. See Paulette L. Stenzel, *Mainstreaming Fair Trade and Resulting Turmoil: Where Should the Movement Go from Here?*, 37 WM. & MARY ENVTL. L. & POL’Y REV. 617, 621–28 (2013) (discussing the different standards of the “Fair Trade” label); *What is the Difference Between Fairtrade and Fairly-Traded?*, PURPLE DOT, <http://www.purpledot.org/mapping/faqs/fairtrade-or-fairly-traded> (last visited Mar. 9, 2016) (explaining the difference between “Fairtrade” and “fairly-traded”).

233. See Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 459–60 (2006).

234. See Jessica E. Fliegelman, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 FORDHAM URB. L.J. 1001, 1006–07 (2010).

235. See Mitchell & Ramey, *supra* note 126, at 42 (“Shockinglly, more than 95% of the 4,744 green products identified in the report were guilty of at least one of the seven greenwashing sins.”).

236. See Robert B. White, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325, 343 (2010) (“[S]ince May 2000, the FTC has not prosecuted a single green-marketing claim or issued any *Green Guides* revisions.”); Winders, *supra* note 233, at 463 (“[T]he FDA and FTC have declined to regulate ‘cruelty-free’ claims. Despite citizen requests that they do so, no agency has proposed guidelines or rules on this issue.” (footnote omitted)).

237. See Assaf, *supra* note 222.

238. See Jeffrey J. Minneti, *Is It Too Easy Being Green? A Behavioral Economics Approach to Determining Whether to Regulate Environmental Marketing Claims*, 55 LOY. L. REV. 653, 655 (2009) (“[O]nly 16% of those surveyed trusted manufacturers’ environmental claims about their products.”). Scholars have suggested that information about the production process could be incorporated into the barcodes of products, so that the consumer could get it by scanning the barcodes with her phone. See Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 966 (2014); Stephanie Watts & George Wyner, *Designing and Theorizing the Adoption of Mobile Technology-Mediated Ethical Consumption Tools*, 24 INFO. TECH. & PEOPLE 257, 259 (2011).

considerations from the consumer's mind at the moment of shopping.²³⁹ The social pressure toward shopping for signals of economic status might be another factor distracting the consumer from such considerations. If so, awakening social attention to the moral issues of consumption does not seem overly difficult. Research has shown that competition over ethical dimensions of products is easy to create in a laboratory setting.²⁴⁰ Moreover, when such a competition takes place, people tend to prefer products that present them as morally concerned consumers over goods that signal high economic status and even over better functioning goods.²⁴¹

A caveat is in order here: attention should be paid to the danger that competition over ethical consumption might turn into another form of competition over economic status. Obviously, environment-friendly and humanely produced articles may entail greater costs than their counterparts. Consequently, such products are likely to be more expensive and thus have the potential of serving as symbols of economic status. Yet, the price differences here are not expected to be as significant as in the field of luxury brands. That is, unlike luxury brands, products bearing ethical consumption signs will presumably be within the reach of most consumers and thus will not be good candidates for signifying economic status. In addition, just as consumption-based competition links wealth to status more generally, competition over ethical consumption is likely to tie its values to status in wider social settings. For instance, if recyclable products bring social status, so should creative solutions for reusing seemingly obsolete articles, as well as avoiding the use of plastic bags and other disposable products, consuming less, and so on. Since these patterns of behavior do not entail great monetary outlay, they are expected to be accessible to rich and poor (almost) alike.

Like any social competition, competition over ethical consumption necessitates a reliable signaling system. To this end, I suggest creating a system of three simple signs that will appear on products, grading them in the aspects of human welfare, ecology, and animal treatment (hereinafter ethical consumption signs). To be able to serve as status signals, these signs should be easily observable. In each category, the grade should reflect a bottom-line calculation of the various relevant factors. That is, the grade given in the category of human welfare should be calculated taking into account the labor conditions in the production and distribution processes; the creation of working places in the national industry; donating money, meals, or any other products to charities; etc. Similarly, in the category of ecology, one should take into account the entire impact of production and

239. See Bray et al., *supra* note 231, at 599–600.

240. See Barclay, *supra* note 132; Nowak & Sigmund, *supra* note 132.

241. See Mitchell & Ramey, *supra* note 126, at 43.

distribution processes on the environment in terms of pollution, destruction of natural resources, consumption of water and energy, and any other valuable raw materials. Durability, recyclability, packaging, and any other relevant factors should also be factored into the calculation. Lastly, the grade regarding animal treatment should combine all factors of animal suffering associated with the production process of the article in question. Even if the article is not usually associated with animal suffering (such as olive oil), this does not mean that its high grade in this category would be non-informative. It would remind the consumer of the advantages of this product over its less animal-friendly counterparts (such as butter).

Each ethical consumption sign should be under the control of an entity authorized to license it. The entity would then check all the relevant factors and grade the product in question. The company can then display the sign with the grade it was awarded for its products. As in the field of brands, there should be no duty to display the ethical consumption sign. This suggestion hardly requires creating a novel legal mechanism. The existing institutions of collective marks and certification marks—trademarks that are licensed to those who adhere to standards set by the trademarks’ owners—already provide an adequate platform for developing ethical consumption signs.²⁴²

Similar models of signaling already exist on the market. Private entities license various signs indicating moral product dimensions—notable examples include “Fair Trade,”²⁴³ “Fairly Traded,”²⁴⁴ Product Red,²⁴⁵ “Leaping Bunny,”²⁴⁶ Humane Charities Seal,²⁴⁷ “Green Seal,”²⁴⁸

242. Indeed, several scholars have suggested that these somewhat underused types of trademarks should be employed to signal information on the production process. *See, e.g.*, Nicole Aylwin & Rosemary J Coombe, *Marks Indicating Conditions of Origin in Rights-Based Sustainable Development*, in *LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE* 103, 116–20 (Ruth Buchanan & Peer Zumbansen eds., 2014); Mario Biagioli et al., *Brand New World: Distinguishing Oneself in the Global Flow*, 47 U.C. DAVIS L. REV. 455, 469 (2013); Daphne Zografos Johnsson, *Using Intellectual Property Rights to Create Value in the Coffee Industry*, 16 MARQ. INTELL. PROP. L. REV. 283, 304–08 (2012).

243. *See, e.g.*, *Fair Trade*, EQUAL EXCHANGE, <http://www.equalexchange.coop/fair-trade> (last visited Mar. 9, 2016); FAIRTRADE FOUNDATION, <http://www.fairtrade.org.uk/> (last visited Mar. 9, 2016); FAIRTRADE INTERNATIONAL, <http://www.fairtrade.net/> (last visited Mar. 9, 2016); FAIR TRADE USA, <http://fairtradeusa.org/> (last visited Mar. 9, 2016); FLOCERT, <http://www.flo-cert.net/flo-cert/> (last visited Mar. 9, 2016); WORLD FAIR TRADE ORG., <http://www.wfto.com/> (last visited Mar. 9, 2016).

244. *See, e.g.*, *Fairly Traded Certified Products*, SODEXO, http://sodexousa.com/usen/corporate_responsibility/sustainable_development/local_communities/fairtrade/fairtrade.aspx (last visited Mar. 9, 2016); *Fairly Traded Organics LLC*, LINKEDIN, <http://www.linkedin.com/company/fairly-traded-organics-llc> (last visited Mar. 9, 2016); *Our Sustainability Plan: Our Commitments*, J SAINSBURY PLC, <http://www.j-sainsbury.co.uk/responsibility/our-sustainability-plan/our-commitments> (last visited Mar. 9, 2016).

245. BANK AM. (RED), https://red.bankofamerica.com/#fbid=vceeo_qm57B (last visited Mar. 9, 2016).

246. LEAPING BUNNY PROGRAM, <http://www.leapingbunny.org/> (last visited Mar. 9, 2016).

“Environmental Report Card,”²⁴⁹ and “Forest Stewardship Council.”²⁵⁰ However, in each field of ethical consumption—human welfare, ecology, and animal treatment—there are several entities acting independently of each other. These entities apply diverse standards and focus on different issues. The resulting bulk of certifications generate much vagueness and uncertainty. Creating ethical consumption signs—a unified system combining the various relevant factors in each field and providing the consumer with the “bottom line”—will make the task of ethical consumption significantly easier.

The product-grading entities should of course be governmentally supervised. These should be publically funded nonprofit organizations that rely heavily on volunteers. Since the issues of human rights, ecology, and animal treatment are core interests of many volunteers, this project should not entail unreasonable costs. The idea of relying on volunteer work would not only save expenses but would further contribute to placing altruism high on the public agenda.

Like brands, ethical consumption signs should be protected against non-licensed uses that could cause consumer confusion. This will provide reliable information to all ethically concerned consumers—information that is so much lacking today. Furthermore, unlike brands, these signs should be protected against counterfeits, even if they do not mislead the primary consumer. In this way, the legal system will construct the ethical consumption signs as reliable (potential) symbols of status, just as it has done so far with brands.

Notably, consumers are more unlikely to buy counterfeits of signs representing benevolent corporate behavior than they are to buy counterfeit brands. The “Robin Hood effect” suggests that willingness to buy counterfeits is strongly connected to an unfavorable attitude towards the original brand owner. A consumer who believes that a company charges excessive prices and makes unreasonable profits will be much more willing to buy a counterfeit than one who believes that a company upholds high moral standards.²⁵¹ Consumers who perceive a company as being a highly ethical entity are prone to express their solidarity by opting for the original brand, even when the counterfeit is significantly cheaper.²⁵²

247. *Humane Charities*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MED., <http://www.pcrm.org/research/resch/charities/humane-charities> (last visited Mar. 9, 2016).

248. GREEN SEAL, <http://www.greenseal.org/> (last visited Mar. 9, 2016).

249. *2015 Environmental Report Card for Los Angeles County*, UCLA INST. ENV'T & SUSTAINABILITY, <http://www.environment.ucla.edu/reportcard/> (last visited Mar. 9, 2016).

250. FOREST STEWARDSHIP COUNCIL INT'L, <https://ic.fsc.org/> (last visited Mar. 9, 2016).

251. See Amit Poddar et al., *Exploring the Robin Hood Effect: Moral Profiteering Motives for Purchasing Counterfeit Products*, 65 J. BUS. RES. 1500, 1506 (2012).

252. See *id.* at 1504.

The proposed legal protection is likely to create an aura of authenticity around ethical consumption signs, just as trademark law currently reinforces such an aura around brands. Since authenticity is a purely social construct and not an inherent feature of an object,²⁵³ such a change of perception seems possible. And once the notions of authenticity and sincerity become associated with genuinely high moral standards rather than with genuinely high prices, a step has been taken in the direction of shifting our focus from materialism to altruism.

All in all, spurring social competition around the ethical dimensions of production has the potential to enhance the cultural importance of humanity, empathy, and social responsibility. As discussed above, people competing for social status are typically unaware of this motive and perceive their behavior as inherently valuable. That is, just like a person who buys an expensive suit believes that she simply needs a decent outfit, a person purchasing cruelty-free milk would most probably believe in the importance of humane treatment of cows. This possibility seems especially plausible given that many people already believe in the value of ethical consumption.²⁵⁴

Raising moral issues to the fore is likely to stimulate a shift in our social climate. Many scholars have noted that the values of consumer culture extend to wider social environments, legitimizing the calculation of self-interest in interpersonal relations and increasing materialism and hedonism.²⁵⁵ That is, consumption currently constitutes a most significant source of cultural norms, and if this is the case, the key to a shift in social consciousness may well lie in altering the very meaning of consumption.

CONCLUSION

Today's economists and politicians ordinarily use income and consumption as proxies for human well-being,²⁵⁶ and accordingly, the rationale behind policies aimed at economic growth is rarely challenged.²⁵⁷ Meanwhile, happiness research consistently demonstrates that from a certain point, absolute level of income has little or no effect on human well-being.²⁵⁸ In contrast, one's relative economic standing has constantly been found to strongly influence self-reported happiness as well as physical

253. See *supra* note 212 and accompanying text.

254. See Griskevicius et al., *supra* note 3, at 122.

255. For a historical review, see Thomas A. Horne, *Envy and Commercial Society: Mandeville and Smith on "Private Vices, Public Benefits"*, 9 POL. THEORY 551, 552–53 (1981).

256. See Manner & Gowdy, *supra* note 98, at 575.

257. See *id.*

258. See *supra* notes 46–47 and accompanying text.

and mental health.²⁵⁹ Laboratory experiments also confirm that people often prefer to have less in absolute terms, as long as they have more (or at least no less) than others.²⁶⁰ In other words, what matters most is often one's economic *status* rather than one's absolute affluence.

This phenomenon of "relative preferences" has drawn the attention of several scholars from the social sciences, who have suggested that policymakers should abandon standard economic analysis, as it fails to capture the genuine dynamics of economic preferences. Various suggestions have urged taking relative preferences into account. One such suggestion calls for finding ways of weakening competition for economic status and creating new, more socially beneficial forms of interpersonal tournaments in its place. More particularly, competitive altruism has been proposed as a desirable alternative to consumption races.²⁶¹

In this Article, I have made an attempt to implement this proposal using legal tools. In particular, I have suggested discouraging competition for economic status by disempowering symbols of this status. Since today's main symbols of wealth are brands—which constitute legally protected property—the legal system has a significant influence on their social connotations. Specifically, narrowing the scope of trademark protection so as to allow an interested consumer to purchase brand imitations would hinder the status-signaling function of brands. A more challenging task for the legal system is spurring altruistic competition. I have suggested that encouraging competition over ethical product dimensions would make a good start. This may be achieved by creating an appropriate signaling system that functions similarly to today's brands and enjoys similar legal protection.

The consumer culture that currently dominates the Western world has been extensively criticized by philosophers,²⁶² psychologists,²⁶³ social theorists,²⁶⁴ and literary writers.²⁶⁵ Destruction of natural resources, slave labor in developing countries, frustration, dissatisfaction, and general unhappiness of the Western world are but a few ills consumerism has been linked to. This Article has made the first attempt to inquire how the legal

259. See *supra* notes 7–8 and accompanying text.

260. See Frank, *supra* note 16, at 137.

261. See *supra* Parts III–IV.

262. See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 126–35 (1958).

263. See sources cited *supra* note 48.

264. See sources cited *supra* note 31; see also BENJAMIN R. BARBER, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE* (2007); MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 94–136 (Gunzelin Schmid Noer ed., Edmund Jephcott trans., 2002); Sut Jhally, *Advertising at the Edge of Apocalypse*, in *CRITICAL STUDIES IN MEDIA COMMERCIALISM* 27 (Robin Anderson & Lance Strate eds., 2000); MCALLISTER, *supra* note 227, at 59.

265. See, e.g., JEAN KILBOURNE, *CAN'T BUY MY LOVE* (1999); NAOMI KLEIN, *NO LOGO* (2000).

system may assist in shifting our cultural focus from consumerism to more socially advantageous cultural values. Further ways of advancing this important goal remain to be explored.