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The Ethics of Unbranding

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Cover Page Footnote

Associate Professor of Law, St. John's University School of Law. This Essay grew out of a talk delivered on November 5, 2010, as part of a symposium at Fordham Law School entitled: Is Silence Golden? Ethics and Intellectual Property Law, hosted by the Fordham Intellectual Property, Media & Entertainment Law Journal. The Essay incorporates some introductory comments from Professor Susan Scafidi, the moderator of the panel on "The Rise of Unbranding in Trademark Law," and is informed by the discussion among the panelists, including Professor Scafidi as well as Professors Rebecca Tushnet and Eric Prager. Special thanks are due to the student organizers of the symposium-in particular Benjamin Arrow and Sarah Yood. This Essay has also benefited from conversations with Professors Marc DeGirolami, Laura Heymann, Mark McKenna, Mark Movsesian, Michael Perino, and Adam Zimmerman. All errors are the author's alone.

The Ethics of Unbranding

Jeremy N. Sheff*

ABSTRACT

This Essay explores the ethical implications of the phenomenon of “unbranding” that has recently been discussed in popular and scholarly literature. It compares two extant definitions of unbranding and examines each under alternative ethical theories of trademark law, specifically deontological and consequentialist theories. With respect to each of these theories, the Essay examines the ethical questions raised by the existence of asymmetric information between brand owners and consumers. This includes asymmetries not only with regard to information about products, but also with regard to information about consumer decision-making processes. The latter asymmetry presents conflicts between deontological and consequentialist conclusions regarding the ethics of unbranding, requiring that one system be preferred over the other. The Essay concludes by arguing that consequentialist theories provide the most conventional approach to the problem of unbranding, but that the potential sense of dissatisfaction with consequentialist prescriptions regarding unbranding suggests that there may be an opening for a novel, autonomy-based deontological approach to trademark theory.

* Associate Professor of Law, St. John’s University School of Law. This Essay grew out of a talk delivered on November 5, 2010, as part of a symposium at Fordham Law School entitled: *Is Silence Golden? Ethics and Intellectual Property Law*, hosted by the *Fordham Intellectual Property, Media & Entertainment Law Journal*. The Essay incorporates some introductory comments from Professor Susan Scafidi, the moderator of the panel on “The Rise of Unbranding in Trademark Law,” and is informed by the discussion among the panelists, including Professor Scafidi as well as Professors Rebecca Tushnet and Eric Prager. Special thanks are due to the student organizers of the symposium—in particular Benjamin Arrow and Sarah Yood. This Essay has also benefited from conversations with Professors Marc DeGirolami, Laura Heymann, Mark McKenna, Mark Movsesian, Michael Perino, and Adam Zimmerman. All errors are the author’s alone.

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INTRODUCTION

Unbranding appears to be trending upwards lately, at least according to one definition of “trend.”¹ The name “unbranding” has been used to describe two very different phenomena, each of which raises distinct ethical concerns. The first, and probably most prevalent, definition of unbranding refers to “the practice of eliminating or selectively reducing the use of a brand in response to unfavorable consumer opinion.”² Examples include rebranding,

¹ See Nicholas Kristof, TWITTER (Sept. 16, 2010, 2:18 PM), <http://twitter.com/NickKristof/statuses/24698130645> (“[I]n journalism, the plural of anecdote is trend”); see also Clint Hendler, TWITTER (Sept. 16, 2010, 2:25 PM), <http://twitter.com/clinhendler/status/24698613619> (“How does a journalist count to three? One, two, trend.”). These quips are responses to the “bogus trendspotting” critiques of fellow journalists by media critic Jack Shafer. See, e.g., Jack Shafer, *Bloggy Monday*, SLATE.COM (Aug. 11, 2003), <http://www.slate.com/id/2086882> (“Whenever I read the words ‘emerging trend’ in a news story, I reach for my revolver. Most trendspotting articles—especially those appearing in newsless August—are bunk.”). See generally Mallery Jean Tenore, *How Slate’s Jack Shafer Calls Out Bogus Trend Stories*, POYNTER.ORG (Sept. 21, 2010), <http://www.poynter.org/latest-news/making-sense-of-news/105778/how-slates-jack-shafer-calls-out-bogus-trend-stories>.

² Aaron K. Perzanowski, *Unbranding, Confusion, & Deception*, 24 HARV. J.L. & TECH. 1, 3 (2010); see also Cassi G. Matos, Note, *The Unbranding of Brands: Advocating for Source Disclosure in Corporate America*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1307, 1309 (2010) (“An unbranded object, simply defined, is anything ‘not marked with the owner’s mark’ or ‘not sold under a brand name.’”).

such as the transformation of Phillip Morris into Altria,³ and sub-branding, such as the launch of 15th Avenue Coffee & Tea—a local café “inspired by” its corporate owner, Starbucks.⁴ I will refer to this form of unbranding as “concealment unbranding,” as its primary purpose appears to be concealing the well-known source of a product or service.

A second and more recent definition of unbranding arises from a marketing strategy in which companies seek to undermine the image of their competitors’ brands. Simon Doonan of the *New York Observer* noticed that reality television phenomenon Nicole “Snooki” Polizzi of MTV’s *Jersey Shore* had gone from carrying a Coach handbag everywhere she went to changing from one luxury handbag to another nearly every time she was seen in public.⁵ He reported a rumor that various luxury houses were sending their competitors’ bags to Snooki as gifts, in the hopes that her déclassée image would rub off on these competitors’ brands, diminishing their luxury cachet.⁶ I will refer to this type of unbranding as “sabotage unbranding,” as its primary purpose appears to be to undermine a competitor’s brand image by placing the brand in observable real-world contexts that are inconsistent with that image.

The topic of this Essay is the ethical status of these two types of marketing tactics. Clearly, each will raise separate and distinct ethical concerns. Concealment unbranding implicates ethical obligations between the brand owner and the consumer; sabotage unbranding implicates ethical obligations among competitors and between each competitor and the consumers over whom they are

³ *Top 10 Worst Corporate Name Changes: Call Me Altria*, TIME.COM (Feb. 8, 2010), http://www.time.com/time/specials/packages/printout/0,29239,1914815_1914808_1914686,00.html (“To distance itself from a number of publicity nightmares . . . Philip Morris Co. Inc., makers of cigarette brands like Marlboro and Chesterfield, changed its name to the anodyne Altria Group.”). For additional examples, see Perzanowski, *supra* note 2, at 10–14; see also Matos, *supra* note 2, at 1324, 1331–38.

⁴ Melissa Allison, *Starbucks Tests New Names for Stores*, SEATTLE TIMES, July 16, 2009, available at http://seattletimes.nwsource.com/html/localnews/2009479123_starbucks16.html; see also Perzanowski, *supra* note 2, at 14–16; Matos, *supra* note 2, at 1321, 1324, 1336–37.

⁵ Simon Doonan, *How Snooki Got Her Gucci: The Dirt on Purses*, N.Y. OBSERVER (Aug. 17, 2010, 5:55 PM), <http://www.observer.com/2010/culture/pricey-landscaping>.

⁶ *Id.*

competing. Moreover, the nature of these ethical obligations will depend on the ethical system we choose to adopt and the sources of whatever ethical obligations arise under that system. Because the phenomenon of unbranding raises such a diverse set of issues, it is a useful entrée to the ethical analysis of trademark law more generally.

The remainder of this Essay proceeds as follows. Part I discusses the choice of ethical systems—in particular, the choice between deontological and consequentialist ethical systems—and the relevance of each system to trademark law. Part II identifies features of the unbranding scenarios discussed above that might be useful targets of ethical analysis. I argue that the most appropriate target for such analysis is the problem of asymmetric information between persons in trademark-related interactions. Notably, such asymmetry may arise not only with respect to the subject of exchange between buyers and sellers, but with respect to the knowledge of each party and the process by which parties decide what transactions to enter into. Part III applies each of the two ethical systems identified in Part I to the information asymmetries discussed in Part II and finds that each unbranding scenario presents a potential conflict between deontological and consequentialist ethical prescriptions. The Essay concludes with a discussion of the implications of these conflicts for trademark law generally.

I. DEFINING THE ETHICAL SYSTEM

There are two broad categories of ethical systems or approaches that might be used to analyze unbranding.⁷ One is the

⁷ This is, obviously, a gross oversimplification. As the sources cited in this Part make clear, there is vibrant debate in moral philosophy as to the propriety and the limitations of this dichotomization of normative ethical thought. In particular, the aretaic approach to ethics—derived from the philosophy of Aristotle and embodied in the modern philosophical program known as virtue ethics—has recently begun to challenge the two dominant ethical systems, winning a few adherents in the legal academy. See generally Rosalind Hursthouse, *Virtue Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2010), <http://plato.stanford.edu/archives/win2010/entries/ethics-virtue/>; ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999); VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2007); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

deontological approach, the ethical system that defines the rightness or wrongness of an action based on fundamental principles that examine the action itself.⁸ Immanuel Kant is, of course, the paragon of this school,⁹ while John Locke set forth the foundational deontological theory of property.¹⁰ The second approach is the consequentialist ethical system, the system that looks at the rightness or wrongness of an action or practice based on the desirability of the effects that it produces.¹¹ Utilitarianism, as reflected in the moral philosophy of Jeremy Bentham and John Stuart Mill, is the most well-known consequentialist ethical system¹² and is familiar to most of us now as a precursor of the law and economics movement.¹³ As lawyers or policymakers concerned with the ethics of particular trademark practices, it is incumbent on us to determine which of these systems we believe is better suited to analyzing such practices.

On the deontological side of the ledger, Professor Mark McKenna's work is instructive.¹⁴ His documentation of early trademark law's origins in the "natural rights" traditions of English common law and nineteenth-century American jurisprudence

Because the deontological and consequentialist approaches are fairly well-developed in the existing literature on market regulation but the virtue ethics approach is not—and because I have no special expertise in moral philosophy in general, to say nothing of virtue ethics in particular—I will indulge in this oversimplification for purposes of this Essay, while freely admitting to the limitations it imposes on my analysis.

⁸ See generally Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological>.

⁹ See generally IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS; ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS* (James W. Ellington trans., 3d ed. 1993) (1785).

¹⁰ See generally 5 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

¹¹ See, e.g., Walter Sinnott-Armstrong, *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/archives/fall2008/entries/consequentialism>.

¹² See, e.g., JOHN STUART MILL, *UTILITARIANISM* (Roger Crisp ed., Oxford Univ. Press 1998) (1861); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789).

¹³ See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 977–998 (2001) (describing welfare economics and its relationship to utilitarianism).

¹⁴ See generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

suggests that we might think of trademark law as a deontological ethical system unto itself. Taking the American perspective in particular, trademark law has evolved out of the law of unfair competition, a body of doctrine that purported to set off-limits certain tactics for peeling customers away from one's competitors—passing off being the leading example.¹⁵ Under this view, there are some ways of competing—defrauding or deceiving the mark owner's potential customers—that are by their very nature unfair (that is, out of line with “commercial morality”),¹⁶ and therefore illegal.¹⁷ Following Lockean principles, trademark rights so conceived are circumscribed so as to protect the mark owner's labor while ensuring that his rights do not interfere with an equal right in others.¹⁸

While deontological theories may lurk in the background of some modern trademark doctrines,¹⁹ they are rarely overtly invoked these days. The modern focus, rather, is on protecting consumers from confusion. The existence of such confusion, while originally a matter of proving the harm of trademark infringement,²⁰ has become our definition of the harm itself.²¹

¹⁵ *Id.* at 1860–63.

¹⁶ *Id.* at 1860–61 (quoting HERBERT SPENCER, *The Morals of Trade*, in *ESSAYS* 324, 338 (D. Appleton & Co. 1865)).

¹⁷ *Id.* at 1858 (“The defendant's fraud or deception was what made some attempts to divert improper.”).

¹⁸ *Id.* at 1873–93 & nn.156–57. The qualification that requires the rights of persons other than the putative property owner to be preserved notwithstanding the grant of property rights is a fundamental challenge to deontological approaches to intellectual property rights in general and trademark rights in particular. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1583–91 (1993).

¹⁹ *See, e.g.*, Jeremy N. Sheff, *Veblen Brands*, Part III.C, 96 *MINN. L. REV.* (forthcoming Feb. 2012), available at <http://papers.ssrn.com/abstract=1798867>; Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 *MICH. L. REV.* 137, 181–84 (2010); Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 *B.U. L. REV.* 547, 592–618 (2006); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 *EMORY L.J.* 461, 478–84 (2005); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 *CARDOZO L. REV.* 105, 162–67 (2005); *see generally* Gordon, *supra* note 18.

²⁰ McKenna, *supra* note 14, at 1857 (“[P]laintiffs in these [early trademark] actions at law were not vindicating the rights of consumers—they were making claims based on injuries to their own interests that resulted indirectly from deception of consumers.”).

²¹ 15 U.S.C. § 1125(a)(1)(A) (2006) (imposing liability against uses of trademarks that are “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,

This shift in emphasis, in turn, has shifted trademark theory away from deontological rationales and toward consequentialism. In particular, the currently dominant law-and-economics theory of trademark protection²² encourages us to determine whether particular uses of trademarks either increase or decrease the efficiency of consumer markets.²³ While many commentators—myself included—question whether current trademark doctrine produces the efficiency promised by Chicago School theory,²⁴ rather few contemporary scholars approach trademark law from a non-consequentialist perspective.²⁵

Given this history, it may be that both of these types of ethical approaches—the deontological and the consequentialist—could be profitably applied to trademark law. But a problem will arise to the extent that the two ethical systems appear to give us conflicting answers as to the ethics of a particular trademark-related practice. When such a conflict arises, it raises classic questions of ethics: is it logically possible to do “the wrong thing” for “the right reasons,” and if so, is it morally justifiable to do so? This type of dilemma was recognized even in Kant’s day, in the famous “murderer at the door” hypothetical.²⁶ In trademark law, similar dilemmas have

connection, or association of [the defendant] with another person, or as to the origin, sponsorship, or approval of [the defendant’s] goods, services, or commercial activities by another person”).

²² The theoretical dominance of economic approaches to trademark law has been widely noted by myself and others. *See, e.g.*, McKenna, *supra* note 14, at 1844–49 (collecting commentary of various trademark scholars on the issue); Jeremy N. Sheff, *Biasing Brands*, 32 *CARDOZO L. REV.* 1245, 1249–54 (2011).

²³ *See generally* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & ECON.* 265 (1987); Nicholas S. Economides, *The Economics of Trademarks*, 78 *TRADEMARK REP.* 523 (1988).

²⁴ In previous work I have critiqued the conclusion of Chicago School commentators that modern trademark doctrine tends toward economic efficiency. *See generally* Sheff, *supra* note 22. I am hardly the first person to raise this form of critique. *See, e.g.*, Glynn S. Lunney Jr., *Trademark Monopolies*, 48 *EMORY L.J.* 367 (1999); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 *YALE L.J.* 1687, 1687–97 (1999); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165 (1948).

²⁵ For notable exceptions, see generally Gordon, *supra* note 18; Laura A. Heymann, *The Public’s Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 *GA. L. REV.* 651 (2009); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621 (2004).

²⁶ Of course, Kant denied that this hypothetical presented the dilemma his antagonists claimed. *Compare* BENJAMIN CONSTANT, *DES RÉACTIONS POLITIQUES* 36 (1797) (Jean-

been obliquely raised by various scholars, typically in the context of critiquing particular trademark doctrines as indulging fuzzy deontological notions of trademark rights in ways that generate undesirable consequences.²⁷ The remainder of this Essay asks whether the practice of unbranding raises a similar dilemma, and if so which ethical system should be favored over the other in the unbranding context.

II. THE LAW AND ETHICS OF ASYMMETRIC INFORMATION

To understand how such a dilemma could arise, I propose that we begin by examining the ethics of unbranding through the lens of asymmetric information. It is a fundamental fact that parties to a transaction are likely to have different levels of information about the subject matter of their exchange. The simplifying assumptions of neoclassical economics aside,²⁸ there is no real-world transaction in which both parties have perfect and complete information. Asymmetry of information with regard to, say, a product being bought and sold obviously creates an opportunity for the party with greater information to take advantage—to benefit at the expense of the party with lesser information. One might characterize a transaction completed under these circumstances as offensive to a deontological principle of equality, or to a consequentialist principle of welfare maximization—that is, as

Marie Tremblay ed. 2003) available at http://classiques.uqac.ca/classiques/constant_benjamin/des_reactions_politiques/reactions_politiques.pdf (“Le principe moral, par exemple, que dire la vérité est un devoir, s’il était pris d’une manière absolue et isolée, rendrait toute société impossible. Nous en avons la preuve dans les conséquences très directes qu’a tirées de ce principe un philosophe allemand, qui va jusqu’à prétendre qu’envers des assassins qui vous demanderaient si votre ami qu’ils poursuivent n’est pas réfugié dans votre maison, le mensonge serait un crime.”); with KANT, *supra* note 9, at 63–68 (disputing the formulation and the causal reasoning of Constant’s “assassins” hypothetical, and reaffirming the duty to refrain from making intentionally untrue statements where a statement cannot be avoided, even if harm to particular individuals may result).

²⁷ See *supra* note 19 and accompanying text.

²⁸ See, e.g., JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 29–30 (3d ed. 1953); see generally George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1 (1957) (describing the historical development of the theory of perfect competition in economics, and of the assumptions—including assumptions about the knowledge possessed by economic actors—on which the theory depends).

unfair or inefficient. It is therefore notable that the law does not consider asymmetric information an absolute evil. In general, we accept the fact that there is going to be asymmetric information in transactions, subject to certain exceptions.

Contract law provides a clear example. The parties to a contract may have differing levels of information about the subject matter of their agreement, and yet that asymmetry in and of itself is insufficient to determine whether the disadvantaged party will be entitled to relief as a result of the asymmetry.²⁹ Thus, unilateral mistake of fact, standing alone, is not grounds for avoiding performance of a contract.³⁰ However, if the party with greater information could somehow be said to be responsible for his counterparty's mistaken belief—if he knew of it and failed to correct it, or worse, if he created it through his own misrepresentation or concealment of the facts—then the mistaken party could be entitled to relief.³¹ So there must be something beyond the mere fact of asymmetric information about the subject of exchange—something that goes to the relationship between the parties—that makes the asymmetry problematic or unproblematic from the point of view of contract law.

In securities law, we see a similar ambivalence about asymmetric information. In general, we think that curing such asymmetry is precisely what securities markets are for. Large, liquid markets on transparent public exchanges use the price mechanism to efficiently disseminate relevant private information about the subject of exchange.³² But there is a category of informational advantage—material inside information—that we apparently think shouldn't be tolerated in securities markets, and

²⁹ See, e.g., *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 194 (1817) (“The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do any thing tending to impose upon the other.”).

³⁰ RESTATEMENT (SECOND) OF CONTRACTS §§ 153–54 (1981).

³¹ *Id.* §§ 153(b), 159–64.

³² F.A. Hayek, *The Use of Knowledge in Society*, 4 AM. ECON. REV. 519, 524–28 (1945).

we outlaw insider trading accordingly.³³ Again, information asymmetry in itself is not problematic, but when combined with some other factor going to the relationship between seller and buyer it may become so.

In each of these two spheres, commentators have offered both consequentialist and deontological analyses of the relevant legal doctrines.³⁴ In deontological analysis, we typically look at the innocence or fault of the parties with respect to the existence of the asymmetry: has the party with greater knowledge knowingly (or perhaps negligently) created or perpetuated his counterparty's informational disadvantage?³⁵ In consequentialist analysis, we typically look to the costs of acquiring or transferring information: would holding the more informed party liable (or excusing the less informed party) generate incentives that lead to diminished production or dissemination of socially valuable but costly information?³⁶

These two areas of law are a useful prelude to thinking about the ethical dimensions of trademark law, for two reasons. The first is that in the contract literature, the conclusions of deontological and consequentialist analyses largely agree, whereas in the insider

³³ 17 C.F.R. § 240.10b-5 (2011).

³⁴ See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 57–84 (1981) (deontological analysis of contract doctrines that deal with mistake and fraud); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978) (economic analysis of unilateral mistake and the duty to disclose in contract law); Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375 (1999) (deontological analysis of insider trading law); Kim Lane Scheppele, "It's Just Not Right": *The Ethics of Insider Trading*, 56 LAW & CONTEMP. PROBS. 123 (1993) (same); Dennis W. Carlton and Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983) (economic analysis of insider trading); Hayne E. Leland, *Insider Trading: Should It Be Prohibited?*, 100 J. POL. ECON. 859 (1992) (same).

³⁵ See FRIED, *supra* note 34, at 62–63, 77–85; Scheppele, *supra* note 34, at 155–63; Strudler & Orts, *supra* note 34, at 409–19. Whether the better informed party is responsible for creating his own informational *advantage* is a separate question—deontological accounts generally do not require a better informed party to disclose information that the less informed party has equal access to, or information that the better informed party undertook significant effort and risk to obtain in the reasonable expectation of a return on his investment. See FRIED, *supra* note 34, at 82–84; Scheppele, *supra* note 34, at 162–63; Strudler & Orts, *supra* note 34, at 414–19.

³⁶ See, e.g., Kronman, *supra* note 34, at 32–33; Carlton & Fischel, *supra* note 34, at 866–68. Alternatively, some consequentialist accounts may examine the amount and distribution of wealth generated by a particular choice of rule. See, e.g., Carlton & Fischel, *supra* note 34, at 869–72; Leland, *supra* note 34, at 876–85.

trading literature, they differ.³⁷ Thus, there must be some difference between the two fields that makes the choice of an ethical system determinative. We might therefore ask what that difference is, and whether it correlates with some feature of trademark-related transactions that distinguishes them from negotiated bilateral transactions on the one hand or impersonal exchange-based transactions on the other.

The search for such a correlation provides the second reason why the contract and securities law examples are a useful prelude to the ethical analysis of unbranding. I propose that such a correlation does in fact exist, and that it too hinges on a kind of information asymmetry. This asymmetry has to do not with the parties' knowledge concerning the subject of exchange, but rather their knowledge concerning one another. In particular, the areas of law examined in this Part deal with situations where one party has superior information, not only about the subject of exchange, but also about the knowledge, position, and decision-making processes of both parties to the exchange.

In the contract example, it is not superior knowledge about the subject of exchange that makes a contract voidable, but superior knowledge *about the parties' asymmetric access to information* about the subject of exchange.³⁸ Importantly, focusing the ethical analysis on one of these forms of asymmetry at the expense of the other does not change the outcome of that analysis. Within the closed universe of a bilateral contract, forbidding a party from knowingly taking advantage of his counterparty's lack of information *about the parties' asymmetric access to knowledge* does not change the distribution of information *about the subject of exchange*. Conversely, *allowing* a party to take advantage of his counterparty's inferior information *about the parties' access to knowledge* will not necessarily increase, and may in fact decrease, the flow of information *about the subject of exchange*—again within the closed universe of a bilateral contract. It is thus unsurprising that the consequentialist and deontological

³⁷ Compare *supra* note 35 and sources cited therein with *supra* note 36 and sources cited therein.

³⁸ See Scheppele, *supra* note 34, at 162–63.

approaches to asymmetric information in contract law are essentially consistent.

The same cannot be said for insider trading. In the securities context, again, it is not the fact that an insider has material non-public information that is said to be problematic, but the fact that the insider enters into a transaction with someone *whom he knows lacks access to that information* due to some pre-existing relationship.³⁹ Where we are dealing with an exchange-based securities transaction, however, blocking the transaction based on asymmetric information about the asymmetric knowledge of the parties to the trade has the effect of blocking the dissemination of information about the subject of exchange *to third parties*, insofar as that information is conveyed primarily through the price paid for a security traded over an exchange.⁴⁰ To a deontologist, this effect is of no moment, but to a consequentialist, it is has great significance for the efficiency of the market (and thus the welfare of market participants) going forward.

Thus, the conflict between ethical systems that arises as we move from the bilateral contract to the exchange-based trade can be seen as a question of priorities. While the consequentialist system seems to view the dissemination of information about the

³⁹ Scheppele, *supra* note 34, at 162–63. The requirement of some preexisting duty of a Section 10b-5 defendant to his or her counterparty under current law stems from the Supreme Court’s efforts to limit Section 10b-5 liability to corporate insiders and fiduciaries. *See generally* United States v. O’Hagan, 521 U.S. 642 (1997) (validating the “misappropriation” theory of 10b-5 liability, under which the defendant may be held liable for trading on information in violation of a duty to the source of that information); Chiarella v. United States, 445 U.S. 222 (1980) (holding that Section 10b-5 is not violated when the party with inside information owes no independent duty to disclose to his counterparty, for example, as a fiduciary of the counterparty). These authorities layer an additional element onto the insider trading analysis beyond the mere use of material inside information in trading, which had prevailed under earlier precedent. *See generally* Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968); *see also* Chiarella 445 U.S. at 247 (Blackmun, J., dissenting) (“I do not agree that a failure to disclose violates [Rule 10b-5] only when the responsibilities of a relationship of that kind have been breached. As applied to this case, the Court’s approach unduly minimizes the importance of petitioner’s access to confidential information that the honest investor, no matter how diligently he tried, could not legally obtain.”).

⁴⁰ *See* Carlton & Fischel, *supra* note 34, at 866–86; Strudler & Orts, *supra* note 34, at 395–403.

subject of exchange as paramount,⁴¹ the deontological system focuses on how we use information we have about one another in our interactions.⁴² I propose that this difference, more than anything else, explains the disparity between deontological and consequentialist conclusions regarding insider trading, and the difference between those conclusions and the conclusions of the same ethical systems regarding mistake in contract law.

III. THE ETHICS OF UNBRANDING

A similar set of information asymmetries arises in the unbranding context. Trademark law generally applies to consumer markets, which occupy an intermediate space between the bilateral dealings that we generally think of as being the subject of commercial contract law and the broad, liquid, and impersonal markets that we find in the context of securities law. Consumer markets also have a unique characteristic: sellers virtually always have superior information to buyers,⁴³ in a way that we wouldn't necessarily expect would predictably be the case in bilateral commercial contracts or in securities markets. Moreover, in consumer markets, sellers also tend to have superior information *about buyers' product knowledge and decision-making processes*. Indeed, the entire discipline of marketing can be understood as an effort to improve sellers' understanding of how brands influence consumer knowledge, beliefs, and behavior—and to use that better understanding to improve sellers' profits.⁴⁴ In short, trademark

⁴¹ This preference appears to be motivated by the effect of dissemination of information about the subject of exchange on the efficiency of the market in question. *See supra* note 36.

⁴² *See supra* notes 38–39 and accompanying text. This preference appears to be based on a respect for personal autonomy and the moral value of consent. *See, e.g.*, FRIED, *supra* note 34, at 81–85 (a consent-type argument based on the need to fulfill reasonable expectations); Scheppele, *supra* note 34, at 162–63 (a Rawlsian argument based on implied consent); Strudler & Orts, *supra* note 34, at 413–17 (an autonomy-based argument).

⁴³ Economides, *supra* note 23, at 526–27; *cf. generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

⁴⁴ I have previously written about the ability and incentive this superior understanding gives brand owners to take advantage of consumers in potentially welfare-reducing ways. *See generally* Sheff, *supra* note 19. For alternative takes on the relative sophistication of consumers and producers with respect to trademark-influenced consumer decision-

law seems to present a similar dilemma to the securities context: if we restrict the uses to which trademark owners can put their superior knowledge about consumer knowledge and decision-making processes, we may jeopardize the dissemination of information about trademarked products themselves.⁴⁵ The question then arises: which is the more important value in terms of the ethics of trademark law?

A. *The Consequentialist Case*

We could begin an answer to this question with the observation that unbranding is a modern phenomenon, and modern trademark theory is largely consequentialist in its approach. Prevailing theory tells us that trademark protection—the exclusive right to use a particular source identifier and to prevent others from using it—encourages the efficient transfer of accurate product information from seller to buyer.⁴⁶ It has help in this regard from false advertising law, which prohibits dissemination of false or misleading product information to potential buyers.⁴⁷ In this view the trademark itself is information about the subject of exchange, and preserving the integrity of that information while ensuring its efficient dissemination is the fundamental purpose of trademark law. Trademark protection is thus a means, not an end. The end of trademark protection, in this account, is a marketplace flush with goods of reliably consistent quality, that are easy to identify and distinguish, where producers compete vigorously on quality and price, consumers can satisfy their preferences, transaction costs are minimized, and aggregate social welfare is maximized as a result.⁴⁸ Practices that interfere with the attainment of these ends—by giving consumers bad information, or making it harder

making, see generally Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020 (2005); Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99 (2010).

⁴⁵ Cf. Beebe, *supra* note 44, at 2066 (“The tradeoff between information and persuasion described above goes far towards explaining one dynamic that has driven the expansion of trademark scope since the beginning of the twentieth century. At the heart of this dynamic is the trademark producer’s willingness to assume the costs of search in order to gain the benefits of persuasion.”).

⁴⁶ See *supra* note 23 and sources cited therein.

⁴⁷ See 15 U.S.C. § 1125(a)(1)(B) (2006).

⁴⁸ See *supra* note 23 and sources cited therein.

for producers of quality products to inform consumers about that quality—are wrongful, as a legal and, we might say, an ethical matter.

1. Concealment Unbranding

There is a plausible argument that concealment unbranding is problematic under this consequentialist account of trademark law. Concealment unbranding can be said to *reduce* consumer information and to *increase* information asymmetry, at least about the unbranded product or service. The practice takes away information that the consumer had come to rely on in evaluating products sold under the now-concealed trademark. In this view, unbranding, like false advertising or passing off, looks like a kind of misrepresentation. This is the basis on which other commentators have criticized this first species of unbranding as wrongful.⁴⁹

But perhaps this condemnation of concealment unbranding is unwarranted. After all, trademark law countenances depriving consumers of information in other contexts. For example, trademark licensing—which was once thought to be a heinous form of consumer deception⁵⁰—is unremarkable today,⁵¹ although naked licensing doctrine puts some limits on the extent to which licensing can take away relevant information from a consumer.⁵² Likewise, assignment of a mark can change relevant facts about the source of a branded good, yet it is tolerated, subject to the limits imposed by the prohibition against assignments in gross.⁵³ And of course, a producer is free to change the formulation of a

⁴⁹ See generally Perzanowski, *supra* note 2; Matos, *supra* note 2.

⁵⁰ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 33 cmt. a (1995) (“The historical conception of trademarks as symbols indicating the physical source of the goods led a number of early courts to conclude that the owner of a trademark could not license others to use the mark without destroying the significance of the designation as an indication of source. Licenses were sometimes declared invalid as a fraud on the public, and licensors risked forfeiture of their rights in the mark through a finding of abandonment.”).

⁵¹ 15 U.S.C. § 1055 (2006).

⁵² *Id.*; see also *Dawn Donut Co. v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (Lumbard, J., dissenting) (“Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities.”).

⁵³ 15 U.S.C. § 1060.

product, in ways that may not be readily detectable to consumers, without changing the trademark that consumers rely on for information about the altered product.⁵⁴ In each of these situations, a producer is changing the state of affairs that consumers have relied on in potentially misleading ways. Given that trademark law tolerates these practices, any ethical analysis will have to explain why unbranding should be treated any differently.

One potential explanation may be found by looking at the mark owner's incentives. As Landes and Posner point out, the threat of retaliation by consumers may well lead trademark owners to refrain from licensing or selling their trademarks to unreliable parties, or from significantly reducing the quality of goods bearing their marks, at least where the mark owner intends to continue as a going concern.⁵⁵ We might therefore ask whether concealment unbranding presents trademark owners with similar incentives.

This is a complex question, which again leads us to the second form of information asymmetry discussed in the previous Part. As noted above, trademark owners, by virtue of their marketing research efforts, virtually always have more information about consumer knowledge, beliefs, and behaviors than consumers themselves do.⁵⁶ This superior knowledge puts trademark owners in a unique position to ensure the flow of accurate information in the marketplace, and more importantly, to stanch the flow of *inaccurate* information.

To take just one example of this dynamic, I have previously written about how difficult it can be to dislodge consumer product beliefs.⁵⁷ Importantly, this “stickiness” of consumer beliefs may prevail regardless of whether the consumer belief is accurate or inaccurate, even in the face of contradictory consumer experience with the branded product.⁵⁸ This feature of consumer decision-making—well known to and frequently manipulated by

⁵⁴ See generally J. Shahar Dillbary, *Trademarks as a Media for False Advertising*, 31 CARDOZO L. REV. 327 (2009).

⁵⁵ See Landes & Posner, *supra* note 23, at 284–87.

⁵⁶ See *supra* notes 43–44 and accompanying text.

⁵⁷ See Sheff, *supra* note 22, at 1287–95.

⁵⁸ Sheff, *supra* note 22, at 1290–95.

marketers⁵⁹—complicates our consequentialist analysis. For example, consider the 15th Street Coffee and Tea Company.⁶⁰ It may be that Starbucks provides a poor quality product and poor quality service, and that consumers are perfectly justified in avoiding its coffeehouses. But that might not be the case. It might be that Starbucks has developed a poor reputation based on mistaken rumor, or based on cultural biases that lead consumers to avoid learning about the high quality of the company's products or services, or by random chance. In the latter circumstance, putting Starbucks to the burden of mounting a consumer re-education campaign in order to correct the mistaken beliefs of the consuming public could be wasteful. It might be easier (that is, more efficient) to give consumers an accurate impression of the company and its products or services by simply starting over with a new brand.

Thus, when we talk about the ethics of concealment unbranding from a consequentialist perspective, it may be useful to distinguish between two possible forms of the behavior. One form seeks to efficiently correct *mistaken* consumer beliefs about a product—we might call it “corrective concealment unbranding.” The other form seeks to neutralize *accurate* consumer beliefs about a product or service—we might call it “deceptive concealment unbranding.” The latter, from a consequentialist ethical perspective, would be blameworthy, the former praiseworthy, to the extent that we view one of the ends of the trademark system as being the satisfaction of consumer preferences.

Once we accept this distinction, the ethics of concealment unbranding generally must be seen as contingent on various factors that might make the prevalence of one or the other form of the behavior more likely. One such factor is market incentives. Of course, permitting concealment unbranding *at all* provides trademark owners the potential opportunity to change consumer associations with their product or service while continuing in

⁵⁹ Sheff, *supra* note 22, at 1295–97.

⁶⁰ See *supra* note 4 and accompanying text. In presenting this talk at Fordham Law School, I relied instead on the example of Philip Morris's rebranding as Altria. As if to prove the point that rebranding can be an efficient way of changing consumer beliefs, I literally forgot what the predecessor brand to Altria was, and had to be reminded by a member of the audience.

business, without any ill effects for the concealed brand. As a result, the market discipline that we rely on in the licensing, assignment, and product reformulation context is likely sufficient to cause trademark owners to engage in corrective concealment unbranding, but insufficient to cause them to eschew deceptive concealment unbranding.

But even this general statement about incentives is potentially overbroad. The market incentives under discussion depend on the threat of consumer retaliation. As noted above, there is some debate over the ability of consumers to see through marketing efforts,⁶¹ and it may be that even a clever instance of deceptive concealment unbranding will be revealed in time—as the examples discussed in this Essay have already been. Thus, market incentives alone may well be sufficient to deter deceptive concealment unbranding, but whether this will be the case depends on the nature and sophistication of the relevant consuming public and the ease of acquiring information about the source of the unbranded product from somewhere other than the brand itself.

Finally, to the extent we would look to courts rather than the market to sort desirable corrective concealment unbranding from undesirable deceptive concealment unbranding, we are inviting a new category of enforcement costs into our consumer markets.⁶² To the extent that the ultimate good that our consequentialist account of trademark law seeks to promote is the efficiency of consumer markets, these added enforcement costs would have to be weighed against the benefit gained by preventing deceptive concealment unbranding. Once again, this is a fundamentally contingent empirical question.

In sum, the consequentialist approach to concealment unbranding does not lend itself to generalizable ethical conclusions. And of course, this must be true of any ethical system that looks to the consequences of a class of behavior that may be motivated by various factors and directed at diverse targets. This does not mean that the law should not take these empirically

⁶¹ See *supra* notes 43–44 and sources cited therein.

⁶² See generally Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099 (2004).

contingent ethical considerations into account. On the contrary, the doctrines discussed in Part II above—and particularly the contract law example—demonstrate that courts are frequently called upon to sort sheep from goats based on precisely these types of fact-intensive ethical inquiries. Whether they should do so in the unbranding context is a question that cannot be answered—from a consequentialist perspective—in the abstract.

2. Sabotage Unbranding

In my view, the sabotage unbranding scenario presents far less ambiguity from a consequentialist perspective. I would go so far as to say that a consequentialist ethical approach to trademark law should view sabotage unbranding as an almost unmitigated good. To understand why, we must be careful to situate sabotage unbranding in the context in which we find it: the market for luxury brands and status goods.

I argue in a forthcoming article that luxury brands—what I have referred to as “Veblen Brands”—are fundamentally different from other types of trademarks.⁶³ Whereas in all other areas of trademark law we rely on trademarks to provide information about the products bearing them, in the luxury goods context we rely on trademarks to provide information about *the people who consume them*.⁶⁴ Consumers of such goods care less about the actual features of the product than about the product’s social connotations. Absent extremely broad notions of intellectual property rights, these social connotations—with the exception of price—remain largely outside of the producer’s control.⁶⁵ Rather, they depend entirely on what types of people are known to consume the product. This being the case, markets for status goods may be the only type of consumer markets where buyers are at no significant informational disadvantage relative to sellers

⁶³ See generally Sheff, *supra* note 19.

⁶⁴ Sheff, *supra* note 19, Part II.

⁶⁵ See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 840–47 (2010) (discussing the bulwark that “sumptuary intellectual property law” throws up against the socially de-differentiating “ideology of the copy”); cf. PAUL FUSSELL, *CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM* 172 (Touchstone ed. 1992) (1983) (“Prole Drift, we can call it, a term that will suggest the tendency in advanced industrialized societies for everything inexorably to become proletarianized.”).

regarding the subject matter of exchange: a signal of social status.⁶⁶

Thus, when we ask whether sabotage unbranding is wrongful from a consequentialist perspective, we must ask whether it reduces the production or dissemination of information regarding the type of people who consume the branded product. I submit that it does precisely the opposite. When Coach (or Louis Vuitton, or Prada) gives legitimately purchased, genuine Gucci handbags to Snooki in the hopes that she is the type of person who will conspicuously consume a Gucci bag, and she then does so, these competitors of Gucci are *creating relevant and accurate information* about the Gucci mark. That this information might not be the kind of information that Gucci particularly wants to be disseminated does not render it false or misleading. To argue that it is would be to argue that nobody could ever purchase a genuine Gucci handbag to be given as a gift unless Gucci approved the recipient as a worthy representative of its brand—a position that even Gucci surely would not take. Rather, the antipathy of the targets of sabotage unbranding toward the practice more likely merely reflects their resentment of the fundamental truth of status good markets: beyond the ability to set a price, such markets give sellers no special informational advantage over buyers regarding the subject matter of exchange.

To the extent there is still something about the sabotage unbranding scenario that troubles us, then, our misgivings are likely to be grounded in a deontological ethical perspective. Let us therefore consider whether such a perspective leads to a different assessment of the ethical status of unbranding.

B. The Deontological Case

As discussed in the previous Part, deontological analysis of market relationships may be said to turn on the degree of information asymmetry between market actors with respect to the knowledge, position, and decision-making processes of their

⁶⁶ Sheff, *supra* note 19, Part II.C; *see generally* J. Shahar Dilbary, *Famous Trademarks and the Rational Basis for Protecting Irrational Beliefs*, 14 GEO. MASON L. REV. 605 (2007).

counterparties.⁶⁷ We might say that any effort to take advantage of such asymmetric information between buyers and sellers is a violation of some kind of ethical duty, insofar as it interferes with the disadvantaged party's autonomy. While the concept of autonomy is too complex and contested to be thoroughly explored here,⁶⁸ I will propose a working definition for present purposes that I intend to expand upon in future work. I propose that consumer autonomy can be understood as the right and ability of the consumer to make a purchasing decision under conditions where the consumer both determines and more or less accurately understands the reasons for his or her choice. Under this definition, we might consider consumer autonomy to have been violated where a seller manipulates the consumer's decision-making process *using knowledge about that process that the consumer lacks* in order to influence that process *in ways that the consumer is unlikely to be able to detect*. In Kantian terms, we might say that sellers who engage in such practices are treating consumers as means, rather than as ends.⁶⁹

Sabotage unbranding appears to be this kind of ethical breach. The perpetrators of such practices are fully aware of the basis for consumer decision-making in status goods markets.⁷⁰ They use this knowledge to selectively give consumers knowledge that will inure to the perpetrators' competitive benefit (e.g., Snooki is a Gucci girl), while withholding additional information that would reveal to the consumer the basis for her own decision-making in a way that the perpetrators' know might blunt or reverse that benefit (e.g., social signals built on conspicuous consumption of brands are so fragile that Coach felt the need to give Snooki a free Gucci

⁶⁷ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 31, § 153(b) (1981).

⁶⁸ GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 6 (1988) ("[The term 'autonomy'] is sometimes used as an equivalent of liberty, . . . sometimes equivalent to self-rule or sovereignty, sometimes equated with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one's own interests. . . . About the only features held constant from one author to another are that autonomy is a feature of persons and that it is a desirable quality to have.").

⁶⁹ KANT, *supra* note 9, at 35–36.

⁷⁰ See *supra* note 56 and accompanying text.

bag in the hopes she would stop carrying her Coach bag).⁷¹ If we view such active manipulation of consumers' knowledge and decision-making processes as wrongful,⁷² we would have to condemn sabotage unbranding.

Similarly, in the case of concealment unbranding, brand owners are using their understanding of consumer knowledge and decision-making process to manipulate the flow of information about the subject matter of exchange in such a way as to gain some sort of advantage. In this case, it is the "stickiness" of consumer beliefs that is particularly known to sellers, and unbranding seeks to circumvent this feature of consumer decision-making without the consumer detecting the reasons for their changed decisions.⁷³ Under the definition proposed above, we would consider this to be a violation of consumer autonomy, and therefore wrongful. Importantly, the deontological view does not condition ethical condemnation of concealment unbranding on the corrective or deceptive nature of the practice.⁷⁴ Rather, it is the practice itself, and its interference with consumer autonomy,⁷⁵ that is wrongful. Thus, a deontological perspective would likely categorically condemn concealment unbranding as well.

CONCLUSION

In sum, the practice of unbranding squarely presents a conflict of ethical systems. While both forms of the practice are likely blameworthy from a deontological perspective, sabotage unbranding does not seem to present serious ethical concerns from a consequentialist perspective, and the ethical implications of concealment unbranding are mixed at worst. We thus return to the question that began this Essay: which ethical system is most appropriately applied to unbranding in particular and trademark law in general?

⁷¹ See *supra* Part III.A.2.

⁷² See *supra* notes 68–69 and accompanying text.

⁷³ See *supra* Part III.A.1.

⁷⁴ Cf. *supra* Part III.A.1.

⁷⁵ Cf. *supra* notes 42, 68–69 and accompanying text.

Many commentators, including myself, have argued that deontological justifications for many forms of intellectual property rights are essentially circular.⁷⁶ But these critiques are typically leveled against theories grounded in misappropriation and the moral claims of labor, rather than theories grounded in the principle of autonomy. On the latter class of theories, the scholarly literature is somewhat underdeveloped, but potentially less hostile.⁷⁷

It should be noted, however, how novel—even radical—such an autonomy-focused deontological theory of trademark would be.⁷⁸ A principle that sellers in consumer markets may not use their superior knowledge of consumer decision-making processes to clandestinely influence consumer behavior would proscribe many modern advertising and marketing practices. Moreover, there is no real precedent for imposing a duty on sellers to respect the autonomy of buyers in consumer markets, at least as I have defined autonomy. Even the historical deontological model of trademark law discussed in the first Part of this Essay is generally unconcerned with the duties owed by sellers to buyers. Rather, it looks to sellers' duties *to each other*—buyers are essentially the evidence, not the victim.⁷⁹ If we were to examine unbranding under this historical model, we would likely be right back at the circular, misappropriation-based theories that have drawn such (in my view, warranted) skepticism. Thus, an ethical framework that would reliably deem unbranding wrongful would require a significant shift in our thinking about the subject.

This is not to say that an autonomy-based deontological theory of trademark law is *wrong*, just that it is *unusual*. Contemporary trademark theory, having succumbed to the totalizing logic of economic analysis, is far more comfortable with consequentialist

⁷⁶ Sheff, *supra* note 19, Part III.C.1; *see also* Lemley & McKenna, *supra* note 19, at 181–84; Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 400–12 (1990); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

⁷⁷ *See generally* Heymann, *supra* note 25.

⁷⁸ *See* Heymann, *supra* note 25, at 702–14 (discussing various expansionary trademark doctrines that would have to be retrenched under a theoretical perspective based on consumer autonomy).

⁷⁹ *See supra* notes 20–21 and accompanying text.

approaches to novel problems.⁸⁰ And the consequentialist approach generates comforting results in the unbranding context. By and large, the market is presumed to know best, and unbranding does not threaten to disturb that conclusion to any great degree. Frankly, my personal sympathies continue to lie with the consequentialist camp. Still, to the extent that something about unbranding continues to irritate our ethical organ, it may suggest that our reliance on consequentialist thinking in trademark law is in some way misplaced, or at least incomplete.

⁸⁰ See *supra* notes 22–25 and accompanying text.