

Marks, Morals, and Markets

Jeremy N. Sheff¹

This article proposes to analyze trademark law as a system of moral obligations between producers and consumers. Trademark theory to date is overwhelmingly consequentialist in approach, and much current debate over trademark doctrine rests on empirical claims that doctrinal innovations are producing undesirable results. Of approaches that do not follow consequentialist reasoning, the extant theoretical frameworks focus on the mark itself as a storehouse of meaning, the property-like “moral rights” that inhere in a mark, or the moral obligations of producers to one another as competitors. To the extent that the modern view of trademark law is that it seeks to vindicate not only producer interests but consumer interests as well, the absence of a robust deontological account of the relationship between mark owners and their customers is a significant shortcoming of the current scholarly literature.

This Article proposes to fill that gap by looking to analogous fields of law that have been theorized in both consequentialist and deontological terms—specifically, contract law and securities law. By situating the law of consumer markets (trademark law) in an intermediate space between these two legal regimes, it seeks to determine the key features of a deontological approach to market regulation and to distinguish such an approach from the type of consequentialist account that currently dominates trademark theory. The key implication of this comparison is that a deontological approach, unlike a consequentialist approach, would focus on consumers as ends in themselves rather than as means to the end of lowered information costs and efficient markets. This distinction has broad implications both for the scope of current trademark doctrine (and particularly the expansion of liability under novel theories of confusion and dilution), with a key variable being the model of the consumer—as both a normative and a descriptive matter—on which the doctrines of trademark law are built.

¹ Assistant Professor of Law, St. John’s University School of Law.