

ESSAY

BOUNDED RATIONALITY, PATERNALISM, AND TRADEMARK LAW

*Stacey Dogan**

ABSTRACT

We don't need behavioral economics to understand that trademarks can shape consumer preferences in ways that have little to do with objectively measurable differences in product quality. Scholars, judges, economists, and policymakers have long recognized the tendency of strong marks to skew consumer decisions. The concern lies not only in price effects but with the allocative effects of encouraging investment in persuasive advertising, rather than product innovation or similar "productive" pursuits. While informative advertising can benefit consumers, advertising that creates artificial brand-based differences between otherwise identical products appears not only costly to consumers but also socially wasteful.

This Essay complements the rich—and growing—literature considering the relationship between contemporary trademark law and consumer welfare. Much of this literature focuses on the harms that expansive trademark law poses to consumer interests such as speech, autonomy, and product choice. This Essay considers the consumer/trademark relationship from a different perspective. It seeks to identify some of the cognitive mechanisms through which trademarks, in collaboration with advertising, may skew consumer decisions away from what rational self-interest might suggest. Because these effects can occur even with narrowly-

* Associate Dean for Academic Affairs, Professor and Law Alumni Scholar, Boston University School of Law. Thanks to participants in the University of Houston Law Center's Institute for Intellectual Property & Information Law Symposium for helpful comments, and to Boston University School of Law for supporting my research.

drawn trademark subject matter and scope, they deserve separate attention. A better understanding of these effects may enable a more informed conversation about whether we should worry about them. It also might suggest legal, regulatory, or educational mechanisms to soften or counter some of the more pernicious effects of trademarks without compromising consumer autonomy.

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I. INTRODUCTION

We don't need behavioral economics to understand that trademarks can shape consumer preferences in ways that have little to do with objectively measurable differences in product quality.¹ Scholars, judges, economists, and policymakers have long recognized the tendency of strong marks to skew consumer decisions.²

1. See Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1172–73 (1948) (explaining that market control depends not on objective differences between products, but upon the perceived differences caused by advertising).

2. See *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (“The protection of trade-marks is the law’s recognition of the psychological function of symbols.”); EDWARD HASTINGS CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 56, 61–62 (5th ed. 1946); Kurt Borchardt, *Are Trademarks an Antitrust Problem?*, 31 GEO. L.J. 245, 246 (1943); Brown, *supra* note 1, at 1187; Bartholomew Diggins, *Trade-Marks and Restraints of Trade*, 32 GEO. L.J. 113, 115 (1944). See generally Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 428 (1999) (explaining the effect of trademarks on consumers’ unconscious decision-making).

While many factors contribute to this phenomenon, the power of persuasive advertising, combined with the bounded rationality of consumers, plays a potent role. The twentieth century witnessed extraordinary growth in the use of psychological tools to shape people's desires, contributing to a culture of consumerism and brand hegemony.³

Critics have long fretted about the consumer harm that can result from trademark-based product differentiation.⁴ As a trial judge wondered in 1928: "Why should a vendor be able to collect from a purchaser, as a part of the purchase price, money which has been spent in an effort to mislead that very purchaser in making that very purchase?"⁵ In particular, the judge balked at the idea that consumers should pay higher prices for a branded version of the exact same product based on their misimpression that the advertised version was superior.⁶ The concern lies not only in the consumer's over-payment but with the allocative effects of encouraging investment in persuasive advertising, rather than product innovation or similar "productive" pursuits.⁷ While informative advertising can benefit consumers, advertising that creates artificial brand-based differences between otherwise identical products appears not only costly to consumers but also socially wasteful.⁸

Should the law worry about these tendencies of trademarks, or should it view them as endemic (or even desirable) in any system that protects marks as indicators of source?⁹ More fundamentally, should judges and lawmakers care if advertising shapes consumer preferences in ways that appear to diverge from what a

3. See Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 85, 105, 107 (2009); Peter S. Menell, *2014: Brand Totalitarianism*, 47 U.C. DAVIS L. REV. 787, 791 (2014); cf. Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 810, 819–20 (2010) (discussing the psychological interplay between consumerism and the desire to distinguish oneself). See generally THE CENTURY OF THE SELF (BBC television broadcast Mar. 17, 2002) (exploring how psychological techniques were applied to influence consumer decisions during the twentieth century).

4. See *Am. Safety Razor Corp. v. Int'l Safety Razor Corp.*, 26 F.2d 108, 114 (D.N.J. 1928), *rev'd*, 34 F.2d 445 (3d Cir. 1929) (denouncing efforts to mislead consumers into paying more for an identical product).

5. *Id.*

6. *Id.* ("[I]f the public knew the truth, it would buy that blade . . . which is sold at the smallest price, . . . its ignorance is costing it money without warrant every time it buys a blade at any figure beyond the minimum.")

7. See Brown, *supra* note 1, at 1169 ("If we consider first the total stream of production and consumption, persuasive advertising seems only to consume resources that might be put to better use producing more goods and services.")

8. See *id.*

9. See generally Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 263 (2013) (contending that consumers derive substantial utility from their hedonic experience with marks, and that the law should embrace that phenomenon rather than resisting it).

hypothetical “rational” actor would choose?¹⁰ Does it matter whether consumers derive measurable short-term pleasure from acting on those preferences, and whether that pleasure endures or reverses itself?¹¹ How should we think about attempts to “correct” such preferences—as regulation of competition, benign consumer protection, or paternalistic meddling?¹² To what extent might trademark doctrine play a role?

Trademark scholars have pondered these questions for over a century, and have debated the extent to which trademark doctrine should tolerate, resist, or even encourage the persuasive function of marks.¹³ Legal scholars have also drawn from the literature of marketing, psychology, and behavioral economics to demonstrate the complexity of human decisions and to consider their implications for trademark law.¹⁴ Yet the trademark literature has not fully explored whether particular systematic biases revealed by these disciplines may reduce the benefits conveyed by trademarks under the economic model.¹⁵ In particular, psychological and economic researchers have identified a set of heuristics and biases that influence human decisions in predictable (and predictably

10. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 72 (2008) (“[F]or all their virtues, markets often give companies a strong incentive to cater to (and profit from) human frailties, rather than to try to eradicate them or to minimize their effects.”).

11. For a discussion of this phenomenon, see generally Colin F. Camerer, *Wanting, Liking, and Learning: Neuroscience and Paternalism*, 73 U. CHI. L. REV. 87, 98–99 (2006).

12. See Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1088 (2012) (warning that even limited paternalism can “pose a significant risk of reducing both our welfare and our liberty”); cf. Laura A. Heymann, *The Public’s Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 660 (2009) (exploring trademark law from a Kantian approach to consumer autonomy, in which “[t]he value of choice is not in what choice is ultimately made, but rather in the fact that the choice is personal to the individual”).

13. For an example of the latter, see Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 830–31 (1927); see also Manta, *supra* note 9, at 263 (arguing that a trademark system must account for the hedonic utility derived by consumers when they use products of a certain brand); cf. Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTELL. PROP. L.J. 331, 373–75 (2007) (advocating a view of infringement law as a de-biasing mechanism).

14. E.g., Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2032 (2005); Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 IOWA L. REV. 63, 92–93 (2009); Sheff, *supra* note 13, at 373–75.

15. Cf. Wright & Ginsburg, *supra* note 12, at 1044–45 (discounting the policy relevance of experimental findings of cognitive biases). In an important article, Jeremy Sheff has advocated the use of behavioral economics as a *justification* for trademark protection. See Sheff, *supra* note 13, at 334 (noting that trademark law should be understood as “designed . . . to accommodate and even harness non-rational human thought processes, rather than suppress or eradicate them.”). This Essay considers non-rational behavior from a different perspective, asking whether trademarks’ ability to harness consumers’ biases might sometimes harm consumer interests.

non-rational) ways.¹⁶ These features can help to explain not only the phenomenon of brand attraction but also the stickiness of consumer loyalty to particular brands.¹⁷ Equipped with this understanding, we can better assess whether consumers might benefit from making different purchasing decisions and whether the law has any role to play in helping them.

This Essay complements the rich—and growing—literature considering the relationship between contemporary trademark law and consumer welfare.¹⁸ Much of this literature focuses on the harms that expansive trademark law poses to consumer interests such as speech, autonomy, and product choice.¹⁹ Scholars have proposed various responses to these threats, ranging from adjustments to the standard for infringement,²⁰ to shoring up defenses,²¹ to narrowing the scope of trademark subject matter,²² to eliminating the recently-added anti-dilution right.²³

This Essay considers the consumer/trademark relationship from a different perspective. It seeks to identify some of the cognitive mechanisms through which trademarks, in collaboration with advertising, may skew consumer decisions away from what rational self-interest might suggest.²⁴ Because these effects can occur even with narrowly-drawn trademark subject matter and

16. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, SCL MAG., Sept. 27, 1974, at 1124 (stating that people rely on heuristics to simplify decision-making) [hereinafter *Judgment Under Uncertainty*].

17. See THALER & SUNSTEIN, *supra* note 10, at 35 (explaining the heuristic underlying the status quo bias).

18. See, e.g., Beebe, *supra* note 3, at 819–20; Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 71–72 (2008); Heymann, *supra* note 12, at 659–60; Lunney, *supra* note 2, at 421.

19. See, e.g., Lunney, *supra* note 2, at 486–87 (stating that the expansion of trademark law has harmed consumers and the public interest more generally).

20. See, e.g., Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1672–73 (2007) (proposing “trademark use” requirement in infringement suits); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 450 (2010) (advocating threshold materiality requirement); Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1360, 1366 (2011) (proposing that courts reconcile trademark and false advertising law by, among other things, requiring materiality for both).

21. E.g., William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267, 2299 (2010) (suggesting safe harbors to protect certain speech-related uses of trademarks).

22. E.g., Lunney, *supra* note 2, at 435–46 (concluding that trademark protection for product design causes more harm than good and should be abolished); Kenneth L. Port, *The “Unnatural” Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?*, 85 TRADEMARK REP. 525, 574–75 (1995) (arguing against an anti-dilution amendment to the Lanham Act).

23. See Port, *supra* note 22, at 574–75.

24. For a discussion of the numerous ways in which heuristics result in systematic bias, see *infra* Section III.B.

scope, they deserve separate attention.²⁵ A better understanding of these effects may enable a more informed conversation about whether we should worry about them.²⁶ It also might suggest legal, regulatory, or educational mechanisms to soften or counter some of the more pernicious effects of trademarks without compromising consumer autonomy.²⁷

II. THE ECONOMIC MODEL OF TRADEMARK LAW

Despite an active debate over its legitimacy,²⁸ the economic explanation for trademark law has dominated both judicial and scholarly accounts of the law in recent decades.²⁹ Under this model, trademark law exists to promote informational accuracy in markets, with the ultimate aim of making those markets more competitive.³⁰ Trademarks, the story goes, convey information to consumers about the source and quality of products bearing a

25. Cf. Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 515, 529–30 (2008) (explaining that even “conceptually weak, diluted marks” can affect consumer behavior in certain contexts).

26. For a discussion of the implications of cognitive biases on current trademark theory, see *infra* Part IV.

27. Cf. Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1382 (2015) (discussing legal tools to counter technology-enabled exploitation of consumers).

28. See, e.g., Deven R. Desai, *Bounded by Brands: An Information Network Approach to Trademarks*, 47 U.C. DAVIS L. REV. 821, 826 (2014); Chad J. Doellinger, *A New Theory of Trademarks*, 111 PENN. ST. L. REV. 823, 860 (2007) (contending that “[t]he economic approach” to trademarks “has . . . gradually undermined and unsettled what was once a rich and normatively-driven body of law”); McKenna, *supra* note 14, at 75 (contending that the persuasive function of trademarks dominates their informative function); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 74–75 (2012); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 794 (2012) (explaining that the economic theory of trademark law is an incomplete explanation of the policy underlying status confusion cases); cf. Beebe, *supra* note 14, at 2025, 2060 (describing the “neoclassical orthodoxy” as “essentially frivolous”); Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1607–08 (proposing a modified version of the economic model that distinguishes between the “linguistic function” and the “trust function” of trademarks).

29. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (noting that trademark law “reduce[s] the customer’s costs of shopping and making purchasing decisions” and “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.” (internal citations omitted)); Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2105 (2004); Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786 (2004) [hereinafter *Trademarks and Consumer Search Costs*]; Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 466 (2005) [hereinafter *The Merchandising Right*]; Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 526 (1988); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265, 285 (1987).

30. See Landes & Posner, *supra* note 29, at 270 (explaining that trademarks reduce consumer search costs).

mark.³¹ Because they can rely on these signals, consumers can spend less time researching every product that they buy, which reduces transaction costs and enhances competition.³² It also makes firms willing to invest in quality products with the knowledge that they can protect their reputations against imposters.³³ To serve their function, of course, trademarks need legal protection.³⁴ If competitors could mimic trademarks with impunity, marks would lose their meaning, and firms would wastefully allocate resources to ensure that consumers know what they are buying.³⁵ The “search costs” theory of trademark law thus presumes that by reducing consumer search costs, trademark laws can promote a more efficient, competitive economy.³⁶

Like any economic model, this one relies on certain assumptions about the behavior and preferences of individuals and firms. It treats consumers as rational actors who have ordered preferences and act on them consistently; consumer decisions are assumed to maximize the utility that comes from those preferences.³⁷ Utility, in this model, is measured by willingness to pay, not the actual benefit derived from the purchase.³⁸ Thus, although consumers can learn from their experiences with prior transactions, their utility from the present transaction turns on how much they pay.³⁹ The model leaves no room for inquiry into whether the purchase lived up to that valuation or whether some unknown alternative might have served equally well (or better).

To complement this rational view of consumers, the economic model assumes that the “information” revealed through trademarks helps consumers to identify products with features that

31. Trademarks initially indicated source explicitly, but consumers today rely on trademarks primarily for information about product features and quality, which—of course—depend upon consistency of source. See Economides, *supra* note 29, at 527 (“Presently the trademark typically identifies the product (the full combination of features that constitute the product), and its role of identifying the source is secondary in the minds of consumers.”).

32. See McKenna, *supra* note 28, 73–74 (2012) (explaining the “search costs” theory of trademark law).

33. See Landes & Posner, *supra* note 29, at 270 (explaining that firms would have no incentive to invest in quality products if free-riders could legally duplicate trademarks).

34. *Id.*

35. Cf. Brown, *supra* note 1, at 1169 (asserting that money spent on convincing consumers to pick one product over its brand-name equivalent is a waste of resources).

36. See Landes & Posner, *supra* note 29, at 269 (explaining that trademark law promotes efficiency by saving consumer search costs and encourages expenditures on product quality).

37. See Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, in *ENCYCLOPEDIA L. & ECON.* 790, 791 (Boudewijn Bouckaert & Gerrit De Gees eds., 2000).

38. See Brown, *supra* note 1, at 1181 (stating that the utility of goods is measured by what people will pay for it).

39. *Id.*

meet their objective needs.⁴⁰ Advertising, in this view, serves an informational function; consumers rely on the combination of advertising, word of mouth, and direct experience to shape opinions and preferences about products bearing a mark.⁴¹

The search-costs model has come under attack in recent years from critics who charge it with everything from naiveté to complete responsibility for trademark law's twentieth-century expansion.⁴² The full scale of the critique goes beyond the scope of this Essay, but two points bear mention. First, because the model conditions trademark rights on the existence of a source-identifying signal, it tolerates a broad range of trademark subject matter, from words to logos to product features and sounds.⁴³ Critics question whether the informational benefits of such wide-ranging trademarks outweigh their costs, particularly when it comes to protection of product features.⁴⁴ Second, some complain that the model's obsession with confusion leads to over-broad trademark rights and a chill on behavior that may benefit consumers.⁴⁵ While these concerns about the subject matter and scope of trademark rights deserve attention, they arguably involve questionable extensions of the economic model, rather than faithful application of it. The model itself seeks to promote competition, not restrain it; indeed, trademark law has limiting doctrines to block claims that

40. See Stacey L. Dogan & Mark A. Lemley, *A Search Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1226 (2007) (explaining that trademarks tell a consumer that a particular good has the features they are seeking).

41. It bears emphasis that this product-related information has value regardless of its source. Consumers benefit as much (indeed, sometimes more) from third-party reviews and criticism of branded products as they do from information conveyed by trademark holders themselves. Because this information, too, can facilitate consumer search and promote better-informed markets, the economic model welcomes it. See, e.g., *id.* ("Trademarks work as signifiers precisely because they are a particularly efficient means of conveying information. They are useful in making comparisons for the same reason.").

42. See sources cited *supra* note 28 (challenging the legitimacy of the economic explanation of trademark law).

43. See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163 (1995) ("We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained 'secondary meaning' and therefore identifies and distinguishes a particular brand (and thus indicates its 'source').").

44. Particularly with respect to product configuration marks, these costs include chill in the introduction of competing products. See Bone, *supra* note 29, at 2183–84; Lunney, *supra* note 2, at 428.

45. See, e.g., Graeme B. Dinwoodie, *Developing Defenses in Trademark Law*, 13 LEWIS & CLARK L. REV. 99, 120 (2009); Grynberg, *supra* note 18, at 110 (proposing that courts consider consumer interests on both sides of the ledger in trademark litigation); Heymann, *supra* note 12, at 656; William McGeeveran & Mark P. McKenna, *Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253, 300 (2013) (advocating that courts single out some types of cases for "different treatment because they systematically implicate important competition or communication values").

would have the opposite effect.⁴⁶ In any event, the economic model's core insight—that legal protection of trademarks enables consumers to rely on these signals for information about products—does not mandate unlimited subject matter or scope.⁴⁷ The fact that trademarks may impose costs as well as benefits has implications for the shape of trademark law but not for its existence; nor does it discredit the basic premise of the economic model that some form of trademark protection is essential to a functioning competitive market.⁴⁸

III. COMPLICATIONS

While the economic model offers a rationale for trademark protection and capably explains many trademark doctrines,⁴⁹ its reliance on rational choice theory leaves it ill-equipped to address consumer decisions that appear incompatible with their utility-maximizing self-interest. In particular, the model fails to contemplate that trademarks might influence people to make purchasing decisions that might not bring them the highest quality goods at the lowest available price—i.e., the selection of the hypothetical rational actor.⁵⁰ This apparent discrepancy can come in different forms, which may have different implications for trademark theory and doctrine.

Costly shortcuts. In some markets, consumers appear to use trademarks as a proxy for objective product quality that may or may not be warranted.⁵¹ Take over-the-counter pharmaceuticals. If we asked people, in the abstract, to identify their goals in purchasing pharmaceutical products, most would say that they want high-quality goods at the lowest possible price. Studies demonstrate that health care professionals, educated people, and pharmacists choose generic drugs over branded drugs by a wide margin, no doubt because they know that generics offer the same chemical ingredients and therapeutic effect at a significantly lower price. As we move away from these sophisticated audiences, however, the preference for generics drops dramatically.⁵² If we assume that these better-informed purchasers are making “rational”

46. See generally *Trademarks and Consumer Search Costs*, *supra* note 29, at 786–99.

47. *Id.* at 795.

48. See, e.g., Dogan & Lemley, *supra* note 40, at 1226; Lunney, *supra* note 2, at 427–28.

49. See Dogan & Lemley, *supra* note 40, at 1234.

50. See Bart J. Bronnenberg et al., *Do Pharmacists Buy Bayer? Informed Shoppers and the Brand Premium*, 130 Q. J. ECON. 1669, 1690 (2015).

51. *Id.*

52. *Id.* at 1700.

utility-maximizing decisions, trademarks in this market are arguably having the opposite of their intended effect, inhibiting information flow and frustrating competition rather than promoting it. By using the trademark as a proxy for quality, in other words, less-informed consumers appear to be consistently over-paying for otherwise equivalent products.⁵³

The model responds to these concerns in two ways. First, it assumes *a priori* that the less-informed consumers receive some benefit from paying a higher price for the branded product. In the pharmaceutical context, for example, a consumer might derive utility from her confidence in the firm's reputation as a reliable manufacturer.⁵⁴ Second, to the extent that better information might reduce the consumer's preference for the higher-cost product, the model contemplates legal doctrines that allow access to such information.⁵⁵ Competitors and third parties, for example, may use trademarks to call attention to equivalents, imitations, or other alternatives to the trademarked good.⁵⁶ In this way, the model assumes that over time, consumer decisions will gravitate in a utility-maximizing direction. As the persistent price gap in the over-the-counter pharmaceutical market demonstrates, however, this assumption is a contestable one.⁵⁷

Hedonic consumption. Whereas costly shortcuts appear to result from a stubborn information gap, a second form of apparently non-rational consumer behavior—what I call hedonic consump-

53. Cf. *Am. Safety Razor Corp. v. Int'l Safety Razor Corp.*, 26 F.2d 108, 114 (D.N.J. 1928), *rev'd*, 34 F.2d 445 (3d Cir. 1929) (expressing this concern).

54. Landes & Posner, *supra* note 29, at 275 ("The fact that two goods have the same chemical formula does not make them of equal quality to even the most coolly rational consumer. That consumer will be interested not in the formula but in the manufactured product and may therefore be willing to pay a premium for greater assurance that the good will actually be manufactured to the specifications of the formula."); cf. Bone, *supra* note 29, at 2116 ("Just because advertising creates new preferences in addition to supplying information to help satisfy preferences already formed does not mean that the induced preferences are 'irrational' or 'bad' or that they should count as a social cost in considering whether to protect the mark. In order to draw this conclusion, one needs a normative theory of good and bad preferences, and any such theory is difficult to defend in a nonpaternalistic way."); Richard Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994, 1037 (1979) (noting that consumers might purchase name-brands as "a sensible way of reducing perceived risk" of a sub-standard purchase).

55. Bone, *supra* note 29, at 2116.

56. See Dogan & Lemley, *supra* note 40, at 1234.

57. It is no response, moreover, to return to the first point: that consumers derive utility from their confidence in the brand's reputation. An information transmission model of trademarks assumes that consumers benefit from *accurate* information that trademarks convey about the source and qualities of products. If better-informed consumers are consistently opting in favor of generics, then the confidence that less-informed consumers have in the branded version is misplaced. *Id.* at 1226.

tion—involves a more complicated relationship between consumers, trademarks, and products.⁵⁸ Research has shown that consumers often experience distinct pleasure from knowing that they are buying, consuming, or experiencing a trademarked version of a good.⁵⁹ The canonical example involves Coca-Cola. In repeated experiments, Coke drinkers show not only verbally expressed preferences, but a measurable difference in brain response, when presented with a drink labeled Coca-Cola in comparison to an unlabeled version of the very same liquid.⁶⁰ Status goods, too, involve a form of hedonic consumption: consumers who buy, use, and wear them derive pleasure from the experience—a pleasure that is distinct from whatever benefits they receive from the physical, non-trademark aspects of the product.⁶¹

Hedonic consumption sits uncomfortably with the economic model of trademark law with its presumed dichotomy between trademarks and the products they denote.⁶² When the trademark becomes a salient feature of the product itself—i.e., when it becomes part of the product's value (and therefore its purchase price), independent of its function as a source-indicator—the effect of trademark protection on competition becomes more ambiguous.⁶³ If consumers relish the feeling of drinking a Coke because it's a Coke, rather than because they know Coke denotes a particular drink product, Coke's exclusivity in the mark gives it a competitive advantage beyond that contemplated by the search-costs model.⁶⁴ At the same time, hedonic consumption, unlike persistent costly shortcuts, does not necessarily reflect a glitch in the information model, at least from the perspective of consumer utility. If the trademark really enhances the consumer's experience of the

58. Irina Manta embraces hedonic consumption as a social good, and she urges that hedonic utility be included explicitly in the economic model. See Manta, *supra* note 9, at 248.

59. *Id.* at 248–49.

60. See, e.g., Samuel M. McClure et al., *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 NEURON 379, 382–85 (2004) (describing differences in both expressed preferences and MRI-measured neural activity when subjects were presented with unbranded versus branded colas in taste tests).

61. See generally Sheff, *supra* note 28, at 794 (explaining the effect of status good purchases on consumers).

62. Cf. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 624 (2004) (“The culture industries—and what industries aren’t?—have long sold trademarks as commodities in their own right.”); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 125 n.63 (2005) (“Trademarks have in some instances become the commodities themselves rather than signifiers of a producer of the good or service, or of the product itself. For example, the Nike swoosh is valuable separate and apart from the running shoes that were first marked with the trademarked swoosh.”).

63. *Id.* at 661–62.

64. *Id.* at 695.

good, then the consumer is making a rational choice to pay more for it, at least in the short term.

Of course, the various effects of trademarks are not mutually exclusive; it may be that consuming Tylenol rather than generic acetaminophen leads to similar hedonistic enjoyment as drinking Coke rather than an unmarked sample of the very same cola. Indeed, the various functions of a trademark—accurate information facilitation, the tendency toward costly shortcuts, and hedonic consumption—undoubtedly interact, with different factors predominating depending on the trademark and the class of product. The resulting muddle can make it appear impossible to segregate the various effects. But it's worth pondering what might happen if such segregation were possible. If, for example, the law could isolate and reduce the tendency of consumers to use costly shortcuts, it would align trademark law more closely with its competitive aspirations.

Decades of research on human decision-making may offer some insight into these questions. In particular, research in cognitive decision theory and behavioral economics exposes a number of specific ways in which the rational choice model fails as an accurate predictor of human behavior.⁶⁵ Repeated studies demonstrate that real people rarely behave as rational utility-maximizers; instead, they rely on a set of heuristics and biases that shape their decisions in predictable—and predictably irrational—ways.⁶⁶ Unlike hypothetical rational consumers, real consumers act with “bounded rationality.”⁶⁷ They act impulsively, favoring short-term rewards over longer-term satisfaction.⁶⁸ They opt for stability rather than change, even when change might benefit them.⁶⁹ They often experience a chasm between what they want and what they

65. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 101 (1955).

66. *Id.* at 100–01.

67. *Id.*; see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541 (1998); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 690 (1999).

68. See *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (“The protection of trade-marks is the law’s recognition of the psychological function of symbols.”); Jolls et al., *supra* note 67, at 1479 (“[H]uman beings often take actions that they know to be in conflict with their own long-term interests.”); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1843–44 (2012) (discussing welfare effects of the “present bias,” in which consumers make choices based on short-term costs and benefits, without adequate attention to long-term effects).

69. THALER & SUNSTEIN, *supra* note 10, at 8 (discussing status quo bias); Colin Camerer, et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1225 (2003).

like, even after repeated exposures.⁷⁰ These studies do not disprove the essential insight of law and economics—that people behave in predictable ways and that the law both shapes and reflects those predilections—but they complicate our understanding of that behavior. As Christine Jolls, Cass Sunstein, and Richard Thaler explain in their canonical article: “The task of behavioral law and economics, simply stated, is to explore the implications of *actual* (not hypothesized) human behavior for the law.”⁷¹ As such, it’s worth considering whether the insights of behavioral economics have implications for the economic model of trademarks.

Why bother using the language of behavioral economics to confirm intuitions that date back to the early days of advertising? Legal scholars, economists, and others have long observed the tendency of advertising to shape consumer preferences in ways that appear inconsistent with their best interests;⁷² what, if anything, does behavioral economics add to that picture? A possible answer lies in the discipline’s relationship to traditional economic models of law. Rather than rejecting the economic framework as a tool of legal analysis, behavioral law and economics strive for “an approach to the economic analysis of the law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings.”⁷³ Behavioral economics, in other words, seeks to improve, rather than supplant, economic models of the law.⁷⁴ It does so by formalizing a model of human decision-making that diverges from the rational actor model in specific and predictable ways.⁷⁵ As such, the discipline provides an empirically-based response to the trope that all consumer decisions are, by definition, utility-maximizing and rational.⁷⁶ By unpacking the factors that motivate consumers to act,

70. See Camerer, *supra* note 11, at 90–91.

71. Jolls et al., *supra* note 67, at 1476–77. This article was among the first to consider the law-and-economics implications of the groundbreaking work on consumer decision theory pioneered by Daniel Kahneman and Amos Tversky. See *Judgment Under Uncertainty, supra* note 16, at 1128. See generally DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES, AND FRAMES 1–16 (2000) (introducing concepts of consumer decision theory).

72. See, e.g., Brown, *supra* note 1, at 1172; Sigmund Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROBS. 323, 323 (Spring 1949) (“Successful trade-marks . . . are largely matters of giving conventional forms of syllabification and ornamentation a reiteration prolonged and attractive enough to evoke a conditioned reflex on the part of their audience—the so-called consumer response. It was Judge Learned Hand, and no crusading sociologist, who said in a trade-mark case that ‘The art of advertising spuriously reinforced a genuine demand by the power of reiterated suggestion.’” (quoting *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 F. 960, 962 (2d Cir. 1918))).

73. Jolls et al., *supra* note 67, at 1473.

74. *Id.* at 1523.

75. *Id.* at 1524.

76. *Id.* at 1488 (“If rationality is used to mean simply that people ‘choose’ what they

it also offers the possibility of harnessing those factors to improve outcomes.⁷⁷

For the economic model of trademark law, behavioral economics (along with its precursor and psychology-based counterpart, cognitive decision theory) allows us to interrogate the assumption that consumers rely on trademarks in utility-enhancing ways. To that end, consider the following insights about consumer decision-making.⁷⁸

A. *Consumers Rely on Predictable Heuristics to Simplify Decisions.*

In an important (and Nobel Prize-winning) body of work on consumer decision theory, the psychologists Amos Tversky and Daniel Kahneman provided the framework and foundations for the field of behavioral economics.⁷⁹ Through a series of experiments, Tversky and Kahneman demonstrated that, in the face of uncertainty, “people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”⁸⁰ People, in other words, use mental shortcuts to guide their decisions. These heuristics save time and mental energy but can also “lead to severe and systematic errors.”⁸¹

Tversky and Kahneman identified three common heuristics used by consumers in gauging probabilities and estimating values.⁸² The *Representativeness* heuristic leads people to make judgments not by assessing objective probabilities, but based on assumptions about the relationships between a concept and

‘prefer’ in light of the prevailing incentives, then the notion of rationality offers few restrictions on behavior. The person who drinks castor oil as often as possible is rational because she happens to love castor oil. Other self-destructive behavior (drug addiction, suicide, etc.) can be explained on similar grounds. It is not even clear on this view whether rationality is intended as a definition of ‘preference’ or as a prediction.”); cf. Schmalensee, *supra* note 54, at 1041 & n.203 (1979) (“If consumers are irrational in any deep sense, the welfare-economic case for competition breaks down.”).

77. See *infra* Part III.

78. The combination of psychological and economic research has yielded a rich body of scholarship regarding the nature of human decisions and other behavior; this Essay emphasizes only a small slice of the research that has particular salience for trademark law. For a more thorough exploration see THALER & SUNSTEIN, *supra* note 10, at 19–20; Hanson & Kysar, *supra* note 67, at 646–54; Jolls et al., *supra* note 67, at 1541; Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1169–70 (2003).

79. *Judgment Under Uncertainty*, *supra* note 16, at 1124.

80. *Id.* at 1124.

81. *Id.*

82. *Id.*

something they know.⁸³ People may assess the likelihood of a person's profession, for example, based on the extent to which she fits some stereotype of that profession without regard to how many people actually work in that profession relative to alternatives.⁸⁴ Under the *Availability* heuristic, people evaluate risk (or opportunity) based on how readily examples of the hypothetical event come to mind.⁸⁵ This heuristic leads to inflated estimates of familiar, memorable, widely reported, or graphic sorts of events.⁸⁶ Finally, *Anchoring* drives people to approach decisions from some starting point, and adjust from there.⁸⁷ This heuristic demonstrates the power of defining that starting point; settlement negotiations, for example, tend to result in higher settlements if the plaintiff begins with a big number.⁸⁸ All of these heuristics show the importance of *framing*.⁸⁹ The way that choices or propositions are framed can have a profound influence on outcomes.⁹⁰

B. Heuristics Produce Systematic and Predictable Biases.

Although Tversky and Kahneman's project began as an exploration of the human decision-making process from a psychological perspective, it had a profound impact on scholarship in economics and law because it called into question the foundational principle of rational choice.⁹¹ In their own work, Tversky and Kahneman described numerous ways in which their heuristics resulted in systematic bias, and others have refined and extended their findings. For purposes of trademark law, a handful of biases have particular salience.⁹²

Status quo bias. Rational choice theory would predict that people re-evaluate their choices on an ongoing basis, adjusting their preferences in response to new information.⁹³ In reality, however, humans have a remarkable propensity to stick with the status quo, even when switching costs are negligible and in the face

83. *Id.*

84. *Id.*; see also Rachlinski, *supra* note 78, at 1171 (discussing examples).

85. *Judgment Under Uncertainty*, *supra* note 16, at 1127.

86. *Id.*

87. *Id.* at 1128.

88. THALER & SUNSTEIN, *supra* note 10, at 33.

89. *Id.* at 36.

90. *Id.*

91. See generally Rachlinski, *supra* note 78, at 1169–70.

92. Scholars have identified other biases that have special relevance in contexts such as juror deliberations. See, e.g., Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 L. & HUM. BEHAV. 89, 91 (1995) (discussing hindsight bias).

93. THALER & SUNSTEIN, *supra* note 10, at 34.

of objectively superior options.⁹⁴ As a result, starting points—the first-time purchase of a product, the initial options in an investment portfolio—matter far more than the rational model would predict.⁹⁵

Conformity. People tend to conform to others' views, even when the facts are available and conflict directly with that consensus.⁹⁶ Of course, relying on the views of other people is often rational, to the extent that those others have better information and can thus reduce the decision-maker's costs.⁹⁷ Research on conformity, however, shows that it occurs without regard to the merits of the adopted view and is largely immune to correction.⁹⁸ Groupthink and strong personalities play a special role here. People show a strong tendency toward group opinions even if they are clearly wrong⁹⁹ and show a similar inclination toward views of "confiden[t,] . . . consistent and unwavering" people.¹⁰⁰ Relatedly, perceptions of the widespread use of certain behavior can normalize that behavior, and perceptions that few people engage in the behavior has the opposite effect.¹⁰¹

Confirmation bias. Repeated studies have demonstrated that once someone settles on a point of view, she tends to interpret all evidence in a way that supports that point of view—even evidence that refutes it.¹⁰² As a result, time and experience reinforce existing beliefs, thus further entrenching errors rather than correcting them.¹⁰³ As Matthew Rabin and Joel Schrag describe it, "even an infinite amount of information does not necessarily overcome the effects of confirmatory bias: over time an agent may with positive

94. *Id.* at 35; Camerer et al., *supra* note 69, at 1224 ("People are much more likely to stick with existing policies, consumption bundles, legislators, and so on than normative theories would predict, even when the costs of switching are very low.").

95. Status quo bias complements a related bias, loss aversion, in which people fear loss more than they appreciate gains of identical value. *See* THALER & SUNSTEIN, *supra* note 10, at 34 (describing status quo bias and loss aversion as contributors to "inertia").

96. THALER & SUNSTEIN, *supra* note 10, at 56–58.

97. *Id.* at 57–58.

98. *Id.* at 56–58.

99. *See generally* Ranxi Jiang & Stella C. Chia, *The Direct and Indirect Effects of Advertising on Materialism of College Students in China*, 19 *ASIAN J. COMM.* 319, 319 (2009) (concluding that advertising affects Chinese college students both directly (by creating individual materialist desires) and indirectly (by shaping peer group norms in a materialistic direction)).

100. THALER & SUNSTEIN, *supra* note 10, at 58.

101. *Id.* at 67–68.

102. Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 *Q. J. ECON.* 37, 46–47 (1999).

103. *Id.* at 47–49.

probability come to believe with near certainty in the wrong hypothesis.”¹⁰⁴

Optimism bias (and related self-serving biases). Optimism and other self-serving biases give people an unduly sunny view of their own abilities and prospects.¹⁰⁵ Although these delusions appear critical to our mental health,¹⁰⁶ they can reinforce existing preferences and thus exacerbate the effects of other errors in judgment. As Jeffrey Rachlinski explains:

[P]lacing a high degree of confidence in a judgment made in heavy reliance on a misleading heuristic compounds matters. Excess confidence impedes individuals’ ability to learn from mistakes and improve their ability to make better decisions. It might also undermine basic goals of the legal system by clouding the signals that law is trying to send to legal actors.¹⁰⁷

C. *Temporal Considerations Provide Insight About Consumer Decision-making.*

While decision heuristics and cognitive biases help to explain the *direction* of diversions from the rational-actor model, another (related) set of complications comes from the model’s use of a point-in-time valuation of utility.¹⁰⁸ By assuming that price captures the utility derived from a purchase, the model ignores the fact that consumers’ long-term interests may conflict with their short-term desires.¹⁰⁹ As Cass Sunstein puts it:

A growing literature explores the difference between “decision utility” and “experienced utility”—the difference between the utility that we think we will get when we make a decision and the utility we actually experience after that decision has been made. The central finding is that at the time of decision, people think that they will obtain a certain amount of utility, or welfare, from certain products or activities—but they sometimes err.¹¹⁰

The error may come from impulsive behavior that they come

104. *Id.* at 38; see also Hanson & Kysar, *supra* note 67, at 648.

105. See Rachlinski, *supra* note 78, at 1173.

106. Studies have shown that people who lack the optimism bias tend toward depression. See C.W. Korn et al., *Depression is Related to an Absence of Optimistically Biased Belief Updating About Future Life Events*, 44 PSYCHOL. MED. 579, 589 (2014).

107. Rachlinski, *supra* note 78, at 1173.

108. See Jolls et al., *supra* note 67, at 1488.

109. *Id.* at 1539.

110. Sunstein, *supra* note 68, at 1875.

to regret,¹¹¹ from a mismatch between “wants” and “likes” that resists correction (often through operation of the biases discussed above),¹¹² or from addiction or other mechanisms that block their self-control.¹¹³

IV. IMPLICATIONS

How does this understanding of human decision-making complicate the search-costs model? And with what implications?

At the very least, it challenges the notion that purchase price fully captures the utility that a consumer derives from a trademarked product or service. In particular, to the extent that consumers pay more for products bearing a well-known trademark than for less-expensive equivalents, behavioral economics offers a number of explanations that have little to do with utility.¹¹⁴ By harnessing decisional heuristics and leveraging consumer bias, advertisers can attract consumers to products bearing their mark; having arrived, status quo bias, confirmation bias, and optimism bias create a strong presumption that the consumer will stick with that product.¹¹⁵ And patents and other forms of exclusive rights only exacerbate these effects because they give the seller a head start to attract consumers and establish purchasing habits.

The behavioral economics literature, in other words, offers a persuasive explanation for the existence, persistence, and consequences of costly shortcuts. And it suggests that these shortcuts can result in substantial and enduring over-payment by consumers.¹¹⁶ A robust economic model of trademark law should contemplate these costs alongside trademarks’ benefits in facilitating consumer search.¹¹⁷ And it should consider tools that might reduce those costs while preserving trademarks’ informational benefits.¹¹⁸

The same decision characteristics help to explain the phenomenon of hedonic consumption, although the implications for the

111. See Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 360 (2008) (discussing compulsive buying and possibility of regulating businesses that encourage people to make compulsive decisions that they later regret).

112. See Camerer, *supra* note 11, at 91 (“My suggestion . . . is that the wanting-learning-liking distinction provides a potential basis, grounded in neuroscience, for asserting that choices are not always utility-maximizing.”).

113. See *id.* at 98–99.

114. See *infra* Part III.A.

115. See *infra* Part III.B.

116. *Am. Safety Razor Corp. v. Int’l Safety Razor Corp.*, 26 F.2d 108, 114 (D.N.J. 1928), *rev’d*, 34 F.2d 445 (3d Cir. 1929).

117. See *generally infra* Part III.B.

118. See *generally infra* Part V.

economic model are less clear. Through imagery, celebrity endorsements, and other tools, advertisers can create powerful emotional connections between consumers and brands. To the extent that consumers derive pleasure from buying and consuming these products—as opposed to reflexively choosing them out of habit—the decision may well look rational and utility-maximizing, at least in the moment.¹¹⁹ Yet here too the assumption of rationality may overlook the broader context in which “wants” do not always translate into long-term satisfaction and material consumption does not always yield its anticipated benefits over time. However, given the near-impossibility of comparing the temporary and enduring satisfaction from particular purchases, there is no plausible way to measure the net effect of trademark-focused hedonistic consumption.¹²⁰

This understanding does not discredit the notion that trademarks reduce consumer search costs and thus promote competition in certain ways.¹²¹ But it recognizes that some trademarks may impose costs that counteract those savings.¹²² Understanding the forces that lead to those effects may open a conversation about strategies to counteract them. This doesn't necessarily mean that the law should intervene; it may well be that to get the benefit of the informational function of trademarks we have to live with their downsides.¹²³ Paternalism concerns, moreover, counsel in favor of caution, even if intervention might leave consumers better off.¹²⁴ A richer understanding of consumer behavior, however, requires engagement with the costs and benefits of doing something, rather than waving the flag of paternalism as an excuse for inaction.¹²⁵

119. See Manta, *supra* note 9, at 263 (discussing how consumers receive other hedonic values from trademarked products beyond the experience of consuming the actual product).

120. See Edwards, *supra* note 111, at 362 (“[I]n cases of conflict between a present self and future selves, regulators must articulate a principle to mediate conflict between multiple selves. Not only might it be hard to elaborate such a principle, but the notion of having regulators choose which of our different selves are making the right choices starts to look a lot like the bad old ‘hard paternalism’ that the new paternalism seeks to avoid.”).

121. See sources cited *supra* note 29; cf. Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting Irrational Beliefs*, 14 GEO. MASON L. REV. 605, 623 (2007) (contending that trademarks not only economize on consumers' search costs and minimize consumer errors, but also impact the product's demand and sales); Edwards, *supra* note 111, at 640 (explaining how trademark allows for different labels and different prices, enabling “competition in the market for psychological freight”).

122. See *Trademarks and Consumer Search Costs*, *supra* note 29, at 788 (noting some of the economic costs associated with trademark protection, particularly in markets dominated by one or more well-known brands).

123. *Id.* at 788 (recognizing the need to maintain the “informative role of trademarks while minimizing [the] downside risks”).

124. See Jolls et al., *supra* note 67, at 1545 (noting that government intervention in markets is often “likely to make things worse rather than better”).

125. *Id.* at 1541 (urging decision-makers to take empirically supported understandings

V. THE CASE FOR PATERNALISM?

As the field of behavioral economics has matured, so has the discourse about whether—and how—government should take steps to protect consumers against their own irrational propensities.¹²⁶ The debate is really over whether the government has *any* role to play; even the strongest advocates for a behavioral approach would rarely mandate outcomes or deprive consumers of freedom of choice.¹²⁷ Many behavioral law-and-economics scholars believe in a form of paternalism—i.e., some form of government intervention in consumer decisions in order to help consumers make better choices.¹²⁸ Their proposals, however, are incremental and focused principally on improving the decision-making *process* rather than dictating *results*.¹²⁹ At the same time, they challenge the refusal of anti-paternalists to even consider the possibility of helping consumers to make better decisions.¹³⁰ “Behavioral economists generally favor paternalism about means, not ends. Most of their key findings involve human errors with respect to means; their goal is to create choice architecture that will make it more likely that people will promote their own ends.”¹³¹ They view their project not as advocating paternalism, but as “anti-antipaternalism—a skepticism about antipaternalism, but not an affirmative defense of paternalism”¹³²—at least paternalism of the strongest sort.

of human behavior into account in making policy).

126. *See id.* at 1543 (noting that government intervention is not immune to the same problems that affect citizens).

127. *Id.* at 1541 (contending that citizens are the “best judges” of how to promote their own welfare, at least in contrast to government decisionmakers).

128. *See* Gerald Dworkin, *Paternalism*, THE STAN. ENCYCLOPEDIA PHILOS. ARCHIVE, <https://plato.stanford.edu/archives/win2017/entries/paternalism/> [http://perma.cc/MX8F-W5FV] (last modified Feb. 12, 2017) (defining paternalism as “the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm”).

129. *See* Sunstein, *supra* note 68, at 1845 (emphasizing the goal of improving the decision-making process by promoting self-control and freedom of choice).

130. *Id.* at 1868 (dismissing certain objections to paternalism as a “form of chest-thumping”).

131. *Id.* at 1868 (distinguishing between paternalism that dictates outcomes and paternalism that shapes the context in which people make choices); *see also* Rachlinski, *supra* note 78, at 1219 (“[P]aternalistic interventions can often be made less intrusive by taking advantage of the lessons of behavioral decision theory and restructuring, rather than restricting individual choice.”). One of the lessons of recent work on behavioral law and economics is that the law can sometimes shape preferences without eliminating consumer autonomy or reducing consumer choice. *Id.* at 1195 (noting that paternalistic intervention can “prevent the distortions that erroneous individual choices create”).

132. Jolls et al., *supra* note 67, at 1541.

Proponents of this kind of “soft paternalism,” “means paternalism,” or “libertarian paternalism”¹³³ suggest interventions like debiasing, changing default rules, and other “nudges” designed to increase the likelihood that the consumer will make a welfare-enhancing choice.¹³⁴ A classic example of soft paternalism is the use of new default rules to require employees to opt *out* rather than to opt *in* to their employers’ retirement savings programs.¹³⁵ Employees retain the choice to contribute or not, but by making the presumption in favor of contribution, this “nudge” harnesses the status quo bias, the optimism bias, and other behaviors to make it more likely that the consumer will end up with an outcome that aligns with her best interests.¹³⁶

Even this kind of choice-preserving intervention, of course, injects the government into private affairs and therefore raises the hackles of anti-paternalists.¹³⁷ Skeptics focus on two clusters of concerns. First, they worry about the quality of government decisions relative to individual ones.¹³⁸ If we can’t trust individuals to make decisions in their own best interests, the reasoning goes, why should bureaucrats do any better?¹³⁹ Second, critics argue

133. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1201 (2003) (defining libertarian paternalism as “an approach that preserves freedom of choice but that encourages both private and public institutions to steer people in directions that will promote their own welfare”); THALER & SUNSTEIN, *supra* note 10, at 5 (“[L]ibertarian paternalists urge that people should be ‘free to choose.’ . . . The paternalistic aspect lies in the claim that it is legitimate for choice architects to try to influence people’s behavior in order to make their lives longer, healthier, and better.”).

134. See THALER & SUNSTEIN, *supra* note 10, at 72 (finding that libertarian paternalism “offer[s] nudges that are most likely to help and least likely to inflict harm”).

135. See generally Sunstein & Thaler, *supra* note 133, at 1195 (discussing a study showing substantially higher participation rates when customers are automatically enrolled in retirement savings plans and must opt out if they wish to avoid contributing).

136. THALER & SUNSTEIN, *supra* note 10, at 33–34.

137. E.g., Edward J. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 142 (2006) (presenting models showing that “private decisions will often be more accurate than public decisions”); Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1625–26 (2006) (suggesting that no intervention at all will often be “more efficient than paternalistic interventions” and contending that such intervention may worsen irrational tendencies); Wright & Ginsburg, *supra* note 12, at 1062 (criticizing proposals for government intervention through the setting of default rules).

138. See Glaeser, *supra* note 137, at 142 (suggesting situations in which regulators make worse decisions than individuals); Klick & Mitchell, *supra* note 137, at 1661 (“[G]overnment regulation intended to counter irrational tendencies may actually exacerbate the problem.”).

139. See Glaeser, *supra* note 137, at 144–45 (suggesting that individuals whose own interests are at stake would make less erroneous decisions than government actors). Glaeser makes two related points: first, that individuals have a stronger motivation than governments to correct their errors in welfare-maximizing ways; and second, that the risk of capture is greater with a small number of government decision-makers than with a diverse

that humans learn through trial, error, and correction.¹⁴⁰ Depriving people of the opportunity to err, the argument goes, will meddle with their personal growth and inhibit better decision-making in the future.¹⁴¹

These objections, however, run into two obstacles of their own. First, they turn on the very assumptions that behavioral economics has called into question: that even if individuals sometimes err, they learn from those errors, and in any event, individual self-interest will do a better job with outcomes than meddling bureaucrats.¹⁴² Decades of research on human decision-making, however, demonstrate that, while individuals may well learn from errors in some circumstances, cognitive biases may prevent them from ever knowing that they made the wrong choice between two alternatives.¹⁴³ Second, the arguments pose a false dichotomy between individual freedom and government control. In particular, this dichotomy overlooks the fact that individual “freedom” is manipulated all the time by private parties who harness cognitive limitations to their own profit-maximizing ends.¹⁴⁴ The choice, in other words, is not between individual freedom and government control, but over whether or not to allow market actors to “cater to people’s frailties and to exploit them,” without any counterbalance or other response.¹⁴⁵

The anti-paternalism trope rings especially hollow in light of the modest, incremental nature of the interventions suggested by behavioral law and economics scholars.¹⁴⁶ In virtually all circum-

population of consumers. *Id.*

140. See Wright & Ginsburg, *supra* note 12, at 1070–71 (“[E]ffective decisionmaking is acquired through trial and error.”).

141. See *id.* at 1036 (“[S]o long as libertarian paternalism ignores the economic welfare and liberty value of allowing individuals the freedom to err, it will fail to achieve its goal of increasing welfare without reducing liberty and will pose a significant risk of reducing both.”); see also Klick & Mitchell, *supra* note 137, at 1626 (“[R]esearch from developmental psychology indicates that individuals improve their decision-making skills over time through a ‘learning by doing’ process, and that paternalistic policies threaten interference in this self-regulatory process.”). Klick and Mitchell make the related point that substituting government judgment for individual choice raises moral hazard concerns. *Id.* (arguing that paternalism reduces individuals’ “motivation to act deliberately and carefully”).

142. See Sunstein, *supra* note 68, at 1899 (proposing that some interventionist “cures” are worse than the individualist “disease”).

143. See THALER & SUNSTEIN, *supra* note 10, at 6 (explaining that despite being able to learn from repeated errors, “human forecasts are flawed and biased”).

144. See Sunstein & Thaler, *supra* note 133, at 1174 (observing that in the absence of government intervention, private parties would impose their own form of paternalism).

145. THALER & SUNSTEIN, *supra* note 10, at 78.

146. See Wright & Ginsburg, *supra* note 12, at 1041 (recognizing bare minimum needed to overcome “recurring and systematic errors”); see also Sunstein, *supra* note 68, at 1845 (analyzing various approaches to counter self-control problems).

stances, these scholars propose mechanisms for shaping the decision-making process in ways that overcome common biases. Unbiased individuals—those who prove capable of distilling all relevant information and making rational decisions—will be unaffected by these tools.¹⁴⁷ Even more vulnerable consumers retain the option of choosing whatever outcome they think promotes their interests. But by shaping individuals’ “choice architecture” and framing the decision process in a way that counteracts common misunderstandings or biases, these interventions can increase the likelihood of outcomes that serve people’s needs.¹⁴⁸

This potential for soft paternalism—to reframe consumer decisions in a way that reduces the risk of exploitation of their biases—could prove useful in the trademark context. In particular, it may suggest mechanisms to maintain the informational benefits of trademarks while softening their potential to drive decisions based on heuristics and biases rather than reason.

Consider, again, the case of over-the-counter pharmaceuticals in which less-informed consumers show an enduring preference for brand-name drugs.¹⁴⁹ An anti-paternalist with a hard-line view of the search-costs model would describe this as a utility-maximizing outcome. Because less sophisticated consumers are willing to pay the price difference in exchange for confidence in their purchase, the cost to them of learning about any quality differential between the brand and the generic outweighs the difference in price.¹⁵⁰ A behavioral economist, on the other hand, might view this as a suboptimal outcome resulting from the bounded rationality of consumers leading to persistent over-payment. If so, the solution is not to dictate a different outcome, but to consider mechanisms for debiasing decisions so that consumers can do a better job of deciding for themselves.¹⁵¹

While a detailed exploration of such mechanisms is beyond

147. *E.g.*, Camerer et al., *supra* note 69, at 1225 (“As long as actively making a choice requires very little effort, the choice of defaults has essentially no effect on fully rational consumers. But for boundedly rational people who have a status quo bias, the choice of defaults is important.”)

148. *See* THALER & SUNSTEIN, *supra* note 10, at 92 (“A good system of choice architecture helps people to improve their ability to map and hence to select options that will make them better off.”).

149. *See* Bronnenberg et al., *supra* note 50, at 1692 (“[G]reater knowledge of active ingredients predicts more purchases of store brands.”).

150. *See* Dilbary, *supra* note 121, at 627 (“Consumers of branded drugs . . . are buying not only a drug or information about the drug, but also a feeling.”).

151. *See* Sunstein, *supra* note 68, at 1855 (distinguishing behavioral economists from ends paternalists because behavioral economists focus on errors and means, rather than controlling outcomes); *see also* Glaeser, *supra* note 137, at 137 (discussing techniques to reduce bias in contract negotiations and jury deliberations).

the scope of this Essay, both trademark and consumer protection laws offer some promising possibilities.¹⁵² This might include, for example, a more liberal approach to the use of trademarks (including logos) by those seeking to advertise competing or complementary products.¹⁵³ Additionally, lawmakers and regulators should consider consumer protection efforts that might improve decisions by focusing consumer attention on salient aspects of products, and by teaching them better decision-making strategies.¹⁵⁴ The European Union, for example, recently adopted a Consumer Rights Information Directive that requires online sellers to disclose, and call attention to, objective product characteristics in a way that enables informed consumer choice.¹⁵⁵ Digital intermediaries have the potential to change consumers' choice architecture by comparing relevant features, including product ingredients and price. Particularly with regulatory oversight, they could nudge consumers toward welfare-enhancing decisions.¹⁵⁶

VI. CONCLUSION

The economic model of trademark law depends on two truths and a lie. The model assumes that trademarks convey information (TRUE) that can save consumers time and money in finding the products they want (TRUE).¹⁵⁷ The model errs, however, when it assumes that consumers consume all available information and

152. See Bronnenberg et al., *supra* note 52, at 1717–18 (considering how the U.S. Federal Trade Commission and European regulators use observed biased behavior to make policy).

153. In the context of private label goods, some courts have allowed competitors to call attention to their cheaper products by copying certain features of an established firm's trade dress. See Dogan & Lemley, *A Search Costs Theory of Limiting Doctrines*, *supra* note 40, at 1234–35 (commending these opinions as promoting competition); *Conopco, Inc. v. May Dep't Stores Co.*, 46 F.3d 1556, 1565 (Fed. Cir. 1994) (finding no infringement when private label retailer “packages its products in a manner to make it clear to the consumer that the product is similar to the national brand, and is intended for the same purposes”).

154. See Rachlinski, *supra* note 78, at 1168 (“Even heuristically driven individual choice can be trusted far more than legal scholars have realized, so long as individuals can learn better decisionmaking strategies or delegate their choices to those who have.” (emphasis added)). This suggests two alternatives for legal intervention: (1) TEACH people better decision-making strategies; and, (2) DELEGATE—identify and support intermediaries who can provide relevant expertise/information/defaults.

155. See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 99/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2001 O.J. (L 304) 64, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN> [<http://perma.cc/KRY9-5MGS>].

156. See Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1310–28 (2017) (noting government oversight necessary to ensure that digital intermediaries deliver on their promise of benefits to consumers).

157. See *supra* Part II (explaining informative and functional uses of trademarks).

act on it rationally (LIE).¹⁵⁸

By better understanding the biases that affect consumer choice, the law can develop a more robust model of the relationship between trademarks and consumer welfare and can adjust trademark rules to achieve a better balance between trademarks' pro- and anti-competitive effects.

158. See *supra* Part III (addressing flaws in the rational actor assumption).

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