Beyond Error Psychology's (Not-So-Easy) Lesson for Consumer Law

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Introduction

For the past few decades, cognitive psychologists and behavioral economists have been uncovering evidence that human decision-making processes are prone to non-rational tendencies. Legal scholars have been increasingly attentive to this research; recognition of the fallibility of human judgment has commonly inspired calls for imposing constraints on individual choice: the psychological research is often seen as providing support for (some version of) paternalism. The ability of individuals to make good choices for themselves is seen as the fundament of contractual freedom. If human beings in general, and consumers in particular, are prone to systematic errors, they should simply be protected from themselves. The 'from *homo economicus* to Homer Simpson' joke has become quite common as a smart way to synthesize the main lesson of psychological research for legal scholars and regulators.

'A large part of behavioral economics describes ways people sometimes fail to behave in their own best interests'; 'it is such errors (…) that can justify the need for paternalistic policies to help people make better decisions and come close to behaving in their own best interest'. In a sense, 'behavioral economics extends the paternalistically protected category of 'idiots' to include most people, at predictable times'.[1]

The main point of this essay is that this perspective seriously misrepresents the findings of cognitive psychology, and offers a simplistic view of its lesson for legal studies. The idea that cognitive psychology can provide support for paternalism is not necessarily wrong, but the issues raised are much more complex than it is sometimes assumed, and they revolve around the problem of manipulation much more than around human error itself.

A first important point to make is that legal scholars have sometimes misunderstood behavioral decision theory. The psychological research itself is not designed to uncover error; it is designed to identify how people think. 'The chief lesson of behavioral decision theory is not that people make bad choices but that they do not rely on rule-based systems, such as deductive logic or expected utility theory in making decisions'.[2] People 'develop rules of the thumb and rely on ad hoc perceptions, emotions, accumulated memory, and loose associations'; 'although reliance on heuristics creates vulnerabilities in judgment, people are also highly adaptive decisionmakers'.[3]

It has now become quite common to speak about a 'dual-process' model of the brain. We apprehend the world in two radically opposed ways, employing two fundamentally different modes of thought, which are sometimes called 'System 1' and 'System 2'. System 1 is fast; it is intuitive, associative, metaphorical, automatic, impressionistic. System 2 is slow, deliberate, effortful; its operations require

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[1] Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"' (2003) 151 University of Pennsylvania Law Review 1211, 1217f.

[2] Jeffrey J Rachlinski, 'The Uncertain Psychological Case for Paternalism' (2003) 97 Northwestern University School of Law 1165, 1206f.

[3] Ibid 1168.

attention. The chief lesson of psychological research regards the importance of automatic, intuitive processes in human reasoning and decision-making, which has often been overshadowed by our tendency to identify ourselves with the conscious, reasoning self that has beliefs and makes choices; System 2 is 'a supporting character who beliefs herself to be the hero'.[4] The flaws of our intuitive mind are largely outweighed by its marvels: it may be 'the origin of much that we do wrong, but it is also the origin of most of what we do right- which is most of what we do'.[5]

A second important observation to make is that the same notion of error may be problematic in light of the new psychological research. The body of findings that document the extreme sensitivity of choices to formulation, context and procedure 'supports a radical challenge to the assumption, central to much economic theory, that stable preferences exist': 'the image of a decision maker who makes choices by consulting a preexisting preference order appears increasingly implausible'; the alternative image is of a decision maker who 'constructs preferences in the context and in the format required by a particular situation'.[6] Daniel Kahneman added that 'of course, no one wishes to pursue the idea of context dependence to the point of nihilism': choices may not be as coherent as the notion of a preference order would suggest, but they are far from random. On the other hand, there are cases where there is without doubt an error (for instance, when a given probability is underestimated or overestimated). Still, the idea of context dependence is at the very core of behavioral decision theory. When different versions of a decision problem evoke different preferences and thus elicit different responses, this does not mean that one of the responses is wrong: it rather raises the problem of the manipulability of choices, which we will discuss later.

A third point regards the idea of people failing to behave in their own best interests because of their systematic errors. Once again, especially when the assumption of firm, stable preferences is challenged, it is in many cases questionable if someone who has been influenced through the framing of information and manipulation of the context is really prejudicing her own interests: the issue at question regards her liberty rather than her interests. Choosing one particular store or brand rather than another may be realistically neutral from the point of view of the consumer's interests: the problem is the acceptability of some forms of manipulation.

This leads us to the fourth point. Cognitive biases are sometimes treated as some sort of exogenous influences on individual behavior: they are to be taken into account as a fixed influence on behavior, in order to build a more realistic model of human cognition and decision and thus better legal rules. However, one of the central lessons of behavioral decision theory is that cognition and decision making is largely determined by context and the way in which problems are framed; they are thus not independent from the action of other market actors, and this action in its turn can be regulated by the law. The picture emerging from psychological research is not centered about people with stable preferences which make some systematic errors and should be protected from the bad consequences of these errors, but rather about people which are heavily influenced by the context in which their decisions take place; this context can be deliberately manipulated by other market actors and, directly or indirectly, by legal regulators themselves.

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[4] Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Strauss and Giroux, 2011) 31.

[5] Ibid 416.

[6] Daniel Kahneman, 'Preface' in Daniel Kahnman & Amos Tversky (eds), *Choices, Values and Frames* (Cambridge University Press, 2000) xvi.

‘The presence of unyielding cognitive biases makes individual decisionmakers susceptible to manipulation by those able to influence the context in which decisions are made’. More particularly, ‘market outcomes frequently will be heavily influenced, if not determined, by the ability of one actor to control the format of information, the presentation of choices, and, in general, the setting within which market transactions occur’. Once one accepts that individuals’ choices can be manipulated, ‘it follows from an economic perspective that others will exploit those tendencies for gain’[7].

The consumer’s cognitive and decisional processes are heavily influenced by context and by the way in which the information is framed. In some cases this will encourage or prevent errors, in other cases the same notion of error is hardly applicable, but consumers’ decisions will be biased in a predictable way. Our preferences and decisions can be influenced by deliberate behaviors which fall short of what can be called deceit in a traditional sense, and the role of the legal regulator is thus much more complex than in the traditional model, which presupposes rational actors with relatively stable preferences.

The most important lesson of psychological research is thus not that individuals make errors, but rather that their perceptions and preferences are highly manipulable; that they are susceptible to being influenced by features of their surroundings in ways that they do not even suspect. The most important, but also most difficult challenges come from the awareness of this manipulability, which may or may not result in true errors by the individuals.

In the following pages, we will examine some examples of market practices which are able to influence the consumers’ choices and behaviors in ways which could not be predicted if one presupposed perfect rationality and unlimited cognitive resources. The next paragraph will describe some examples of practices which involve an element of deceit. The third paragraph will focus on a much more problematic kind of practices, which are clearly able to exert an influence on consumers but where the element of deceit is less clear.

Error and deceit

According to European law, a commercial practice is regarded as misleading, and thus unfair, if ‘in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct’.[8]

Probably, the easiest part of the lesson of psychological research for consumer law scholars and practitioners consists of highlighting cases in which, because of their cognitive limits and biases, consumers can be induced in errors, without giving them false information.

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[7] Jon D Hanson & Douglas A Kysar, ‘Taking Behavioralism Seriously: The Problem of Market Manipulation’ (1999) 74 New York University Law Review 630, 635.

[8] European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive), art. 6.

For instance, many pricing practices have well-documented effects on consumer behavior which are apparently due to consumers' sub-optimal way of processing information. One of the most simple examples is partitioned pricing: the partitioning of the price charged to consumers into two or more components (such as installation charges, handling charges, service charges, shipping charges, taxes, etc.) can generate higher demand compared to combined pricing. This is due to the fact that consumers (or at least a part of them) do not process the total price accurately: instead of calculating the total cost as the mathematical sum of the base price and the surcharge, they use simplifying heuristics; even when not ignoring the surcharge completely, they use the base price as a cognitive anchor and then tend to adjust insufficiently upward to incorporate the surcharge.[9] Subjects exposed to partitioned prices recall significantly lower total costs than subjects exposed to combined prices.

Another similar example regards the ubiquitous practice of odd pricing (e.g. pricing an item at $ 9.99 rather than $ 10.00). There is a body of literature showing that odd-ending prices are less likely than even-ending prices to be recalled accurately and that they tend to be underestimated.[10] This may be due to a tendency to drop off, or give less attention to, a price's rightmost digits.[11]

Of course no simple conclusion can be drawn by the experimental literature. But when it uncovers systematic errors in the way in which information is processed, at the very least it highlights areas of potential suspicion of consumers' deception, which are not immediately evident if one presupposes perfect rationality and unlimited cognitive resources of consumers.

In other cases, however, one cannot really speak of errors. For instance, psychologists have long recognized that people often behave in ways which are inconsistent with expected utility theory in order to be coherent with their previous decisions. In part, this can be explained with the so-called sunk cost effect: people have difficulty in ignoring sunk costs, and tend to continue an endeavor once an investment in money, effort or time has been made.[12] However, the effects of commitment go beyond the cases where sunk costs are present: once people have committed to an action, they are more likely to be consistent with that particular deed. In a well-known series of experiments, Robert Cialdini and others have demonstrated the effectiveness of the 'low-ball technique': by inducing subjects to make an initial decision to perform a target behavior and then making the costs of performing that behavior known, a requester obtains greater compliance than when subjects are informed of the full costs of the behavior from the outset, even if the initial decision is in fact reversible.[13] These experiments have been inspired by the wide-spread use of such tactics by sales organizations to produce compliance from their costumers: for instance a given car is offered at an

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[9] See e.g., Vicki G Morwitz, Eric A Greenleaf & Eric J Johnson, 'Divide and Prosper: Consumers' Reactions to Partitioned Prices' (1998) 35 Journal of Marketing Research 453; Lan Xia & Kent B Monroe, 'Price Partitioning on the Internet' (2004) 18 Journal of International Marketing 63.

[10] Robert M Schindler, 'Consumer Recognition of Increases in Odd and Even Prices' (1984) 11 Advances in Consumer Research 459; Robert M Schindler & Alan R Wiman, 'Effects of Odd Pricing on Price Recall' (1989) 19 (3) Journal of Business Research 165; George Y Bizer & Robert M Schindler, 'Direct Evidence of Ending-Digit Drop-Off in Price Information Processing' (2005) 22 Psychology & Marketing 771.

[11] Bizer & Schindler (n 10).

[12] See e.g. Hal R Arkes & Catherine Blumer, 'The Psychology of Sunk Cost' (1985) 35 Organizational Behavior and Human Decision Processes 124.

[13] Robert B Cialdini, John T Cacioppo, Rodney Bassett & John A Miller, 'Low-ball Procedure for Producing Compliance: Commitment then Cost' (2014) 36 Journal of Personality and Social Psychology 463.

extremely good price, and once the customer has made the decision for that specific car the effective price is increased in some way. This 'commitment and consistency' principle[14] has different, not mutually exclusive explanations. A high degree of consistency is socially valued; on the other hand, stubborn consistency generally simplifies daily life, by reducing the number of decisions that we have to take. It may be partially related with some sort of confirmation bias, which leads individuals to focus their attention on information that confirm their previous choice, in order to reduce cognitive dissonance.

While the tendency to be consistent with previous decisions does not necessarily lead to errors in the proper sense, it can be easily exploited to manipulate consumers' choices. At the very least, this implies that some deceitful behaviors which would seem relatively innocuous if people behaved according to expected utility theory are in fact much more dangerous. One clear example is bait advertising, which is considered as a misleading practice by the Unfair Commercial Practices Directive: 'making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered'.[15] Consumers enticed with discounts will be reluctant to continue searching elsewhere even when the offer is no longer available; or they may in any case do some shopping on the store or supermarket, once they have spent time and effort to get there.

More generally, consumer law should look with great suspicion to every commercial practice where the initial information is ambiguous, incomplete or misleading, even if this is clearly corrected at some later stage, before the contract is concluded. It is clear that once the consumer has made even an initial, tentative decision about the product or service he is interested in, the market operator has already gained a decisive advantage. Psychology of decision making's lesson in this class of cases is that error and deceit are often only apparently innocuous, given the predictable biases in human behavior.

Context manipulation

Other marketing techniques involve no misleading at all; rather they involve crafting the context or framing information in ways which systematically influence consumers' behavior and choices, without their targets being even aware of them.

We can start from a rather banal example. A huge body of literature shows that a brief, casual interpersonal touch has a positive influence on consumers' evaluations and behavior: for instance a

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[14] Robert B Cialdini, *Influence* (Collins Business, 2007) 57ff.

[15] Unfair Commercial Practices Directive, Annex I, n 5.

brief touch by a waiter improves the restaurant evaluation and increases tips;[16] shoppers in a supermarket are more likely to try a new food product and buy it if touched during the request.[17] Now, it can be hardly said that touching the customers, even if it is part of a deliberate selling technique, is in itself unfair. However, this example shows what kind of advantages a skillful and aggressive seller may draw from the mere possibility of face-to-face interaction with a consumer; this mere possibility should not be gained through deceit or arrogant intrusion (for instance, 'conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return', which is an aggressive commercial practice according to the Unfair Commercial Practices Directive[18]); on the other hand, it contributes to explain why consumers should be given a cooling-off period when they are made object of sudden and unexpected solicitations, like in the case of off-premises contracts.

A clear example of how careful crafting of context can influence consumers' choices is atmospherics, that is 'the effort to design buying environments to produce specific emotional effects in the buyer that enhance his purchase probability'.[19] While the real effectiveness of atmospherics is very much discussed, there is, for instance, a huge body of research on the effects of music[20] and scents[21] on consumers' behavior. While these results should be taken with caution, a study has reported that playing French or German music in a supermarket respectively increases the sales of French or German wines;[22] and several studies seem to show that costumers are prepared to spend more when classical music is played in a wine store or restaurant, possibly because it creates the perception of an upmarket environment.[23]

Drawing consequences for consumer law from this literature is indeed quite difficult. At least in some cases, such practices at least draw some ethical questions. For instance, a study has raised the question of covert ambient scents.[24] Apparently, subliminal odors (that is odors that are below the detection

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[16] Reneé Stephen & Richard L Zweigenhaft, 'The Effect on Tipping of a Waitress Touching Male and Female Customers' (1986) 126 Journal of Social Psychology 141; Jacob Hornik, 'Tactile Stimulation and Consumer Response' (1992) 19 Journal of Consumer Research 449.

[17] David E Smith, Joseph A Gier & Frank N Willis, 'Interpersonal Touch and Compliance with a Marketing Research' (1982) 3 Basic and Applied Social Psychology 35.

[18] Unfair Commercial Practices Directive Annex I, n 25.

[19] Philip Kotler, 'Atmospherics as a Marketing Tool' (1973) 49 Journal of Retailing 48, 50.

[20] See e.g., Charles S Areni & David Kim, 'The Influence of Background Music on Shopping Behavior: Classical Versus Top-Forty Music in a Wine Store' (1993) 20 Advances in Consumer Research 336; Adrian C North & David J Hargreaves, 'The Effect of Music on Atmosphere and Purchase Intentions in a Cafeteria' (1998) 28 Journal of Applied Social Psychology 2254; Stephanie Wilson, 'The Effect of Music on Perceived Atmosphere and Purchase Intentions in a Restaurant' (2003) 31 Psychology of Music 93.

[21] See e.g., Charles S Gulas & Peter H Bloch, 'Right under Our Noses: Ambient Scent and Consumer Responses' (1995) 10 Journal of Business and Psychology 87.

[22] Adrian C North, David J Hargreaves & Jennifer McKendrick, 'In-store music affects product choice' (1997) 390 Nature 132.

[23] Areni & Kim (n 20); Wilson (n 20).

[24] Kevin D Bradford & Debra M Desrochers, 'The Use of Scents to Influence Consumers: The Sense of Using Scents to Make Cents' (2009) 90 Journal of Business Ethics 141.

threshold) have a stronger effect on people than odors of which they are aware. An experimental study has shown how subliminal odors can affect the likeability judgment of photographs of faces.[25] Now, it has been questioned whether the use of subliminal scents to influence consumers would be ethically acceptable, since consumers should have at least the opportunity to recognize that a persuasion attempt is occurring; and, to a lesser degree, the same worry extends to all uses of scent to influence consumers, since 'even if consumers are aware of the scent, they may not interpret it as a persuasion attempt'.[26]

However, this kind of techniques to influence consumers raises a more fundamental question about the manipulability of consumers' preferences. Before getting back at it, it may be useful to consider another rather obvious, and very important, example of manipulation of the context: product placement in supermarkets[27]. Retailers analyze scanner data and use computer simulations to inform shelf space allocation decisions, with the ultimate goal of increasing purchases. Placing staple goods in the far corners of the store is only the first step: the layout and location of products in any retail outlet is used in order to give shoppers maximum exposure to what is on sale and maximum encouragement to buy it. Impulse items are located at the checkout area, so that the inevitable checkout line wait may encourage impulse buying. Children's brands are usually on the lowest shelves in the store, in order to let a child take the initiative to ask for a product or toddle over and pick it out herself. The choice of products placed in the highly valuable eye-level real estate is of curse carefully considered; on the other hand, it seems that consumers mainly look at the right side, and the right side of the aisle is preferred to the left.

Now, some of these practices may be questionable in themselves. At least in some extreme cases, setting an emotive trap where a consumer is unexpectedly exposed to strong psychological pressures in order to stimulate impulse buying may be seen as a form of undue influence. However, since there is no neutral setting of the context in which market interactions take place, it is quite reasonable that market operators try to create an environment which attracts consumers and stimulates sales. The fundamental question that is raised by a full understanding of the measure in which consumers' preferences and choices are influenced by apparently peripheral elements of the context regards nothing less than the fundament of contractual freedom itself.

The idea that free interaction of market forces is the most efficient way for satisfying preexisting, spontaneous preferences by the consumers is no small part of the reasons for self-restraint by public decision-makers. If a given kind of background music has an influence on how much wine is consumed, or even on what kind of wine is consumed, if product placement has an influence on which brands or even which goods are acquired, it becomes increasingly difficult to conceive consumers' choices as revealing anything similar to spontaneous preferences.

There is today rather compelling evidence that people do not face everyday decision tasks armed with a stable set of preferences. Indeed, some experimental studies have shown a phenomenon labelled 'choice blindness': after being asked to make a rather trivial choice between two alternatives (for instance, between two faces on the basis of their attractiveness, or between two varieties of jam on the basis of their taste), people are not usually able to detect the mismatch if they are later presented with the opposite choice as their own; and in fact they are able to produce confabulatory reports when

[25] Wen Li, Isabel Moallem, Ken A Paller & Jay A Gottfried, 'Subliminal Smells Can Guide Social Preferences' (2007) 18 Psychological Science 1044.

[26] Bradford & Desrochers (n 24).

[27] See e.g., Jon D Hanson & Douglas A Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 Harvard Law Review 1420, 1447ff.

asked to describe the reasons behind their choices.[28] As it has been remarked, if people 'are willing to accept a reversal of their decision as being what they really wanted, the outcome of a choice cannot be said to simply reveal an underlying preference'.[29]

Now, as Daniel Kahneman has put it, this idea should not be stressed to the point of nihilism. Humans can obviously form very specific and detailed prior intentions, are often able to resist temptations, and their choices possess a certain degree of coherence. But it should be realistically admitted that many relatively unimportant, everyday choices do not reveal anything similar to the consumers' true preferences. If the context in which they are taken were not manipulated, they would probably be largely casual. In the measure in which manufacturers and sellers are able to exert an influence, they will be systematically biased in a way which increases their profits.

Psychology of decision making's (not-so-easy) lesson for consumer law

Psychology of decision making's lesson for consumer law is relatively simple and straightforward when it identifies ways in which humans can be induced in errors, exploiting their cognitive limits and biases. Commercial practices which, even if they do not involve false information, are likely to induce in error consumers, or at least identifiable groups of particularly vulnerable consumers, should be regarded as deceitful by the law (which of course leaves open the question of identifying the most appropriate legal remedies).

The question is much more complex for marketing techniques which are able to influence the consumers' preferences and choices without inducing them in error. Of course, making consumers behave according to rational choice theory cannot be a realistic goal for consumer law. The context-dependence of preferences and the role of moods and emotions are an inherent part of human mental functioning, and banning any technique aimed at favorably influencing consumers would be senseless. The consequences for consumer law are in this case much more nuanced and complex.

A first consequence of the literature evidencing the manipulability of consumers' preferences and choices is simply that it weakens one of the traditional arguments against public regulation. Market outcomes do not reflect stable, spontaneous preferences of the consumers; they are instead influenced by the ability of manufacturers and sellers to control the setting within which market transactions occur and to systematically bias the consumers' choices in order to increase their profits. In light of this, it can hardly be said that by altering 'spontaneous' market outcomes a public decision maker is necessarily preventing the consumers from satisfying their preferences.

On the other hand, while manipulation in itself cannot realistically be banned, consumer law probably needs to build a model of decision making process which is acceptably serene and deliberate, in order to identify what amounts to an undue influence. This is a complex normative task, and the answer will often be a question of degree. Aggressive forms of social interaction, extreme time pressures, and strong emotional conditions are all elements of suspicion.

[28] Petter Johansson, Lars Hall, Sverker Sikström & Andreas Olsson, 'Failure to Detect Mismatches between Intention and Outcome in a Simple Decision Task' (2005) 310 Science 116; Lars Hall, Petter Johansson, Betty Tärning, Sverker Sikström & Thérèse Deutgen, 'Magic at the Marketplace: Choice Blindness for the Taste of Jam and the Smell of Tea' (2010) 117 Cognition 54.

[29] Ibid 60.

A third point to be stressed is that the effects of manipulation should not be evaluated from the point of view of single consumers. It does not necessarily lead to a 'wrong' or detrimental choice; on the other hand, from the point of view of the single consumer there is hardly sufficient reason to say that she should be relieved of responsibility for her choices. After all temptations can be resisted, and outside of extreme conditions our behavior is rather influenced than determined by contextual stimuli. From the perspective of the enterprises, however, it is evident that once it is clear that a particular manipulation of the context will systematically, if not irresistibly, influence consumers in a way that goes to their advantage, they will have a strong incentive to exploit those opportunities; the problem is thus not so much protection of single consumers, but rather what means of competition are acceptable and desirable from a more general point of view. Some marketing techniques may result in a public nuisance, or they may exert a kind of psychological pressure on the individual which, even if it falls short of being truly an undue influence, is unpleasant and disturbing. Making persistent and unwanted solicitations by telephone is a banal but illustrative example.

It may be interesting to mention the widely documented phenomenon of ego depletion.[30] Choice, active response, self-regulation and all other variants of voluntary effort draw at least partly on a shared pool of mental energy. The self's capacity for active volition is limited: the exertion of self-control is depleting, and reduces the ability to exert self-control when the next challenge comes around. Resisting temptations and other forms of psychological pressure is certainly possible, but not without cost for the individual; and consumer law may take into account this kind of psychological externalities, generated by some particularly aggressive marketing techniques.

The lesson of psychology of decision making for consumer law is complex and nuanced. It provides a more realistic analysis of consumers' choices and motivations. It cannot dictate the normative solutions, and, certainly, it does not suggest that having the consumer behave as a *homo oeconomicus* is a feasible and probably not even a desirable goal.

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[30] See e.g., Roy F Baumeister, Ellen Bratslavsky, Mark Muraven & Diane M Tice, 'Ego Depletion: Is the Active Self a Limited Resource?' (1998) 74 Journal of Personality and Social Psychology 1252; Roy F Baumeister, 'Ego Depletion and Self-Control Failure: An Energy Model of the Self's Executive Function' (2002) 1 Self and Identity 129.