Book Review: The Choice Between Life and Death and Everything in Between

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BOOK REVIEW: THE CHOICE BETWEEN LIFE AND DEATH AND EVERYTHING IN BETWEEN

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ABSTRACT

In his latest book, the Paradox of Choice, Barry Schwartz, a behavioral psychologist at Swarthmore College, says what some of us have been thinking all along: Too much choice is not a good thing. People fail to make good decisions and their tendency to err is only exacerbated by expanding choice. Accordingly, Professor Schwartz argues that, because of the abundance of options, markets are failing to do what markets are supposed to do: maximize individual welfare. A counterpoint to the plain-vanilla economic analysis, Schwartz posits that an increased number of options may actually reduce overall utility, not increase it.

This review of Paradox of Choice comes in several parts. In Parts 2 and 3, I review the most important parts of the Book. Professor Schwartz lays out a convincing case that too much choice can have dire consequences as people muddle along to make decisions and, once made, regret and second-guess those decisions. To alleviate the incessant pressure to choose, Schwartz points out some commonsense things we might all do better. In Part 4, I point out some minor quibbles with the book, since there are few real targets to swipe at in this extremely engaging work.

In Part 5, I analyze the book in light of President Bush’s call for creating an ownership society, which essentially expands individual choice in wide-variety of traditionally no-choice venues, like health care and retirement. In this Part, I make the point that expanded choice may be bad for many of the behavioral characteristics of individuals that Schwartz discusses. But, additionally, in such venues expanded choice should be approached warily since the bad choices individuals make in certain venues produce significant negative repercussions or externalities for others.

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TABLE OF CONTENTS
I. Introduction.......................................................... 2
II. The Book.............................................................. 4
   A. The Range of Choices........................................... 5
   B. Misdiagnosis and Choice....................................... 7
   C. The Problem of Choice......................................... 10
III. Choosing When Not to Choose.................................... 13
IV. Problems with the Book........................................... 14
   D. Expanded Choice as a Problem, Not a Scourge............. 14
   E. Too Many Studies and Too Few............................... 16
   F. Consumer Transactions......................................... 17
V. Bush’s Ownership Society and individual Choice............... 18
   G. Healthcare....................................................... 19
   H. Retirement....................................................... 21
   I. Housing........................................................... 24
VI. Conclusion.......................................................... 25

1. INTRODUCTION

The market for everyday transactions is increasingly complicated, time-consuming and, for some, depressing. Individuals can spend their free time trying on all varieties of blue jeans (loose fit, relaxed fit, or boot cut), or looking at eyeglasses (thin frames, wire, plastic, titanium or horn-rimmed), or pointing at the trimmings of a 6-inch hoagie (toasted or “un”, provolone or Swiss cheese, spicy or Dijon mustard).

The choices associated with choosing significant items—e.g., health insurance, retirement, and financing a family home—are also booming. The normal employer, for instance, provides a healthy variety of insurance options (the PPO, HMO, POS), cafeteria plans, and/or health savings account. Additionally, employers offer workers several 401(k)’s for retirement, each with its own smorgasbord of mutual funds options. Equally,
individuals in the market for new home will find that they can choose to put twenty percent down or no money down or somewhere in-between. They can pay interest only, a variable interest rate, or one that’s fixed for three decades.

In his latest book, the Paradox of Choice, Barry Schwartz, a behavioral psychologist at Swarthmore College, says what some of us have been thinking all along: Too much choice is not a good thing. People fail to make good decisions and their tendency to err is only exacerbated by expanding choice. Accordingly, Professor Schwartz argues that, because of the abundance of options, markets are failing to do what markets are supposed to do: maximize individual welfare. A counterpoint to the plain-vanilla economic analysis,¹ Schwartz posits that the increased number of options may actually reduce overall utility, not increase it. He makes his central complaint early-on:

As the number of available choices increase, as it has in our consumer culture, the autonomy, control, and liberation this variety brings are powerful and positive. But as the number of choices keeps growing, negative aspects of having a multitude of options begin to appear. As the number of choices grows further, the negatives escalate until we become overloaded. At this point, choice no longer liberates, but debilitates. It might even be said to tyrannize.²

Thus, according to Schwartz, choice does not produce an efficient allocation of goods and services, as classical economists would theorize.³ Rather, ranging, sprawling choice leaves individuals with regret, self-doubt, and dissatisfaction with the choices that they have made.

This review of Paradox of Choice⁴ comes in several parts. In Parts 2 and 3, I review the most important parts of the Book. Professor Schwartz lays out a convincing

¹ SCHWARTZ supra note 4, at 19 (noting that the standard opinion among social scientists is that more choice makes society better off) (“Those of us who care will benefit, and those of us who don’t care can always ignore the added options. This view seems logically compelling; but empirically, it isn’t true.”).

² SCHWARTZ supra note 4, at 2.

³ Schwarz sums up the efficient market thesis of classical economists this way:

“Over two centuries ago Adam Smith observed that individual freedom of choice ensures the most efficient production and distribution of society’s goods. A competitive market, unhindered by the government and filled with entrepreneurs eager to pinpoint consumers’ needs and desires, will be exquisitely responsive to them. Supple, alert, unfettered by rules and constraints, producers of goods and providers of services will deliver to consumers exactly what they want.”

case that too much choice can have serious negatives consequences as people muddle along to make decisions and, once made, regret and second-guess those decisions. To alleviate the incessant pressure to choose, Schwartz points out some commonsense solutions. For instance, he advises consumers to develop good rules of thumb, like never try the “new-and-improved version” of an item that works just fine. In Part 4, I point out some minor quibbles with the book, since there are few real targets to swipe at in this extremely engaging work.

In Part 5, I analyze the book in light of President Bush’s call for creating an ownership society, which essentially expands individual choice in wide-variety of traditionally no-choice venues, like health care and retirement. In this Part, I make the point that expanded choice may be bad for many of the behavioral characteristics of individuals that Schwartz discusses. But, additionally, in such venues expanded choice should be approached warily since the bad choices individuals make in certain venues produce significant negative repercussions or externalities for others.

2. THE BOOK

In the *Paradox of Choice*, Schwartz begins by lamenting the growth in the number of consumer choices and the amount of time it takes to choose simple items. The consumer marketplace, for instance, offers several dozen kinds of jeans, cookies, cereals, and other consumer goods. 5 Similarly, in other non-trivial areas, Schwartz traces how choice has expanded such that individuals now choose their health insurance, retirement plans, and even religion from among myriad options. 6 Next, Schwartz discusses how we choose or, more appropriately, mis-choose among options. He points to classic studies that show that individuals tend to experience more displeasure from losses than pleasure from gains (loss aversion) and show that individuals are prone to take risks when it

5 Schwartz, *supra* note 4, at 2 (“Before these options were available, a buyer like myself had to settle for an imperfect fit, but at least purchasing jeans was a five-minute affair. Now it was a complex decision in which I was forced to invest time, energy, and no small amount of self-doubt, anxiety, and dread.”).

6 Schwartz, *supra* note 4, at 23-44.
means keeping what they already have (endowment effect). Although Schwartz trots out the classic studies, his presentation and arguments are fascinating. For instance, Schwartz notes that individuals will take more risk if they are assured that they will not find out how the unselected option turned out. Finally, Schwartz concludes by linking expanded choice to human suffering and pitching a few techniques to mitigate the negative consequences of expanded choice.

A. The Range of Choices

In the first part of the book, Schwartz discusses the range of choices available today in the consumer marketplace, at home, and at work. For instance, Schwartz reports the average supermarket today carries “more than 30,000 items.” In an illustrative trip to his neighborhood grocery, Schwartz discovers dozens of varieties of crackers, juices, chips, and pain relievers. He notes that there were hundreds of varieties of cookies, soap, soup, and tea bags. At an electronics store, he finds scores of computers, car stereos, televisions, cameras, phones, and DVD players to choose from. Even on his own turf, the university campus or on the couch at home, Schwartz is amazed at the number of college courses offered at many colleges, the number of cable television channels to flip between, and the size and number of chinos that can ordered by catalog.

Schwartz examines how the deregulation of certain traditionally monopolistic industries has created more choices for individuals to make today than in the not-too-distant past. Utilities have been deregulated. Consequently, consumers have a range of options for electric power and phone service. Health insurance options have sprouted and spread. Employees today routinely have to select whether they want a dental plan or vision plan and the level of deductible they can live with. Retirement options have also increased, as employers have moved away from defined benefit plans—in which employers invested on behalf of its employees and guaranteed a level of return at retirement age—to defined contribution plans—which put investment decisions to the employees themselves. With remote networking opportunities, like cell phones and e-

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7 SCHWARTZ, supra note 4, at 71 (“Once something is given to you, it’s yours. Once it becomes part of your endowment, even after a very few minutes, giving it up will entail a loss.”).

8 SCHWARTZ, supra note 4, at 158.
mail, they can choose how, when and where they work. In fact, Schwartz notes that many individuals are constantly tortured by the choice to work, to check e-mail or voice mail, whether or not they are physically in the office:

And once people are in the position to be able to work at any time from any place, they face decisions every minute of every day about whether or not to be working. E-mail is just a modem away. Should we check it before we go to bed? Should we bring our laptop along on our vacation? Should I dial into the office voice-mail system with our cell phone and check for messages while waiting between courses at the restaurant? For people in many occupations, there are few obstacles standing in the way of working all the time. And this means that whether or not we work has become a matter of hour-by-hour, minute-by-minute choice.

Interestingly also, Schwartz notes that individuals are increasingly making choices in areas that one might assume are pre-determined and permanently fixed. With plastic surgery options, individuals are able to choose how they look. Individuals don’t inherit a faith, but affirmatively choose what religion to practice. Increasingly, Schwartz argues identity, too, is permeable, whether we “repudiate or embrace our ethnic heritage,” is a matter of choice. With all this choice, it’s no wonder, as Schwartz states, that

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9 SCHWARTZ, supra note 4, at 9-23.
10 SCHWARTZ, supra note 4, at 12.
11 SCHWARTZ, supra note 4, at 9-12.
12 SCHWARTZ, supra note 4, at 12-13.
13 SCHWARTZ, supra note 4, at 15-17.
14 SCHWARTZ supra note 4, at 17-18.
15 SCHWARTZ supra note 4, at 24-25.
16 SCHWARTZ supra note 4, at 26.
17 SCHWARTZ supra note 4, at 27.
18 SCHWARTZ supra note 4, at 34-37.
19 SCHWARTZ supra note 4, at 35.
20 SCHWARTZ supra note 4, at 39.
21 SCHWARTZ supra note 4, at 41; see also, e.g., SCHWARTZ supra note 4, at 42 (“The young New York immigrant woman from Mexico sitting in a college class in contemporary literature can ask herself, as class discussion of a novel begins, whether she’s going to express her identify as the Latina, the Mexican, the woman, the immigrant, or the teenager as class discussion unfolds.”).
Americans shop more often than they go to church and that “Americans now have more shopping centers than high schools.”

B. Misdiagnosis and Choice

Thereafter, in the book’s second part, Schwartz details how individuals make decisions and ultimately choose poorly. He describes several behavioral characteristics that could lead to bad decisions. As Schwartz argues, individuals are terrible at remembering how previous experience made them feel; they make bad guesses about what their future preferences will be; and individuals are moved too much by anecdotes and salient experiences, all of which lead to bad decision-making. Further, individuals hate losses and will avoid experiences, even profitable experiences, that have the chance of creating perceived losses.

To begin with, Schwartz shows individuals have trouble identifying preferences that will create pleasure because they have faulty memories of their past experiences and make poor predictions about the future. For example, individuals tend to remember only the peak and end of an experience, not the average pleasure or displeasure that an experience creates. When it comes to calculating and choosing experiences that will provide pleasure in the future, individuals also misjudge. People who shop for groceries, Schwartz shows, routinely choose a variety of X’s and Y’s, instead of getting their favorite X or Y, since they anticipate that when it comes time to eat they will prefer variety.

Vivid and salient experiences also leave too large an impression on us and our decisions. Thus, individuals are more likely to heed a friend’s warning that a certain car model is unreliable, rather than a Consumer Reports article, based on interviews with thousands of individuals who can attest to the same car’s reliability. In related sense,

22 SCHWARTZ supra note 4, at 18.
23 SCHWARTZ supra note 4, at 48-52.
24 SCHWARTZ supra note 4, at 52.
25 SCHWARTZ supra note 4, at 57.
how a choice is cast can affect our decisions.\textsuperscript{26} Is our neighborhood gas station offering a discount for cash or adding a surcharge for credit? Although the underlying object is still the same, we would weigh our preferences differently if our favorite yogurt were advertised as having 5 percent fat versus marketed as 95 percent fat free.\textsuperscript{27}

Additionally, individuals hate losing more than they enjoy gaining.\textsuperscript{28} Schwartz details the work of Kahneman and Tversky, for instance, who find that individuals are strongly and consistently averse to perceived losses. Another problem with choice, Schwartz says, is related to the propensity of individuals to avoid losses at all costs. As Schwartz notes, for instance, it is a consistent behavioral trait that most individuals are risk averse when it comes deciding among gains, but risk-seeking when it comes to possibly suffering losses.\textsuperscript{29} Thus, individuals would choose to take a small certain sum—say, $100—to 50-50 chance to win $200, although ex ante the value of either options is exactly the same, $100 ($100 versus $200 x 50/50 chance).\textsuperscript{30} Equally, if the dilemma is re-fitted such that the individuals are forced to choose between a certain $100 loss and a 50-50 chance of losing $200, they would go for the coin flip.\textsuperscript{31}

Similarly, aversion to losses may explain why individuals seem unusually motivated by ownership of an object, the so-called endowment effect. In fact, once a person believes something belongs to him or her, individuals are loath to relinquish control:

Once something is given to you, it’s yours. Once it becomes part of your endowment, even after a very few minutes, giving it up will entail a loss. …The endowment effect helps explain why companies can afford to offer money-back guarantees on their products. Once people own them, the products are worth more to their owners than the mere cash value, because giving up the products would entail a loss.\textsuperscript{32}

\textsuperscript{26} SCHWARTZ \textit{supra} note 4, at 63.
\textsuperscript{27} SCHWARTZ \textit{supra} note 4, at 71.
\textsuperscript{28} SCHWARTZ \textit{supra} note 4, at 70.
\textsuperscript{29} SCHWARTZ \textit{supra} note 4, at 65-70.
\textsuperscript{30} SCHWARTZ \textit{supra} note 4, at 65.
\textsuperscript{31} SCHWARTZ \textit{supra} note 4, at 65.
\textsuperscript{32} SCHWARTZ \textit{supra} note 4, at 72.
Thus, as things become part of an individual’s endowment, choosing to hand it over to another, even for a good price or exchange, is viewed as a loss.

Schwartz concludes this part by dividing individuals into two conceptual camps: maximizers and satisficers. Maximizers strive to make the very best decision possible in virtually every circumstance. They spend a lot of time comparing the options. On the other hand, satisficers establish a threshold level of “good enough” when choosing among competing options. As soon as the satisficer across an object that meets the threshold requirement, the satisficer accepts it.

Schwartz argues those who attempt to maximize each decision feel regret most acutely. Because the maximizers are focused on making the best choice every time, they suffer the most serious pangs of regret after they make a decision and are “nagged by the options they haven’t had time to investigate.” According to Schwartz, such individuals are “plagued with…doubts and concerns” about even simple everyday decisions and whether they have chosen the very best. In fact, Schwartz claims that even when the maximizers identify the best they are plagued by self-doubt and second-guessing their decision. In survey results, the author found that individuals who tend to maximize are less satisfied with life, more pessimistic and more depressed than

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33 SCHWARTZ supra note 4, at 78 (“To satisfice is to settle for something that is good enough and not worry about the possibility that there might be something better.”).

34 SCHWARTZ supra note 4, at 78 (“A satisficer has criteria and standards. She searches until she finds an item that meets those standards, and at that point, she stops.”).

35 SCHWARTZ supra note 4, at 87 (noting that nearly all those group as maximizes were also experience high regret scores).

36 SCHWARTZ supra note 4, at 78.

37 SCHWARTZ supra note 4, at 88.

38 For instance, Schwartz writes: “Imagine a maximizer who success in buying a sweater after an extensive search—a better sweater than any but the luckiest satisficer would end up with. How does he feel about the sweater? Is he frustrated at how much time and work went into buying it? Is he imagining unexamined alternatives that might be better? Is he asking himself whether friends of his might have gotten better deals? Is he scrutinizing every person he passes in the street to see if they’re wearing sweaters that look finer? The maximizer might be plagued by any or all of these doubts and concerns while the satisficer marches on in warmth and comfort.” SCHWARTZ, supra note 4, at 88.
individuals that tend to satisficer.\textsuperscript{39} Expanded choice only exacerbates their problem. In fact, expanded choice, Schwartz conjectures, may even create maximizers.\textsuperscript{40}

C. The Problem of Choice

Next, in the most developed part of the book, Schwartz explains why expanded choice leads to unhappiness, regret and diminished satisfaction with the decision we ultimately make.

1. Opportunity Costs

Expanded choice, Schwartz argues, enlarges the pool of next-best options. In other words, as the pool of choice increase, Schwartz argues that we suffer from regret because we compare the choice we make to not just a single next-best option, but all the options we could have (or might have) taken. Schwartz argues that individuals are not rational economic actors that only weigh the costs of doing the next best thing, the opportunity costs. Rather, they think incessantly about all the options, all the time. As a result, individuals are hampered by the opportunity costs of foregoing not just the next-best option, but feel dejected about having to forego all the other options.\textsuperscript{41} Further, Schwartz notes that the varied options dance in our imaginations as well. We invent options that don’t exist (but could) and regret not choosing those as well.\textsuperscript{42} Increased choice makes us imagine there is a perfect choice out there if we search long enough, even when such a choice does not exist.\textsuperscript{43}

\textsuperscript{39} SCHWARTZ, supra note 4, at 85-86.

\textsuperscript{40} SCHWARTZ, supra note 4, at 96 (“[I]t is certainly possible that choice and maximizing are not independent of each other. It is possible that a wide array of options can turn people into maximizers. If this is true, then the proliferation of options not only makes people who are maximizers miserable, but it may also make people who are satisficers into maximizers.”).

\textsuperscript{41} SCHWARTZ, supra note 4, at 122 (“If we assume that opportunity costs take away from the overall desirability of the most-preferred option and that we will feel the opportunity costs associated with many of the options we reject, then the more alternatives there are from which to choose, the greater our experience of the opportunity costs will be. And the greater our experience of the opportunity costs, the less satisfaction we will derive from our chosen alternative.”).

\textsuperscript{42} SCHWARTZ, supra note 4, at 122-123.

\textsuperscript{43} SCHWARTZ, supra note 4, at (noting that to the extent we imagine other alternatives—alternatives that do not exist, but “combine the attractive features of the ones that do exist”—will make us even more dissatisfied with the option we ultimately select).
2. **Inertia**

Expanded choice causes indecisiveness. As the number of choices expands, the choice creates conflict and individuals tend to avoid making a decision. Schwartz recounts studies where individuals become indecisive as the options multiply.\(^{44}\) Schwartz points out this tendency to avoid choosing has serious consequences. For instance, when sample of doctors were given the choice between sending a patient suffering from osteoarthritis to a specialist or prescribing a new medication, about 75 percent of doctors stated that they would prescribe the medication.\(^{45}\) However, when a second medication is thrown in the mix and doctors are asked to choose between “medication 1,” “medication 2,” or sending the patient to the specialist, only 50 percent of doctors went with either medication.\(^{46}\) Although, today, consumers have a range of choices for telephone service and utilities, they simply avoid making a choice at all. Most consumers stick with the telephone provider they have (for most consumers, that’s AT & T) and do not bother to shop calling plans.\(^{47}\)

3. **Sunk Costs**

Additionally, individuals do not do a good job of estimating and acting on sunk costs because of a desire to avoid regret.\(^{48}\) They end up weighing too heavily the value of a previous investment as opposed to the anticipated benefit of a decision. In this way, individuals may end up choosing a course that in all likelihood will not increase their happiness. Thus, if an individual has tickets, both non-refundable, for two events on the same day, they will tend to choose to attend the event for which they paid more, not the one they anticipate they will enjoy more.\(^{49}\)

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\(^{44}\) SchwartZ, *supra* note 4, at 127-128.

\(^{45}\) SchwartZ, *supra* note 4, at 128.

\(^{46}\) SchwartZ, *supra* note 4, at 128.

\(^{47}\) SchwartZ, *supra* note 4, at 25 (noting that “AT & T still has 60 percent of the market, and half of its customers pay the basic rates.”).

\(^{48}\) SchwartZ, *supra* note 4, at 161.

\(^{49}\) SchwartZ, *supra* note 4, at 161 (noting the results of a study in which respondents were to imagine purchasing nonrefundable tickets for two ski trips on the same day, one costing $50 and the other $25).
4. Adaptation

Individuals tend to do a terrible job estimating “future emotional responses.”\(^{50}\) For one thing, there is a mismatch between anticipated joy (or sadness) of an event and the actual experience of the event. For instance, though it is clear that individuals will eventually adapt to both negative and positive changed circumstances, they do not take such adaptation into account when assessing the pleasure or displeasure of a future event. Thus, when questioned, college professors gave responses that suggested that they would be extremely disappointed if they were denied tenure. However, responses from professor who were actually denied tenure were no different from those who were awarded tenure.\(^{51}\) When people fail systematically to take into account the psychological tendency to adapt, they are bound to make a host of bad decisions, decisions that could potentially produce regret.\(^{52}\)

5. Rising Expectations

According to Schwartz, as expectations rise, so, too, does the regret and suffering associating with failing to meet those expectations. As choice expands our expectations for choosing well also expands. The more choices there are with regard to education, work, potential spouses, the more we expect to be able find them.\(^{53}\) However, Schwartz argues that many of these expectations are unrealistic and individuals are setting themselves up for failure.\(^{54}\)

\(^{50}\) SCHWARTZ, supra note 4, at 176

\(^{51}\) SCHWARTZ, supra note 4, at 175.

\(^{52}\) SCHWARTZ, supra note 4, at 176.

\(^{53}\) SCHWARTZ, supra note 4, at 210 (“We should be able to find education that is stimulating and useful, work that is exciting, socially valuable, and remunerative, spouses who are sexually, emotionally, and intellectually stimulating and also loyal and comforting.”).

\(^{54}\) SCHWARTZ, supra note 4, at 213-214 (arguing, for instance, that individuals can do very little to effect their body weight, but view weight as a personal choice and blame themselves for a failure to lose weight); see also SCHWARTZ, supra note 4, at 211 (“When we (inevitably) fail, the culture of individualism means that, not only do we expect perfection in all things, but we expect to produce this perfection ourselves.”)
3. CHOOSING WHEN NOT TO CHOOSE

In the end, Schwartz calls for an odd match-up: less choice and greater enjoyment of life. Schwartz doesn’t endorse less choice in all venues. Schwartz suggests reserving choice “about the things that matter.”55 For the vast majority of cases in which expanded choice is not helpful, Schwartz proffers a few commonsense to rules. Schwartz says, for example, individuals should establish some rules of thumb, like no more than two glasses of wine at one sitting, to make choosing unnecessary.56 Furthermore, Schwartz states avoid the new-and-improved option and just buy what you always have; make decisions final and irreversible; reflect on the positive aspects of a choice; and forget about what other people are doing.57 Most importantly, Schwartz argues that in most areas individuals should embrace the option that is merely good enough, instead of wasting time and energy attempting to identify the option that might maximize satisfaction:

The trick is to learn to embrace and appreciate satisficing, to cultivate it in more and more aspects of life, rather than merely being resigned to it. Becoming a conscious, intentional satisficer makes comparison with how other people are doing less important. It makes regret less likely. In the complex, choice-saturated world we live in, it makes peace of mind possible.58

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55 SCHWARTZ, supra note 4, at 4; see also SCHWARTZ supra note 4, at 222 (“To manage the problem of excessive choice, we must decide which choices in our lives really matter and focus our time and energy there, letting many other opportunities pass us by.”)

56 SCHWARTZ, supra note 4, at 223.

57 SCHWARTZ, supra note 4, at 227-236.

58 SCHWARTZ, supra note 4, at 225.
4. PROBLEMS WITH THE BOOK

The book has some minor problems. First, Schwartz seems to link expanded choice up with too many problems and ends up arguing a bit too much. For instance, perhaps expanded choice vexes the consumer flummoxed by the spate of consumer goods, but expanded choice does not do a good job explaining sexuality or divorce. Second, Schwartz seems to over rely a bit on studies that are beside the point or not particularly relevant.

D. Expanded Choice as a Problem, Not a Scourge

First, at times, some of Schwartz’s conclusions seem overblown. For instance, when Schwartz argues that increased choice means that some decisions, like marriage, are merely a matter of choice, he goes too far to suggest that a sense of choice leads to divorce and broken homes.\(^59\) For one thing, despite the rise in choice in many areas, many families and individuals revere the sanctity of marriage. To the extent that divorces are up, the explanation for failed marriages could be the result of any number of causes, with the specter of expanded choice not high on the list.

\(^{59}\) SCHWARTZ supra note 4, at 145-146.
In a similar sense, Schwartz argues too much when he implies expanded choice means people can choose among any “imaginable arrangement of intimate relations,”\(^{60}\) can elect religious faith and which tenants they follow, and even can even choose their identity or “ethnic heritage.”\(^{61}\) In the vast majority of cases, these features of identities, even as choices grow and expand, continue to be fixed. To be sure, many have some control over the choice to have children or be childless, to marry or stay single. But, others do not. Some people cannot have kids because they are infertile. Others cannot marry because state laws prohibit it. Furthermore, although he does not say it head on, Schwartz seems to imply that one can also choose sexuality,\(^ {62}\) which would cause severe consternation among both hetero- and homosexuals who believe that sexuality is immutable.

Schwartz, like other scholars, argues individuals may be able to cover some feature of their race or identify.\(^ {63}\) However, while his idealism should be praised, Schwartz seems to take this point too far. He writes, for instance, that issues of identity, unlike yesteryear, are now malleable:

> We can choose our identities. Each person comes into the world with baggage from his ancestral past—race, ethnicity, nationality, religion, social and economic class. All this baggage tells the world a lot about who we are. Or, at least, it used to. It needn’t anymore. Now greater possibilities exist for transcending inherited social and economic class. Some of us manage to case off the religion into which we are born. We can choose to repudiate or embrace our ethnic heritage. We can celebrate or suppress our nationality. And even race—that great sore of American history—has become more fluid.\(^ {64}\)

Although some individuals with respect to some features of their identity (hair, clothes, voice, etc) may be able to mask or downplay a racial identity, most of us cannot. Further, many do not see such things as a matter of choice, but rather as part and parcel of their own identity.

\(^{60}\) Schwartz, supra note 4, at 38; Schwartz supra note 4, at 39 (“Today, all romantic possibilities are on the table; all choices are real. Which another explosion of freedom, but which is also another set of choices to occupy our attention and fuel our anxieties.”).

\(^{61}\) Schwartz, supra note 4, at 40 (noting that freedom of choice is advantageous since people can “elect the denomination that is most compatible with their view of life, then select the particular institution that they feel best embodies that view.”).

\(^{62}\) Schwartz, supra note 4, at 38.

\(^{63}\) See, e.g., Kenji Yohshino, Covering, 111 Yale L. J. 769 (2002).

\(^{64}\) Schwartz, supra note 4, at 40-41.
E. Too Many Studies and Too Few

First, some of the studies and analogies seem out-of-place. Second, there are too few really good studies.

To begin with, some of the studies are out-of-place and arguably not related to his central theme of too much choice. For instance, Schwartz argues silver medalists experience more regret and less happiness, since they have faced a near-miss, than bronze medalists. Even if this is true, it is not clear that this relates to whether more choice is better. Surely, no one choose to be a silver or bronze medalist; their relative physical endowment precludes it.\(^{65}\) At one point, Schwartz invokes a study that shows some respondents asked to choose custody between two parents based on several facts about the parents will answer differently depending on whether they are asked which parent they would award custody or which parent would they deny sole custody of the child?\(^{66}\)

But, one problem is that the section is ostensibly about how adding options leads individuals to avoid decisions and suffering, not framing of decisions. Similarly, Schwartz invokes analogies that are not clearly linked to his central point about overwhelming choice. Schwartz laments, for instance, that individuals would prefer 95% fat free yogurt to yogurt described as 5% fat, although both items have the same amount of fat.\(^{67}\) At another point, the author makes the point that visiting several restaurants may actually retard the appetite.\(^{68}\)

Additionally, some of Schwartz’s studies may be poorly devised. Based on survey results, Schwartz discusses two types of individuals—satisficers, those who will take an item that meets a minimum threshold, and maximizes, those who want the very best. At one point, Schwartz relies on a survey that probes how individuals approach a variety of subjects. When they listen to the radio or televisions, for instance, do they station or channel surf?\(^{69}\) However, the survey, by its very first question (“Whenever I’m faced

\(^{65}\) SCHWARTZ supra note 4, at 150-151.
\(^{66}\) SCHWARTZ supra note 4, at 129.
\(^{67}\) SCHWARTZ supra note 4, at 71.
\(^{68}\) SCHWARTZ supra note 4, at 135.
\(^{69}\) SCHWARTZ, supra note 4, at 80-81.
with a choice, I try to imagine what all the other possibilities are, even ones that aren’t present at the moment.”\textsuperscript{70} seems to hint at what the survey is about. It is analogous to asking respondents directly, are you a maximizer? It may have been better practice to rely more on specific contexts, like, admittedly, Schwartz does in the very next question. In other words, to the extent the first question signals to participants that the subject of the test is how they approach choice they may be more inclined to give results that don’t match exactly the answers they would have given had they been asked about specific contexts.

F. Consumer Transactions

To be sure, expanded consumer choice does not necessarily lead to increases in individual utility. Individuals will not necessarily come across the best choice, since it would take unusual stamina to search among myriad alternatives. Further, lots of choices would create unusually high search costs and would not ordinarily be worth the candle. However, I would argue that excessive choice in retail consumer markets is not as problematic as Schwartz leads the reader to believe. Such matters are, for one thing, trivial. No serious penalty flows when consumers choose badly. Imagine a parking lot that increases the number of available spaces. Sure, an individual may look longer for a parking space up front and may waste time, but this isn’t a serious problem. Thus, to the extent individuals are overloaded with excessive choice in consumer transactions is not a cataclysmic worry, since such transactions are trivial.\textsuperscript{71}

Moreover, the evidence suggests individuals are capable of sorting among myriad competing alternatives. In many instances, individuals take steps to mitigate the troubling consequences of excessive choice. People use rules of thumbs to sort out many competing options, which Schwartz himself concedes.\textsuperscript{72} This is particularly true in consumer transactions with many alternatives in which consumers settle for a product that meets a small set of threshold needs.\textsuperscript{73} These rules of thumb save time.\textsuperscript{74} Thus,

\textsuperscript{70} Schwartz, supra note 4, at 80.

\textsuperscript{71} See, e.g, Schwartz supra note 4, at 12 (“Supermarkets are unusual as repositories for what are called “nondurable goods,” goods that are quickly used and replenished. So buying the wrong brand of cookies doesn’t have significant emotional or financial consequences.”).
consumers already are able to effectively sort out competing alternatives, and limiting their choice may cause more problems.

5. BUSH’S OWNERSHIP SOCIETY AND INDIVIDUAL CHOICE

As mentioned, though I agree with Schwartz that the availability of too many options are an inefficient waste of time, I am not convinced that anything should be done about it, since most transactions are trivial and the loss of time are absorbed solely by that individual. However, in other areas, the choices individuals make do affect others. In other words, when consumers are given choice regarding some areas, that choice can create dangerous negative externalities for us all. Thus, the freedom to choose should be closely watched and perhaps even circumscribed in some limited cases.

By illustration, in this Part, I consider Bush’s proposal to create an ownership society and the negative externalities that more choice can create. President Bush’s vision of an ownership society includes at least three areas—healthcare, retirement, and home ownership. For instance, on healthcare, Bush has passed healthcare savings accounts, which ostensibly give individuals more choice as to how their medical expense budget is spent. Additionally, Bush has pitched (to date, not successfully) private retirement accounts that propose to give individuals more choice over how their retirement dollars are invested. Finally, Bush has recently approved legislation to permit federal agencies to back non-traditional home financing products (i.e., adjustable rate mortgages) to, again, given homebuyers more choice over how much home they want and can purchase. In each of the aforementioned cases, the lessons of behavioral science tells us that

72 Schwartz, supra note 4, at 223 (“You may have a rule of thumb never to have more than two glasses of wine at a sitting. The alcohol tastes good and it makes you feel good and the opportunity for another drink is right at your elbow, yet you stop.”).


75 White House Press Release (Aug. 9, 2004) (“Life in America is changing dramatically, and President Bush believes that the Federal government should change too to help meet the challenges of our times. American families should have choices and access they need to affordable health care and homeownership; [and] Americans should have the option of managing their own retirement....”).
individuals will systematically, but unintentionally, err in choosing. They might err in choosing, say, how much to sock away for medical expenses, or which stocks to invest in, or how much home one can afford. In at least these particular contexts—healthcare, retirement, and home-ownership—the consequences of mischoosing have such serious consequences—ill health, impoverished old age, and foreclosure—it may be advisable to call for a more dramatic role in helping individuals choose.

G. Healthcare

First, as part of his ownership society, President Bush has proposed changes in the traditional healthcare system to give individuals more choice. In the traditional healthcare system, most individuals (about 77%) relied mainly on health insurance provided by employers. These plans provide a wide coverage with relatively low costs per transaction patients. Usually, patients pay one premium every month and then a small co-payment when they visit the doctor. Since patients only make a small payment for each visit, they may overuse the coverage—they may use more medical care than is optimal. By contrast, the Bush administration has been able to convince Congress to pass federal law creating tax-preferred healthcare savings accounts (HSAs). Under his plan for healthcare savings account, individuals will be allowed to put pre-tax dollars into an account for use on medical expenses. The individual may then use, tax-free, the saved dollars for qualified medical expenses. Thus, the plans operate much like cafeteria plans that allow individuals to put pre-tax dollars into account for use on medical expenses that they may incur during the year. However, under the already-existing cafeteria plans the

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76 My argument does not include the perhaps equally confounding problem of individuals intentionally mischoosing, because of a presumption that the costs of making risky choices will be absorbed by the government. See, e.g., Eric A. Posner, Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract, 24 J. LEGAL STUD. 283 (1995) (arguing for limits on contract freedom in light of the risky behavior of individuals and the state’s inclination to provide a minimal level of welfare).

77 Amy Monahan, The Promise and Peril of Ownership Society Health Care Policy (noting that, in 2003, about 77 percent of the nonelderly persons relied on employment based health insurance).

78 Monahan, supra note 77, at 3.

79 IRC § 223.

80 IRC § 223. Individuals that choose to use those tax-free dollars on medical expenses and enroll in a healthcare savings account are also required to have medical insurance for catastrophic illness. IRC § 223.
money would not be portable from year-to-year. Individuals that put the money into such accounts and did not spend it would lose it. In contrast to traditional health insurance plans, healthcare savings account attempt to create market incentives for the appropriate level of healthcare spending.\footnote{Monahan, supra note 77, at 3 (“By giving an individual ownership of the tax-favored savings account, and by making the individual responsible for any “gap” between the savings account balance and coverage under an insurance plan, individuals will be incentivized to spend their medical dollars more judiciously.”).} Because individuals realize the costs of medical healthcare, individuals use their scare resources—health care dollars—wisely on an appropriate level of health care.

However, though Bush has advocated more choice regarding healthcare, individuals will likely have a hard time estimating their future medical needs and the accompanying level of savings to pay for those needs.\footnote{Monahan, supra note 77, at 38 (arguing that the success of healthcare savings account depends on individuals’ ability to make decisions regarding contribution levels).} As Schwartz points out though, individuals are poor judges of their future state.\footnote{See SCHWARTZ supra note 4, at 176.} Individuals may place too little in their healthcare accounts because they are over-optimistic about their health.\footnote{Monahan, supra note 77, at 47 (noting that individuals may fail to save appropriate levels because they discount future medical needs too heavily).} In fact, the literature consistently shows, and Schwartz agrees, that individuals are overly optimistic.\footnote{See, e.g., Jolls, et al., supra note __, at 1524 (“A common feature of human behavior is overoptimism: People tend to think that bad events are far less likely to happen to them than to others.”)} Thus, individuals may play down the probability of a negative health event and save too little in their HSAs. Thus, one problem with HSAs is that individuals who place too little in their healthcare accounts may be forced to rely on the public safety net for healthcare (e.g., Medicaid or emergency rooms). Additionally, because of an inability to decide or inertia, individuals may not be able to make any decision about what to spend healthcare dollars on or when. Medical options are varied. As the Schwartz shows, when the choices expand, individuals sometimes “choose” to avoid making any decision. In fact, the evidence available suggests that individuals do not spend healthcare dollars wisely when they have to share the burden of paying for medical expenses. Rather, individuals simply reduce overall consumption of medical care, including effective and
good medical care, when they are forced to bear some of the costs. Accordingly, individuals who make bad decision respecting HSAs might under-rely on hospitals and doctors and stay unhealthy for too long, which also have serious negative effects for third parties. For instance, some individuals may avoid a costly flu shot when they need one. At the same time, those that save too much in their health care accounts may also create negative externalities. For instance, imagine these HSAs are widely adopted. In an effort to spend down unusually large health care accounts, these individuals may go to the doctor too often and unintentionally drive up prices for healthcare for others.

H. Retirement

Second, perhaps the most widely publicized plank of Bush’s pitch to create an ownership society is his proposal to create private or personal accounts for retirement benefits. Although public support for creating private accounts has been disappointing, Bush has continued his push. Under the plan, individuals will be able to allocate a portion of their social security dollars to private accounts and choose how the money is invested. Under Bush’s plan, individuals will have to make several decisions: whether to opt-in and elect to use personal accounts, how to distribute initial investments (e.g., government or corporate securities fund, small- or large-cap stock index fund, domestic or internal stock index fund), whether to make adjustments incrementally or automatically, and with how to devise the assets upon death, among many others. In the traditional FDR-style social security, dollars would be invested exclusively in government bonds and individuals guaranteed a certain level of monthly income. Accordingly, if individuals make wise decisions, they will realize higher returns than they would from social security trust funds, which are invested in government bonds.

However, some data already available suggests individuals do not make wise investment decisions regarding their retirement. Consider the evidence from private firms offering 401(k)’s. They are required to give employees investment options, but cannot

86 Monahan, supra note 77, at 45.
87 President Bush 2005 State of the Union (“As we fix Social Security, we also have the responsibility to make the system a better deal for younger workers. And the best way to reach that goal is through voluntary personal retirement accounts.”).
steer an employee to one of the options. Thus, employees are given maximum opportunity to choose without a predominant default. In these cases, the findings have been that folks make poor decision regarding the choice of employer-sponsored 401(k)’s. For instance, even though 401(k)’s have favorable tax advantages and employers frequently offer matching contributions, many employees fail to sign-up. Some research has shown that when individuals have to opt-in to an employer-sponsored retirement account by taking an affirmative act far fewer will participate than when such employees are automatically enrolled. When they are automatically enrolled, employees frequently fail to choose an allocation among several investment options. Rather, they simply take the company’s default investment option. This failure to choose among investment options has been called inertia. Lower-income earners are even more likely to be passive investors, procrastinate about making investment decisions, and gravitate to the default option. Madrian and Shea explain that some individuals procrastinate since making investment decision is a complicated and time-consuming process:

There are at least two sources of complexity involved in making an optimal 401(k) savings decision. First, the array of participation options is immense. Individuals must first choose what fraction of compensation to contribute to the 401(k) plan, anything from 1 to 15 percent. They must then choose how to allocate that contribution between the nine available fund options. For some employees, a second course of complexity is learning how to evaluate this myriad of 401(k) savings options. For example, young newly hired employees may not know what a “401(k)” plan

88 See, e.g., ALICIA H. MUNNELL & ANNIKA SUNDEN, COMING UP SHORT; see also David E. Rosenbaum, Bush to Return to ‘Ownership Society’ Theme in Push for Social Security Changes, N.Y. TIMES (Jan. 16, 2005) (“With 401(k)’s, we’ve had an experiment in handing over to families the responsibility of saving and planning for retirement, and what we have found is that they make mistakes at each step along the way.”) (quoting Professor Munnell)


90 Madrian & Shea, supra note 89, at 1171 (finding that the vast majority of participants in one company’s 401(k) “choose” the default—“the default contribution rate (3 percent) or fund allocation (100 percent in the money market fund”).

91 Madrian & Shea, supra note 89, at 1173 (noting that “over 70 percent of those earning less than $20,000 per year exhibit participant inertia relative to less than one-third of those earning between $70,000 and $79,000.”)
Further, when people do sign up for defined contribution plans, evidence suggests they use short-cuts to make investment decisions. Specifically, Thaler and Benartzi find that individuals merely divide their contributions evenly across the investment options given. For instance, if an employer plan offered two investment options (stocks and bonds), employees would simply divide their contributions 50-50.

The point is that some young individuals will unintentionally make unwise decisions because they will not be able to efficiently gauge their future retirement needs and may end up destitute. In the case of retirement savings, the problem is particularly acute, since successful individuals would have to estimate what their long-term needs will be in thirty years and make investment decisions today to cover them. Because of problems of perspective this may be akin, as one author puts it, to asking Ulysses to avoid the siren song:

Looking at his overall preferences, Ulysses knows that he should not pay attention to the Sirens. However, at the point at which he hears their song, he can only see clearly the part of his preference map directly in front of him. Because of our preferences are dependent upon the perspective from which we view them, we may rationally choose to take actions in the short run that are welfare-reducing in the long run.

In fact, some individuals will intentionally make risky (and unwise) decisions, since they will bet that society to take care of them in their old age. That is, it would be impossible in the present term to commit to a long-term policy of relinquishing public responsibility

\[92\] Madrian & Shea, supra note 89, at 1177.

\[93\] Shlomo Benartzi & Richard Thaler, Naïve Diversification Strategies in Defined Contribution Savings Plans, 91 AM. ECON. REV. 79 (2001)

\[94\] In fact, TIAA-CREF, the largest defined contribution plan in the world, routinely reported that participants would divide their investments evenly, 50-50, between the only two options the plan offered, TIAA-bonds and CREF-stocks. See Benartzi & Thaler, supra note 93, at 79-80. As part of their research project, the authors look at the investment assets of 170 retirement savings plans. Interestingly, the two find that 61.76 percent of investment options were equity options and about the same number of retirement assets (62.22%) were allocated to those equity options. Benartzi & Thaler, supra note 93, at 89-90.

\[95\] Hylton, supra note 96 at 99.

\[96\] See generally Keith N. Hylton, Calebresi and the Intellectual History of Law and Economics, 1 MD. L. REV. 85, 99 (2005) (discussing Calabresi’s Faustian bargain) (“Knowing that society will not want to see me suffer in my old age, I may not save today, expecting society to help out when I reach poverty in my later years. This is perfectly rational behavior at an individual level, but irrational on an aggregate level.”).
for retirees. If a sufficient number of retirees end up destitute, the federal government will likely (eventually) step in and provide some level of support. Regardless, in all these cases, government and charities would likely have to step in to take care of those individuals that make unwise decision with their retirement investments.

I. Housing

Third, as the housing market has exploded, the private lending market has backed a spate of loan product choices to make purchasing a home more doable. Above and beyond the traditional fixed rate loans, consumers now have to choose among several financing options, including loans with one-year adjustable rates, so-called adjustable rate mortgages or ARMs. For instance, Countrywide, the leading mortgage lender, reports that its ARMs represented 51 percent of its loans in 2004, compared to 14 percent in 2002. Adjustable rates mortgages fluctuate depending on the prevailing interest rate at the end of fixed period, usually 1, 3, 5, or 7 years. Not be outdone, the Bush administration, in promotion of its ownership society, has also stepped-in, offering families a variety of housing products, including adjustable rate mortgages.

Specifically, near the end of 2001, President Bush signed HR 2620, which (among other things) authorized the department of Housing and Urban Development to start insuring hybrid mortgages. As a result, HUD can now back 3-year, 5-year, and 7-year ARMs to individuals.

Of course, the risk to these loans is that interest rates go up more than consumers had anticipated. Consumers would have to calculate, not only the likelihood that interest

97 In fact, lenders are also giving consumers so-called “pay-option” loans, which are structured such that loan payments do not even reflect the current the cost of interest or negative amortization. See, e.g., Jeff Bailey, *The Mortgage Maker vs. the World*, N.Y. Times (Oct. 16, 2005) (noting that pay-option loans accounted for 21 percent of Countrywide’s total mortgage business last year, compared to accounting for 3 percent of their business a year earlier)

98 See, Bailey, *supra* note 97.

99 *Joint Center for Housing Studies at Harvard University, The State of the Nation’s Housing 2005*, at 17 (describing ARMs as loans that “defer interest—and sometimes even principal—payments for a specified period.”)

100 See, e.g., News Release, HUD No. 04-024.

101 See 12 U.S.C. § 1715z-16 (2005); *see also* 24 C.F.R. 203.49.
rates (and by consequence, their monthly payments) would go up, but also predict whether they will have resources to make such payments in the future.\textsuperscript{102} Further, once the fixed period is expired, consumers will have to pay for deferred interest.\textsuperscript{103} The problem with too much choice for home finance projects is also a serious one, where a bad decision could expose homeowners to foreclosure and loss of shelter. Here again, in housing markets, people tend to be over-confident and may borrow to buy too much house. University of Chicago professor-Cass Sunstein, for instance, has argued that consumers may over-borrow because they suffer from “excessive optimism.”\textsuperscript{104} They expect interest rates to be stable; they expect to make significantly more money in the future, which can be used to pay for an outsized mortgage; they may not buy sufficient homeowners insurance because they downplay the likelihood of a devastating event. For instance, in New Orleans, although the likelihood of a disaster event was quite predictable, a significant percentage of residents there had failed to procure flood insurance. Right now, the federal government only requires truth-in-lending disclosures, which may not go far enough to steer borrowers into a good deal. The federal government has tried to implement usury laws in the past, only to fail.\textsuperscript{105} Perhaps steering is worth trying again. That is, the myriad options in housing markets might be supplemented with programs that steer families into traditional lender programs with a large down payment and fixed rate of interest.

6. CONCLUSION

Individuals are given nearly unlimited choice in a wide variety of areas. But, according to Barry Schwartz, choice is not necessarily a good thing. He waxes nostalgic about yesteryear when “default options were so powerful and dominant that few

\textsuperscript{102} See, e.g., Kathleen C. Engel & Patricia A. McCoy, \textit{A Tale of Three Markets: The Law and Economics of Predatory Lending}, 80 Tex. L. Rev. 1255, 1284 (2002) (noting that borrowers with adjustable rate mortgages would need to calculate the probability of changes in the interest rates, a process that “confounds even the brightest financial analysts.”)

\textsuperscript{103} \textit{Joint Center for Housing Studies at Harvard University, The State of the Nation’s Housing 2005}, at 18 (“Option-adjustable mortgages are more worrisome because they can result in especially large payment shocks as deferred interest is added to the principal that must be repaid.”).


perceived themselves to be making choices.”\textsuperscript{106} These increased choices, according to Schwartz, lead to a range of problems, including unhappiness and perhaps even clinical depression.\textsuperscript{107} For instance, Schwartz notes that, though people are shopping more, they are enjoying it less.\textsuperscript{108} But, though it is a serious problem, too much choice in some areas, like retail markets, need not detain us for too long. However, in other areas, like healthcare, retirement, and housing, the consequences of too much choice can be devastating. The costs to society of a bad decision in these areas are high, since third parties have to normally absorb some of these losses. Emergency rooms have to provide treatment to both individuals who make right decisions regarding HSAs and those who get it wrong and run out of treatment dollars. Young workers who make wrong decisions with respect to retirement are still likely to get care in old age from government and charity. And homeowners that make a bad bet with respect to home-loan interest rates can still rely on the protection of bankruptcy or the state for shelter. In these cases, perhaps individuals would be better of with a little steering toward better choices. Perhaps their neighbors would be, too.

\textsuperscript{106} See SCHWARTZ supra note 4, at 38.

\textsuperscript{107} SCHWARTZ supra note 4, at 4-5.

\textsuperscript{108} SCHWARTZ supra note 4, at 19 (“When asked to rank the pleasure they get from various activities, grocery shopping ranks next to last, and other shopping fifth from the bottom. And the trend over recent years is downward. Apparently, people are shopping more now but enjoying it less.”).