Toxic promises

*Shmuel I. Becher,[[1]](#footnote-1)\* Yuval Feldman[[2]](#footnote-2)♦ & Meirav Furth-Matzkin[[3]](#footnote-3)†*

# Abstract

*Sellers often make manipulative and dishonest assertions about their products and services. Such assertions, often made at the pre-contractual stage in the course of oral interaction between buyers and sellers,, substantially influence consumers’ choices. This Article argues that the law currently underestimates, and does not properly respond to, the social harm that manipulative promises generate. Insights from behavioral ethics suggest that even ordinary, law-abiding sellers frequently have limited self-awareness of making such manipulative assertions. At the same time, contracting realities lead consumers to rely heavily on these oral assertions. When consumers discover they have been manipulated, it is often too late: pre-contractual oral representations are either dismissed by courts as puffery, qualified by sellers in the unread fine print, or extremely challenging to prove.*

*Against this background, we call for tighter scrutiny of sellers’ oral promises. We propose a spectrum of ex ante measures that regulators can utilize to monitor firms’ sales personnel training. We also suggest various means to make firms liable for oral misrepresentations made by their employees. We recommend that courts apply a host of doctrines ex post to mitigate toxic oral promises and restrict the enforceability of merger and integration clauses. We furthermore suggest making use of educational campaigns. In making these recommendations, we illustrate how a clever mix of ex ante prevention tools and ex post scrutinizing and liability measures can yield a superior market environment that is both more efficient and fairer.*

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# Introduction

Tens of millions of consumers are victimized by fraud every year.[[4]](#footnote-4) Many of these consumers are manipulated or deceived by sellers’ representatives about a material aspect of the transaction, only to discover—after the fact—that the contract they entered into contradicts or qualifies what they had been told.[[5]](#footnote-5) Consider the following cases. In one, an insurance salesperson represented to consumers that the insurance policy’s coverage included hurricane damage. However, after hurricane Katrina hit the insureds’ home, they learned that, contrary to what they had been told, the fine print excluded coverage for hurricane damage.[[6]](#footnote-6) In yet other cases, car dealers offered buyers a specific trade-in allowance or an assumption of liability for mechanical problems. Later, after purchasing the car, the buyers learned that the written contract significantly reduced the trade-in allowance,[[7]](#footnote-7) or that rather than assuming liability, the contract declared that the car had been sold “as is.”[[8]](#footnote-8)

This Article addresses cases where the written agreement disclaims or qualifies the seller’s oral representations or nullifies their validity. Specifically, we focus on inaccurate, dishonest, misleading, or manipulative promises (“toxic oral promises”). Of course, one should distinguish between the different types of toxic promises (e.g., misleading, inaccurate, dishonest, unethical, and manipulative).[[9]](#footnote-9) Nevertheless, our main interest is in pre-contractual representations sharing the following characteristics: they substantially influence consumers, are commonplace and legitimized by cultural and social norms, and are therefore largely overlooked by the law.[[10]](#footnote-10) These toxic promises can prove very problematic for consumers. Although consumers regularly rely on these promises, courts frequently dismiss claims brought against them, considering them as, alternatively, “puffery,” qualified by sellers in fine print, or generally hard to prove.

Clearly, the law does prohibit sellers from deceiving consumers about materials aspects of their transactions. Sellers generally “cannot promise the moon during the course of selling a product and then seek to escape liability by adding terms in forms.”[[11]](#footnote-11),[[12]](#footnote-12) However, it is often difficult for courts to determine what the seller’s agents promised consumers prior to entering into the contract.[[13]](#footnote-13) Even if consumers can overcome this hurdle, sellers may claim that their agents’ assertions merely constituted puffery, acceptable exaggerations, or legitimate advertising.[[14]](#footnote-14) Indeed, the law does not clearly prohibit sellers from telling “half-truths” or making inaccurate assertions. Furthermore, the common law doctrine of fraud requires showing that the defrauded party “reasonably” or “justifiably” relied on the fraudulent representation. Courts have often held that a consumer who chose not to read the contract before accepting it cannot be said to have “reasonably” or “justifiably” relied on the sellers’ oral representations.[[15]](#footnote-15)

The current state of the law places consumers at a disadvantage and undermines social welfare. Consumers cannot possibly read the overwhelming number of contracts they encounter in routine transactions, nor can they fathom the legal implications of complex contractual provisions.[[16]](#footnote-16) The result is that manipulative oral promises are under-policed and continue to flourish in consumer markets, harming uninformed consumers.

This Article argues that current approaches to the oversight of oral promises are partial and ineffective. Drawing on insights from behavioral ethics and social psychology, the Article presents a comprehensive account of the underappreciated impact of pre-contractual oral statements and the effect on consumers of the interaction between these statements and the contradictory fine print. We thereby demonstrate that current approaches to oral promises underestimate the scope of the problem, do not sufficiently deter sellers from misbehaving, and, consequently, do not adequately protect consumers. We thus argue that instead of trying to encourage consumers to read or shop more diligently, policymakers should focus on eliminating manipulative oral promises, even—and perhaps especially—when these promises are contradicted or qualified in the unread contract.

 The Article’s central thesis relies on two complementary arguments. The first is that oral interactions that precede the written contract can lead to manipulative oral promises wield significant persuasive power over consumers, one that judges, policymakers, lawyers, and legal academics generally underestimate.[[17]](#footnote-17) Adopting an interdisciplinary approach, the Article explains how trust, collaboration, and cognitive biases lead consumers to over-rely on what salespeople say before entering into a contract.[[18]](#footnote-18) Furthermore, we suggest that consumer contracting realities further exacerbate the problems arising from consumers’ trust in oral interactions and their tendency to ignore the fine print. Before entering into a transaction, most consumers do not read form contracts,[[19]](#footnote-19) which sellers draft in such a way that the average consumer cannot read or understand them.[[20]](#footnote-20) Consumers, therefore, have no choice but to rely on salespeople’s oral assertions. Ex post, however, consumers tend to believe that they are bound to their contracts, even if its terms are unfair or unenforceable, and contradict or qualify previous oral promises.[[21]](#footnote-21) While consumers tend to rely on salespeople’s oral assertions ex ante, they nevertheless are prone to adopting a formalistic approach ex post,[[22]](#footnote-22) equating contractual acceptance with “a waiver of most rights.”[[23]](#footnote-23)

The second key argument that this Article makes draws on emerging research in behavioral ethics. Here, the literature demonstrates that even ordinary, law-abiding people, who would otherwise behave ethically, often lie and mislead others when social and situational forces enable them to do so.[[24]](#footnote-24) For example, people generally find it easier and more acceptable to lie or “cut corners” in oral interactions than in written statements when they have strong incentives to lie, or when facing competitive pressures.[[25]](#footnote-25) In the context of this Article, we suggest that salespeople with powerful incentives to increase their sales will often find ways to justify and excuse inaccuracies, overestimates, and biased oral representations of the deal.

 Legal scholars have devoted considerable attention to contractual realities and mechanisms that take advantage of consumers’ vulnerabilities. However, most of this work has focused on standard written form contracts, which consumers generally do not read,[[26]](#footnote-26) with scholars having examined form contracts that, in response to consumers’ non-readership, incorporate one-sided, unfair, unenforceable, or exploitative terms.[[27]](#footnote-27)

 This Article highlights that the written form contract is only one element in the constellation of consumer contractual relations. Another equally important factor is the toxicity of pre-contractual oral promises, an issue that has not received sufficient scholarly attention. Indeed, the literature discussing oral promises remains underdeveloped and under-theorized.[[28]](#footnote-28) This Article addresses this deficit, shedding much needed light on the prevalence and power of manipulative oral promises and exploring possible normative prescriptions.

 We distinguish between three main types of manipulative oral promises. In the first of these, sellers may make blatant oral statements about the product that the contract’s written terms do not support. As the examples presented above illustrate, the contract may qualify or conflict with the seller’s oral statements. Similar situations arise where the contract’s fine print qualifies a seller’s oral promise of high-speed internet,[[29]](#footnote-29) or when the seller promises that a security alarm system will work even if the phone lines are cut off, although the written contract exempts the seller from liability in such circumstances (“fraud in the inducement”).[[30]](#footnote-30) The second type of misleading oral promises involves misstatements about the contract’s content (“fraud in the execution”).[[31]](#footnote-31) Examples include those where a salesperson promises that the contract contains a warranty for a product while the contract expressly denies any such warranty,[[32]](#footnote-32) or when the salesperson promises that the insurance policy will cover certain events that are, in fact, excluded from coverage under the written agreement.[[33]](#footnote-33) The third type of misleading oral promises involves misleading consumers about the nature of the written contract in the course of oral interactions. That is, sellers may tell consumers that the fine print is merely a technicality or a legal formality.[[34]](#footnote-34) Salespeople may assure consumers that the form contract does not, and will not, reflect the actual relationship between the parties. Sellers may further reassure consumers that the “real deal” will accord with the oral promises rather than the form contract.

 Salespeople may convince consumers that the form contract does not merit much attention or concern, even when the contract includes an “integration,” “no-reliance,” or “no-representation” clause denying the legal validity of pre-contractual promises.[[35]](#footnote-35) In effect, such clauses state that, contrary to any oral assurances or statements the seller may have made, the written agreement governs the entirety of the relationship between the parties. Thus, the intent of such clauses is to clearly declare that the form contract *is* the real deal.

We argue that all three types of manipulative oral promises warrant considerable regulatory, judicial, and scholarly attention.[[36]](#footnote-36) In particular, policymakers need to address both the psychological forces that encourage sellers to lie to consumers and those that lead consumers to rely on these lies.

Toxic oral promises can harm consumers, disadvantage honest competitors, erode important societal norms, and undermine market efficiency.[[37]](#footnote-37) In addition, these manipulative oral promises can aggravate distributional disparities. Sellers may yield to assertive consumers who insist on upholding the oral statements despite integration or merger clauses.[[38]](#footnote-38)  However, non-assertive or weaker consumers are likely to face substantial hurdles should they seek to rely upon previously exchanged oral interactions.

Our analysis calls for a fresh approach to pre-contractual oral interactions, whether made face-to-face, on the phone, or online.[[39]](#footnote-39) In particular, it calls on policymakers and regulatory agencies to better scrutinize firms’ ex anteoral statements.[[40]](#footnote-40) The Article also emphasizes that consumer protection efforts should focus not only on ex post scrutiny and sanctions, but also on ex ante preventative measures.[[41]](#footnote-41) In this context, the Article suggests requiring firms to better train and monitor their agents, adjusting corporate social responsibility standards to include a commitment on the part of firms to uproot misleading oral promises, and making use of recordings and mystery shopping to overcome the evidentiary hurdles that misleading and manipulative oral promises inevitably impose. These proffered approaches may help craft and prioritize enforcement efforts, a key challenge in the consumer law and policy landscape. Moreover, these recommended reforms are vital given the disproportionate impact of manipulative oral promises on older, lower-income, less educated, and minority consumers, who are more likely to be exposed to these practices.[[42]](#footnote-42)

Beyond our call for stronger ex ante monitoring andpolicing of manipulative oral promises, our Article presents a strong argument against the inclusion of integration clauses that negate the enforceability of previous oral exchanges in consumer contracts. Integration and merger clauses can deter consumers and undermine their willingness to express their complaints after relying on the seller’s oral representations.[[43]](#footnote-43)

This Article proceeds as follows: Part I elucidates the power of manipulative oral statements from behavioral and societal perspectives. It clarifies how oral interactions are potent given the “no-reading problem” and information asymmetries between consumers and firms. Part II explains why misleading oral statements are prevalent and difficult to eliminate, drawing on the fields of behavioral ethics and social psychology. Part III then discusses the potential harm of misleading oral interactions to consumers, market competition, and society. Based on this analysis, Part IV highlights the inadequacy of current legal approaches and doctrines in uprooting manipulative oral promises. It then provides recommendations for legal and policy changes. Specifically, we call for increased attention to “small lies” and so-called “inaccuracies” that are currently under-policed and often viewed tolerantly.

# The Toxic Power of Oral Statements

This Part explains the psychological power of oral statements on consumers. Section A places oral interactions in the context of consumer trust, the science of persuasion, and cognitive biases that influence how consumers understand and rely on oral interactions. Section B turns to discuss oral statements in view of the realities of consumer contracts. It first describes how ex ante factors—such as asymmetric information, the “no-reading” problem, consumers’ limited attention, and manipulative selling tactics—intensify the impact of oral statements on consumers. It continues by clarifying how ex post realities—namely the silencing (“chilling”) effect of the fine print, litigation hurdles, and the unsoundness of consumer recall—further exacerbate the problems posed by pre-contractual misleading oral statements.

## Trust and Persuasion

 Humans are fundamentally trusting creatures. People generally trust others and believe what others say,[[44]](#footnote-44) although individuals may differ in the degree to which they do so.[[45]](#footnote-45) While laypeople may assume that the exchanged content greatly matters, it is the cues or impressions people receive during conversations that frequently establish trust.[[46]](#footnote-46) In essence, people regularly trust others because they perceive them as honest and moral.[[47]](#footnote-47) Trust has been, and continues to be, fundamental to the orderly conduct of social and economic relations in organized societies.[[48]](#footnote-48)

 Promises that salespeople make to consumers during precontractual negotiations can trigger trust.[[49]](#footnote-49) It is here that interpersonal trust is most prominent and, alas, perilous.[[50]](#footnote-50) In addition to the human tendency to trust others, consumers are especially likely to trust salespeople’s assertions because they typically regard them as competent and experienced.[[51]](#footnote-51)

Consumers may believe that the seller’s representations and promises will override any conflicting contractual provisions. This belief could be due to the assumption that salespeople have the authority to deviate from the standardized agreement to please consumers.[[52]](#footnote-52) Furthermore, consumers may believe that firms closely monitor their agents and subject agents to legal liability if they lie to consumers or defraud them.

From the business’s perspective, eliciting consumer trust is critical in marketing and sales,[[53]](#footnote-53) as trust and persuasion often work in tandem.[[54]](#footnote-54) The seminal work of the renowned psychologist Robert Cialdini on persuasion shows how minor tweaks in environment and rhetoric can significantly affect consumers’ information processing and decision-making.[[55]](#footnote-55) Consistent with Cialdini’s observations, marketing and sales literature offers practical insights and advice on eliciting consumer trust.[[56]](#footnote-56) To be sure, salespeople are often trained professionals and are naturally incentivized to gain expertise in persuasion and manipulation.[[57]](#footnote-57)

Along with people’s natural tendency to trust, people are also not good at detecting lies.[[58]](#footnote-58) While people may believe that they areable to detect lies, the evidence suggests the contrary. Not only is there little evidence that people are capable of detecting lies, but people’s ungrounded confidence in their ability to detect lies further exacerbates the effect of this underlying deficit.[[59]](#footnote-59)

Moreover, in many markets, consumers are one-time actors, while sellers are repeat players. In the context of oral representations, sellers engage in the same types of conversations again and again, and thus become adept and more effective over time. They learn—or know from the outset—how to elicit consumer trust. Consumers, however, are likely to be a party to only a handful of such interactions. They are, therefore, unlikely to develop any expertise in sales communication, rendering them even less able to detect misleading statements.

Marketing research devotes extensive attention to how various attributes of salespeople can unconsciously affect consumers. For example, experimental research shows how factors not directly relevant to the sale, such as eye contact and empathy, can increase sales.[[60]](#footnote-60) Other experimental studies have shown the impact of emotional manipulation on consumers’ ability to process information.[[61]](#footnote-61) Other empirical studies have documented how adopting a visible manner of listening can facilitate consumer trust and influence purchasing decisions.[[62]](#footnote-62)

This body of evidence leads to two insights. First, most of these studies document behaviors typical of oral interactions. Indeed, it is easier for a salesperson to create empathy, listen actively to customers, or manipulate consumers’ emotions during oral interactions rather than solely utilizing language cues in written documents.[[63]](#footnote-63) Second, while the documented sales and persuasion techniques do not necessarily involve deception, they can still be manipulative and distract consumers’ attention away from their objectives or the practical aspects and qualities of the goods or services they consider. Given the powerful effect of these interpersonal interactions, the possibility that consumers may enter into transactions due to misleading oral understandings is highly likely in the absence of effective monitoring. These insights serve as the basis for much of the proceeding analysis.

## Beyond Persuasion: Cognitive Biases

As previously noted, consumers frequently trust salespeople’s assertions and rely on them when making their decisions. Indeed, consumers may trust sellers’ assertions even when it is not entirely rational for them to do so, given a host of cognitive biases and behavioral tendencies.

The mechanisms that lead to consumer manipulation are diverse. Various cognitive biases can explain much of the “success” of oral manipulations. As detailed in this Section, various biases may motivate consumers to look for and pay attention to those cues and information that reinforce their already existing inclinations and preferences.[[64]](#footnote-64) Furthermore, cognitive biases lead consumers to ignore unpleasant information that could otherwise serve as a warning. In a similar vein, consumers are more likely to interpret information in ways that align with their pre-existing beliefs.

Several psychological mechanisms and cognitive biases can lead consumers to misprocess, ignore, or misuse information. Consider, for example, motivated reasoning. Motivated reasoning suggests that one’s self-interest and existing beliefs unconsciously shape one’s understanding of reality.[[65]](#footnote-65) Instead of accurately analyzing the evidence or data at hand, people process information in ways that promote their ends or goals.

Studies have found that self-interest can affect people’s ability to process visual stimuli.[[66]](#footnote-66) Essentially, people tend to see different things, depending on what better serves their interests. For example, in a classic study from the 1950s, students from two Ivy League colleges watched a film. The film featured controversial calls that referees made during a football game between teams from the students’ respective schools. In this experiment, students were more likely to see the referees’ calls as correct when they favored the team from their school than when they favored their rival’s team.[[67]](#footnote-67)

This experiment indicates that the emotional stakes—here, affirming loyalty to one’s institutions—can shape what people see.[[68]](#footnote-68) The existence of this effect might also shed light on marketers’ behavior and communication choices. For example, it helps explain why many marketers might not feel uncomfortable about “stretching” the truth and “emphasizing” certain aspects of the transaction while downplaying others.

This attitude among marketers may be particularly applicable to vague statements, since greater vagueness allows people more room for self-deception and motivated reasoning.[[69]](#footnote-69) When using vague speech, the speaker can avoid feeling that he or she is engaging in intentionally misleading behavior. Indeed, ordinary unethicality increases in ambiguous situations. By its very nature, speech is far more likely to generate ambiguity for the listener and the speaker. This ambiguity is one reason we believe salespeople might be more likely to deceive consumers orally rather than in writing, a point we will return to below.[[70]](#footnote-70)

Motivated reasoning shares some characteristics with other behavioral phenomena. One is the confirmation bias,[[71]](#footnote-71) which also leads people to look for information that strengthens their existing beliefs.[[72]](#footnote-72) Another is the desirability effect, according to which people may believe that something will happen just because they want it to happen.[[73]](#footnote-73) In our context, the desirability effect makes consumers more likely to believe the oral statements and less likely to understand the conflicting language of the fine print.

 Another related mechanism that makes consumers vulnerable to misleading oral interactions is the optimism bias.[[74]](#footnote-74) The literature on the optimism bias illustrates how people often display unrealistic optimism, viewing the future through rose-tinted glasses and systematically underestimating the risks to which they are exposed.[[75]](#footnote-75) For example, most people believe that they are less likely than others to be involved in accidents and suffer from negative experiences, such as bad relationships, job loss, economic difficulties, or health problems.[[76]](#footnote-76)

 Generally speaking, optimism is a positive quality,[[77]](#footnote-77) contributing to people’s happiness, health, confidence, personal relationships, and ambition.[[78]](#footnote-78) However, unrealistic optimism can lead people to take excessive risks and ignore warning signs. In our context, the dangers posed by consumers’ optimism can be exacerbated when the risky or harmful nature of a transaction is hidden in the fine print and downplayed through oral conversations and misleading statements. These measures reinforce consumers’ trust and optimism, making them more likely to enter into a transaction.

In addition, consider the sunk cost effect, which “is manifested in a greater tendency to continue an endeavor once an investment in money, effort, or time has been made.”[[79]](#footnote-79) This effect also explains why consumers heed oral statements yet disregard the conflicting fine print. The main explanation for this behavior is that people often seek to preserve a perception of consistency and efficiency.[[80]](#footnote-80) Overcoming the sunk cost effect is a rather challenging task, which most people cannot undertake successfully on their own.[[81]](#footnote-81)

By their very nature, precontractual oral interactions precede the form contract. The efforts to become familiar with the transaction’s details, including the precontractual conversations, are sunk costs. Thus, a natural tendency would be to ignore potentially adverse terms.[[82]](#footnote-82) Once a consumer has spent substantial time and effort engaging with a salesperson and deciding to conclude the transaction, the consumer will prefer to capitalize on these efforts regardless of the fine print.

In essence, inspecting the contract is usually possible only after orally engaging with the seller. The sunk cost effect will make it much less probable that consumers will inspect the fine print at this relatively late stage. Fraudulent salespeople can exploit this effect by intentionally postponing the presentation of contractual terms to a later stage once the consumer has already incurred high sunk costs.[[83]](#footnote-83)

Finally, information overload can lead consumers to rely on oral statements and ignore the fine print. Because the human brain is limited in its ability to absorb and analyze information, consumers are likely to experience information overload when confronting a myriad of information.[[84]](#footnote-84) Put differently, consumers’ ability to process information may be compromised when overwhelmed by a deluge of information.

Hence, consumers typically focus on a few salient aspects of the transaction at stake while neglecting many others.[[85]](#footnote-85) In the context of oral representations about a transaction, the agent’s representations are likely to be more straightforward, vivid, and memorable than the typically lengthy and complex fine print.[[86]](#footnote-86) Thus, the consumer is likely to regard the oral interaction as salient and vital while at the same time ignoring the convoluted fine print.[[87]](#footnote-87)

## Oral Interactions and Consumer Contracting Realities

This Section explains how consumer contracting realities increase the significance and the perils of oral interactions. First, it addresses ex ante contracting realities that govern the early stages of the negotiation. Next, it addresses the ex post stage, after a dispute or a problem has arisen.

At the ex antestage, it is assumed that consumers make their purchasing decisions based on different types of information. These may include information about the product, its alternatives, the market, and the firm. From an economic perspective, the contractual substance is one informational factor to be considered.[[88]](#footnote-88) Indeed, contract law assumes that the contracting parties consciously agree upon a set of terms that reflect their understandings and advance their interests.[[89]](#footnote-89)

However, this assumption is largely inapplicable to transactions entered into through consumer form contracts. Consumers rarely read such contracts,[[90]](#footnote-90) which sellers pre-draft and are generally unwilling to negotiate. As a result, consumers often do not become familiar with the content of their contracts. Moreover, even if consumers wanted to read their contracts, empirical evidence suggests that doing so would be next to impossible for most laypeople. As noted, consumer contracts are unreadable for the average consumer.[[91]](#footnote-91)

The fact that consumers are generally unaware of the substance of their contracts creates a potential market failure due to information asymmetry.[[92]](#footnote-92) Sellers, who draft form contracts and execute them repeatedly, know what these contracts say. Consumers, lacking the experience of sellers, are not aware of this information. This information asymmetry, in turn, may lead consumers to make ill-advised decisions that do not maximize their utility.[[93]](#footnote-93)

Numerous studies have examined the legal challenges posed by the problem of consumer contracts not being read.[[94]](#footnote-94) For our purposes, it is sufficient to acknowledge that consumers do not learn about the contractual elements of their transactions by reading the contract. Nor are they likely to seek expert advice or consult a lawyer in most types of consumer transactions. As a result, other informational sources, such as oral interactions, become even more meaningful. Therefore, consumers must often rely heavily on oral interactions, using them as a shortcut, or as a substitute, for reading detailed and complex contracts.[[95]](#footnote-95) Consumers’ reliance on these oral interactions is highly significant, especially since most consumers are largely unaware of their rights and often misperceive the law.[[96]](#footnote-96)

Alarmingly, salespeople can further use oral interactions to dispel consumers’ fears once consumers realize that the form contract contains onerous terms.[[97]](#footnote-97) For example, to convince the consumer to proceed with a deal despite problematic terms, salespeople sometimes provide reassurances and deceptive clarifications, explaining away the problematic terms.[[98]](#footnote-98) Such explanations can be effective in allaying consumers’ suspicions even when the proffered explanations are meaningless.[[99]](#footnote-99) Consequently, even those consumers who read the contract, understand the risks involved, and take them into account, may still be harmed by misleading oral promises.

The discussion above elucidates how ex ante consumer contracting realities heighten the power of misleading oral interactions. Alas, ex post contracting realities exacerbate the problem, leaving consumers even more vulnerable.

The chilling effect of fine print provides an excellent example of the problem of ex post effects. As noted, experimental and empirical data suggest that laypeople are contract formalists;[[100]](#footnote-100) consumers tend to believe that the fine print legally and morally binds them. People’s intuition is to believe in the validity of the fine print,[[101]](#footnote-101) even if the fine print incorporates illegal, unconscionable, or otherwise unfair terms.[[102]](#footnote-102) Thus, a form contract term that negates an oral statement or otherwise conflicts with a pre-contractual representation is likely to impact consumers’ perceptions of their rights.

Consider one study that investigated people’s intuitions regarding consent to the fine print.[[103]](#footnote-103) This study found that people generally understand that consent to the fine print is often compromised and is less meaningful than consent to negotiated contracts.[[104]](#footnote-104) Given this understanding, one could hypothesize that consumers’ consent to the form contract should be treated cautiously when the written contract contravenes the oral promise. Nevertheless, the study found that peoples’ “ambivalence seems to dissipate entirely when questions about consent come up in the context of contract enforcement.”[[105]](#footnote-105) Thus, as another study illustrated, in the case of enforcement of standardized unfavorable terms, people believe that the consent to the fine print is genuine and legitimate, both morally and legally.[[106]](#footnote-106) Consistent with this finding, research illustrates that form contract terms reduce consumers’ willingness to complain, exit the contract, or otherwise challenge sellers.[[107]](#footnote-107)

Another study explored the incorporation of unenforceable and misleading terms in residential rental contracts.[[108]](#footnote-108) The study found that landlords regularly misinform tenants about their legal rights and remedies through their contracts, often failing to comply with mandatory disclosures. At times, their contracts included terms that “ﬂatly contravene the law.”[[109]](#footnote-109) Consistent with earlier literature, the study argued that “when a problem or a dispute with the landlord arises, tenants are likely to perceive the terms in their lease agreements as enforceable and binding, and consequently forgo valid legal rights and claims.”[[110]](#footnote-110)

A follow-up study confirmed that unenforceable terms indeed shape tenants’ perceptions.[[111]](#footnote-111) In particular, unenforceable terms made tenants “eight times more likely to bear costs that the law imposed on the landlord than were tenants with contracts containing enforceable terms.”[[112]](#footnote-112) Notably, the study also found that unenforceable terms undermine the tenant’s motivation to search for legal information online.[[113]](#footnote-113) It further suggested that unenforceable terms hinder the non-drafting party’s “ability to accurately process legal information obtained through online searches.”[[114]](#footnote-114)

Of particular relevance to our inquiry is another related study that investigated laypeople’s beliefs about contracts that, as in our context, contradicted false representations.[[115]](#footnote-115) The findings of this study revealed that respondents believed that form contracts—which in this study were signed by consumers without reading them—were valid and enforceable as written despite prior pre-contractual material deceptions.[[116]](#footnote-116) Once again, the findings suggest that fine print “discourages consumers from wanting to take legal action, initiate complaints, or damage the deceptive firm’s reputation by telling others what happened.”[[117]](#footnote-117) Disturbingly, the study also found that informing consumers about consumer protection laws “does not completely counteract the psychological effect of the fine print.”[[118]](#footnote-118)

Thus, mounting evidence suggests that consumers are likely to feel bound by the written contractual terms, even when the terms contradict previous misleading oral statements. While there are valid reasons for assuming the evidentiary superiority of written documents over oral statements, this assumption may entail a significant cost.[[119]](#footnote-119) As Solan observes:

The consequences of this shift in focus from verbal legal events to written ones cannot be overstated. Reliance on the written word is a two-edged sword. On the one hand, it reduces the likelihood of dispute about what the agreement (or statute) really says. On the other, it empowers the party with the pen. When only one party to the transaction controls the document, the possibility arises that the drafter will take advantage of this leverage unfairly. Thus, in addition to intended consequences, there are likely to be some unintended ones.[[120]](#footnote-120)

 In addition, other obstacles may also induce consumers to adhere to contractual terms that negate preceding oral interactions. First, consumers in such situations are not likely to complain because they may blame themselves for failing to read the fine print.[[121]](#footnote-121) According to the Federal Trade Commission (FTC), less than 10% of defrauded consumers make a formal complaint.[[122]](#footnote-122) Even if consumers overcome the fine print’s chilling effect, they are still unlikely to insist upon their rights for various other reasons. Some consumers may be concerned about legally challenging a firm due to unequal bargaining power.[[123]](#footnote-123) Others may prefer to avoid conflicts and confrontations due to the emotional toll involved.[[124]](#footnote-124) Yet others may find litigation costs to be too high a burden.[[125]](#footnote-125)

Relatedly to this latter consideration, many consumer transactions involve a relatively small sum of money or low-value items. In such cases, initiating a legal dispute is not cost-beneficial,[[126]](#footnote-126) a reality which further reduces consumers’ willingness to invest resources in complaining or otherwise pursuing legal action.[[127]](#footnote-127) In addition, some consumers may be especially reluctant to pursue legal action due to low levels of trust in the legal system.[[128]](#footnote-128) Finally, the fine print itself may limit the legal options consumers may use, as is the case in the context of class action waivers and mandatory arbitration clauses.[[129]](#footnote-129)

Given all of these considerations, many consumers are ultimately likely to feel that there is no choice but to comply with the questionable form contract that contradicts the oral promise. Firms, as a result, may have strong financial incentives to implement schemes that encourage salespeople to behave unethically. Thus, from an economic viewpoint, firms can accept the risk of such schemes. Simply put, sellers may realize that since only few customers will take action, unethical oral exchanges are economically valuable. Indeed, empirical evidence, including firms’ training materials, indicates that companies encourage their salespeople to exaggerate the benefits of their products or mislead consumers to increase sales.[[130]](#footnote-130)

# Are all Salespeople Liars?

Part I explained the power of misleading pre-contractual oral statements. It first delineated the social and behavioral forces that make such promises significant for consumers. Next, it discussed the ways consumer contracting realities, both ex ante and ex post, make consumers vulnerable to such promises.

Part II shifts the focus from consumers’ vulnerabilities and biases to salespeople’s perspectives and psychology. Employing insights derived from behavioral ethics and social psychology, this Part explains why making misleading oral statements is prevalent, tempting, easy, and, at times, an acceptable norm among marketers.

## Contextualizing Oral Promises

Consumer fraud is a persistent, ubiquitous, and detrimental problem in the United States.[[131]](#footnote-131) A recent FTC survey found that some 16% of respondents, “representing 40.0 million U.S. adult consumers,” reported having been defrauded.[[132]](#footnote-132) The survey estimated that there were almost 62 million fraud incidents during 2017.[[133]](#footnote-133) The average direct loss for consumers was one hundred dollars,[[134]](#footnote-134) which translates to a total economic loss of the astounding figure of approximately six billion dollars. This estimation does not include other types of loss, such as time, attention, personal data, opportunity costs, emotional frustration, enforcement and litigation costs, and erosion of societal values.

Various factors may lead salespeople to mislead consumers about material aspects of the transaction. One reason may be a lack of knowledge. A mundane example is Solan’s own experience when experimentally attempting to purchase a printer. He reports:

Many stores have inexperienced sales help with little knowledge of computers. As an experiment, I recently went to such a store and asked questions about printers. The information I received from one salesman was at odds with the information I received from another. I was quite sure that both of them made up much of what they said in any event.[[135]](#footnote-135)

Sales representatives may also misstate facts out of insecurity, stretching the truth to please the consumer by telling the consumer what they think the consumer would like to hear.

Primarily though, salespeople may lie to consumers to sell the product and secure the sale. This type of toxic oral promise is the focus of our attention here.

## A Behavioral Ethics Perspective

The people who engage in unethical behavior, such as lying and deception, are not limited to just a few miscreants. Recent studies demonstrate that ordinary unethicality is pervasive.[[136]](#footnote-136) In fact, in some contexts, systematic violations of law or ethical standards have become the norm rather than the exception.[[137]](#footnote-137) Some outstanding examples include stealing office supplies from work,[[138]](#footnote-138) making exaggerated statements in market transactions,[[139]](#footnote-139) misreporting tax benefits,[[140]](#footnote-140) or double-parking in a way that blocks other cars.[[141]](#footnote-141)

Because of its pervasiveness, routine unethicality is highly harmful in the aggregate. Its accumulative harms, and the fact that otherwise good people commit it, often overshadow the more “serious” forms of unethicality that could rise to the level of crime.[[142]](#footnote-142) Furthermore, widespread unethical behavior has devastating effects on interpersonal relations and social trust,[[143]](#footnote-143) and could lead to more extreme forms of anti-social behavior.[[144]](#footnote-144)

Here, we focus on salespeople who make misleading oral statements to consumers. Our key argument is that these salespeople find ways to excuse, justify, or ignore the fact that their sales pitches include false representations. In essence, one can argue that “good people” are willing to behave unethically as long as they can maintain a positive self-image as moral individuals.[[145]](#footnote-145) One of the key ways to accomplish that is to use motivated reasoning and self-deception.[[146]](#footnote-146) When “good people” can interpret what they do as a legitimate business practice, more people are likely to engage in unethical behavior.

In this context, ordinary unethicality describes the types of unethical behaviors people engage in during their daily routines.[[147]](#footnote-147) The very ordinariness of these infractions suggests that individuals consistently engage in supposedly minor ethical and legal violations while excusing their unethicality.[[148]](#footnote-148)

The literature details several potential mechanisms that explain why otherwise good people behave in an unethical way.[[149]](#footnote-149) Some of the unconscious mechanisms that people employ make it hard for them to understand the wrongdoing involved in their behavior, especially when the behavior could be interpreted in more than one way.[[150]](#footnote-150) In other cases, the decision to behave unethically could be a byproduct of more conscious, deliberate mechanisms.[[151]](#footnote-151) Such mechanisms allow people to justify their own unethicality by using arguments such as “it would not really harm anyone,” “this is how people expect me to behave,” and “this is the only way to survive in this business.”[[152]](#footnote-152)

The power of both these conscious and unconscious mechanisms becomes eminent in the context of oral misrepresentations to consumers. Notably, oral interactions often include intuitive and spontaneous conversations. When salespeople engage freely with consumers and respond to their questions, they typically use their intuitive, rather than deliberate, reasoning. Such intuitive reasoning may enhance dishonesty in situations where cheating is tempting, i.e., when it is easier or more rewarding to lie than to tell the truth.[[153]](#footnote-153) Indeed, serving one’s interests is an automatic tendency and refraining from doing so requires a high degree of self-control.[[154]](#footnote-154) Second, verbal interaction is likely to increase ambiguity. Ambiguity is likely to make it easier for people to overlook the misleading nature of their words, especially where the spoken words have more than one possible interpretation.[[155]](#footnote-155)

In addition, oral interactions often occur in a grey space, where salespeople are unsure whether what they say is morally acceptable or legally binding.[[156]](#footnote-156) This grey area of legal and moral uncertainty may give salespeople greater moral wiggle room to speak freely yet inaccurately. It enables them to tell themselves that oral statements are “merely pre-contractual, informal, sales talks.” Salespeople may accordingly convince themselves that their oral misrepresentations are no more than “puffery” or legitimate marketing techniques.

Sellers can mislead consumers by making a false statement or knowingly failing to correct consumers’ stated (or implicit) misperceptions. However, deception through omission, or failure to disclose the whole truth, could be perceived by salespeople as less morally troublesome than deception through commission. Here, salespeople may believe that failing to disclose something is not as morally wrong as lying, even if the outcome for consumers is the same.[[157]](#footnote-157)

Furthermore, research suggests that in competitive settings, people are more likely to behave unethically.[[158]](#footnote-158) The salesperson’s incentive to “close the deal” might increase the likelihood that this incentive and pressure will mitigate any ethical constraints they might have. The competitive context might also cause salespeople to believe that their peers probably utilize any possible trick to boost their sales.[[159]](#footnote-159) Indeed, people generally believe that they are more honest and moral than others.[[160]](#footnote-160) Such a belief may lead all salespeople to engage in a “race to the bottom,”[[161]](#footnote-161) excusing their dishonest behavior as “part of the game.”

## The Nuts and Bolts of B2C Oral Interactions

It is the mundane nature of business-to-consumers (B2C) transactions that enables sellers to see their unethical acts as “ordinary” rather than harmful. Since misleading oral statements are perceived to be less severe, salespeople may find it much easier to justify such promises.[[162]](#footnote-162) Defrauding consumers can thus quickly become a norm, even an epidemic. In short, the perception of misleading oral statements as minor infractions, if even that, can change the accepted standards of ethical, social, and professional norms of commercial transactions.[[163]](#footnote-163)

 The literature on compliance and enforcement illustrates that various situational forces typically shape people’s decisions to behave unethicality.[[164]](#footnote-164) For example, people are more likely to be dishonest when they do not expect to be the only ones benefiting from their wrongdoing.[[165]](#footnote-165) Thus, salespeople, who typically receive a fee or commission while the firm retains most of the benefit, may behave more dishonestly because they often do not reap the full benefit of their wrongdoing.

Another situational factor that possibly encourages unethical behavior is teamwork or division of work, where different salespeople are responsible for different aspects of the transaction. For example, one person will often make the oral marketing pitch followed by another sales representative who oversees the formal aspects, including the written contract. Generally, marketers and sellers are responsible for the oral interaction with the consumer, while lawyers are responsible for drafting the contracts. As a result, teams and groups are more likely to engage in unethical behavior, as each individual can reduce their personal responsibility by drawing legitimacy from the group and referring to others.[[166]](#footnote-166) Another factor affecting ethicality in these situations is that, unlike written contracts, oral interactions lack an effective accountability mechanism. Lack of accountability, in turn, increases the likelihood of unethical behavior.[[167]](#footnote-167)

Given all of these factors, it is easy to see why misleading statements are frequent and potent in interactions between salespeople and consumers. Pre-contractual oral exchanges are mundane actions, and many people cut corners when communicating orally.[[168]](#footnote-168) In fact, sellers may mislead or deceive in oral communication without a clear intention to deceive, justifying their behavior as “part of the game” and a way to make a living. They may view such interactions as integral parts of their jobs, or even as (perhaps implicit and subtle) requirements or expectations emanating from their employers.[[169]](#footnote-169)

Furthermore, to excuse or justify their behavior, sellers may also shift the blame to consumers, arguing that consumers have ample sources of additional information.[[170]](#footnote-170) Some may believe the old maxim of “buyer beware.”[[171]](#footnote-171) Salespeople may also believe that consumers *want* to be manipulated and derive satisfaction or hope from believing the salespeople's marketing stories.[[172]](#footnote-172)

Disturbingly, when the typical customer’s profile is different from the typical salesperson’s, salespeople may be more likely to justify unethical misrepresentations, as they may be better able to distance themselves from the particular consumer. Salespeople are likely to favor social groups with which they associate. This partiality is related to the “in-group favoritism” or the “homophily bias,”[[173]](#footnote-173) which people quickly form.[[174]](#footnote-174) Such a bias may also help salespeople justify misrepresentations when they target consumers from whom salespeople feel socially distant.

In fact, sales talk may fall under the somewhat ambiguous legal doctrine of “puffery,” whereby the law protects the kind of nonfactual speech that the reasonable consumer perceives as unrealistic, humoristic, or exaggerated.[[175]](#footnote-175) While courts may see such misrepresentations as mere puffery, many consumers perceive these statements as accurate and therefore influential.[[176]](#footnote-176) This perception may further blur the line between legitimate sales talk and contractual promises.

Another factor is the emotional stimulation for both parties that characterizes most sales talk and oral, face-to-face negotiations. This emotional stimulation further limits people’s capacity to self-monitor,[[177]](#footnote-177) once again making it easier for salespeople to overlook their unethical behavior. At the same time, consumer arousal may distract consumers from some types of information and make them less likely to explore aspects of the transaction vigilantly and thoroughly.[[178]](#footnote-178)

For the reasons discussed above, toxic oral promises can quickly become the norm.[[179]](#footnote-179) At the same time, both buyers and sellers may not even be aware of this new and essentially unethical norm. While people may accept this reality, it nevertheless results in significant harms, which the next Part identifies.

# The Various Harms of Toxic Oral Promises

Salespeople are skillful and experienced communicators. As already discussed, they are motivated to make misleading promises and find ways to excuse and justify them. At the same time, consumers want to trust sellers. Various cognitive biases lead consumers to believe sellers and trust their statements. Unfortunately, consumer contracting realities—such as the no-reading problem, the chilling effect of the fine print, and hurdles reducing consumers’ likelihood of seeking justice—intensify consumers’ vulnerabilities toward misleading oral promises. Misleading oral statements are thus bound to be prevalent and effective.

This Part identifies the various social costs of misleading oral promises. It explores how such deals can harm consumers, undermine important societal values, disadvantage honest competitors, and harm the salespeople themselves.

**Harm to consumers**. First and foremost, misleading oral statements provide incorrect information, leading consumers to make erroneous decisions. In this context, the maxim that market transactions advance the parties’ utility relies on the assumption that the market provides relevant and accurate information.[[180]](#footnote-180) When this is not the case, inefficient transactions are more likely to take place.[[181]](#footnote-181)

Of course, misleading and deceiving promises also harm consumers’ autonomy and dignity. Borrowing from Kant,[[182]](#footnote-182) when salespeople lie to consumers in order to sell to them, they often treat consumers merely as a means (to conclude a sale) rather than as an end in themselves.

People generally agree that lying is disrespectful and morally wrong[[183]](#footnote-183) and that it contravenes accepted social norms.[[184]](#footnote-184) Thus, the public largely expects “that a salesperson's verbal representations would be consistent with the terms of the Sales Agreement.”[[185]](#footnote-185) Surveys also clarify that people expect firms to “stand behind the verbal representations of their salespeople, even if these representations contradicted the written contract.”[[186]](#footnote-186)

Certainly, consumers are heterogeneous, and some consumers are more naïve and trusting than others.[[187]](#footnote-187) Thus, consumers differ in their inclination to believe misleading oral promises. Alarmingly, marginalized consumers are more likely to be defrauded than those who are wealthy and well-educated.[[188]](#footnote-188) High-income consumers have more to lose and are more likely to distrust and fear deception.[[189]](#footnote-189) At the same time, those from lower socio-economic groups will distrust others if they perceive inequality.[[190]](#footnote-190) Thus, if sales agents appear to treat members of lower socio-economic groups with respect, the resulting illusion of equality will make these consumers less likely to take precautionary steps against deception.[[191]](#footnote-191) Consequently, vulnerable, poor, and marginalized consumers are likely to suffer a disproportionate impact from misleading oral promises.

The distributional effects of misleading oral promises become even more disturbing, given firms’ profit-incentive to discriminate among consumers. That is, firms may choose to strategically use misleading oral statements as a means to exploit weak consumers. Indeed, pre-contractual misleading promises can facilitate both ex ante and ex postdiscrimination.

Ex ante, firms can use big data and personal information to micro-target consumers.[[192]](#footnote-192) For example, they can identify naïve or vulnerable consumers, who are more likely to trust extravagant promises. At the same time, firms will be more careful when dealing with sophisticated or wealthy consumers.

Ex post, assertive consumers might insist on enforcing oral statements. Customers from higher socio-economic groups are more likely to confront the firm. These consumers will more often complain about its unfair practices, threaten the firm’s reputation, or initiate legal action.[[193]](#footnote-193) Firms, realizing the threat, are likely to yield to assertive consumers and honor their verbal promises.[[194]](#footnote-194) In contrast, weak consumers are much less able to assert their rights and confront the misleading agent or business. As noted above, they are typically less informed, less educated, and have fewer resources and less capacity to manage conflicts with firms.

**Undermining societal values**. Beyond harming consumers and market efficiency, toxic oral promises also undermine fundamental societal values. Frequent misleading oral interactions legitimize and trivialize dishonesty. As a result, they erode consumer trust in the marketplace and reduce levels of trust more generally. Trust erosion, in turn, harms society at large.

Recall that trust facilitates relationships, enhances mental and physical wellbeing, supports flourishing societies, and advances efficient markets.[[195]](#footnote-195) Trust is a fundamental necessity for facilitating economic activity, reducing the need to take precautions and be vigilant.[[196]](#footnote-196) On a public health level, trusting people are also happier, more tolerant, and more optimistic.[[197]](#footnote-197) Misleading oral interactions that reduce trust can thereby result in negative externalities that extend beyond the contracting parties.

**Disadvantaging honest competitors**. Moreover, the practice of misleading oral promises can harm scrupulous sellers who make an effort to refrain from making oral misrepresentations to their customers, thereby putting honest sellers at a disadvantage. If honest sellers who do not want to engage in misleading sales tactics need to compete with unscrupulous ones who use oral promises to manipulate consumers, the result is an unfair competition that might lead to a “race to the bottom.”

In competitive markets, sellers compete over salient attributes, offsetting the price of this competition by reducing the quality of other attributes.[[198]](#footnote-198) Therefore, if consumers cannot effectively detect lies, honest sellers in competitive markets might be forced to adopt the practice of making misleading oral statements to remain competitive. Sellers who do not participate in this race to the ethical bottom to mislead consumers might compromise their earnings and eventually be pushed out of the market.[[199]](#footnote-199)

**Damaging salespeople**. Finally, the practice of justifying toxic oral promises can harm salespeople themselves, who become accustomed to lying and behaving unethically. Research suggests a slippery slope process whereby engaging in more minor acts of deception may pave the way to more frequent and severe types of misbehavior.[[200]](#footnote-200) Furthermore, research on social norms suggests that when a particular unethical behavior appears to be more pervasive, people view it as more legitimate.[[201]](#footnote-201) This phenomenon is consistent with the bandwagon effect, suggesting that the increasing popularity of a norm or trend makes it more likely that others will adopt it.[[202]](#footnote-202) Where more and more people who would not otherwise adopt a particular behavior join in accepting or engaging in the unethical norm, a vicious circle ensues.

Currently, oral pre-contractual promises are generally not considered an integral part of the contract. This separation reduces the likelihood of salespeople receiving any normative feedback about what is (un)acceptable in their oral interactions with customers.[[203]](#footnote-203) Lack of feedback, in turn, deprives sellers of the opportunity to update or improve their operating principles and gives salespeople even more power over consumers. Power can corrupt,[[204]](#footnote-204) and lead to other unethical behaviors. Finally, while the law under-deters salespeople from orally misleading customers, salespeople may still be legally liable for fraud. This ubiquitous practice thus also exposes them to legal sanctions, potentially without them being aware of these risks.

# Law and Policy Recommendations

One should not misinterpret our analysis to suggest that the law explicitly permits pre-contractual misleading and deceptive interactions.[[205]](#footnote-205) Undoubtedly, sellers cannot promise anything imaginable to consumers during negotiations while avoiding liability by incorporating one-sided contract terms. To be sure, should sellers attempt to do so, buyers “can prevail without having to assert any rights under the contract.”[[206]](#footnote-206)

To be sure, the law regulates speech and does not tolerate deceptive lies and misleading promises.[[207]](#footnote-207) That being said, current consumer protections against these misleading practices are partial and insufficient. Most conspicuously, the law does not effectively attend to the risk that salespeople will “stretch the truth” and use “mundane” or “little” lies to entice consumers.[[208]](#footnote-208)

Section A of this Part reviews the current law and policy landscape of misleading oral promises. The remainder of this Part offers policy recommendations to improve the legal scrutiny of misleading oral promises. Section B focuses on ex ante measures, tailored for application at the pre-contractual stage. These proposals seek to prevent misleading oral statements from occurring in the first place. Section C details ex post recommendations designed to better respond to misleading oral promises that do transpire.

## The Current Landscape of Misleading Oral Promises

Perhaps the most relevant legal regulation of misleading oral promises relates to the parol evidence rule, codified by Section 2-202 of the Uniform Commercial Code (“U.C.C.”),[[209]](#footnote-209) and the common law doctrine of fraud. However, the judicial implementation of the codified parol evidence rule has been unclear and varies significantly among jurisdictions.[[210]](#footnote-210) Essentially, according to the parol evidence rule, a finding that a writing is integrated limits the introduction of extrinsic evidence to vary or contradict the terms of the contract.[[211]](#footnote-211) Thus, extrinsic evidence, such as oral interactions, may not be allowed if the court finds that a written contract is entirely integrated and unambiguous.[[212]](#footnote-212)

Fraud, which at times takes the form of misrepresentation, is an exception to this rule.[[213]](#footnote-213) As § 164 of the Restatement (Second) of Contracts notes, where “assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”[[214]](#footnote-214)

As Eric Posner explains:

The parol evidence rule deals with a common contractual situation: where initial negotiations, in which preliminary oral or written promises are exchanged, conclude with a writing that appears to embody the entire agreement. The question is whether the court's interpretation of the contract should rely at all on evidence related to the earlier negotiations, known as ‘extrinsic evidence,’ or should rely entirely on the writing.

…

Most courts would subscribe to something close to the following statement of the parol evidence rule: A court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (1) incomplete, (2) ambiguous, or (3) the product of fraud, mistake, or a similar bargaining defect.[[215]](#footnote-215)

Courts seem to differentiate among different types of transactions and parties when applying the parol evidence rule.[[216]](#footnote-216) Generally speaking, courts are more likely to apply the rule strictly to contracts between sophisticated parties.[[217]](#footnote-217) This strict application, to use Posner’s terminology, is the “hard” parol evidence rule.[[218]](#footnote-218) Nonetheless, courts have applied more lenient versions of the rule where parties lack sophistication.[[219]](#footnote-219) These are also known as “soft” parol evidence rules.[[220]](#footnote-220) Since most consumers are considered unsophisticated parties, courts tend to apply soft rules to consumer form contracts.[[221]](#footnote-221)

Where both contracting parties are sophisticated, insisting upon integration clauses makes sense. Sophisticated parties are likely to negotiate the terms of their contracts, genuinely agree to their contents, be represented by lawyers, and prefer certainty over judicial discretion.[[222]](#footnote-222) However, where consumer contracts are involved, many have argued that relaxing the rule is also sensible.[[223]](#footnote-223) Consumers do not bargain over the contractual terms, do not necessarily read or understand them, and are rarely represented by lawyers.[[224]](#footnote-224) Instead, consumers generally believe salespeople and rely on the word of sales agents.[[225]](#footnote-225)

That said, allowing consumers to present extrinsic evidence in the form of misleading oral promises does not cure the problem. It would be counterproductive to place the onus of initiating litigation on individual consumers.[[226]](#footnote-226) This crucial point should be borne in mind when crafting effective legal responses to misleading oral promises, some of which we will discuss in the following Sections.

Relaxing the parol evidence rule is not the only protective measure the law can offer to consumers who are lured into transactions by misleading oral promises. When the transaction involves a sale of goods and the misleading promises pertain to warranties, the buyer may sue for damages for breach of warranty.[[227]](#footnote-227) Section 2-316 of the U.C.C. further addresses the relationship between an oral warranty and the seller’s standard form contract, which purports to undermine the oral warranty. According to this section, contractual terms that bar oral modifications should be “in writing and conspicuous.”[[228]](#footnote-228) Furthermore, the Magnusson-Moss Warranty Act requires that sellers who provide a warranty to consumers disclose, fully, conspicuously, and in plain language, the terms and conditions of the warranty according to the FTC rules.[[229]](#footnote-229)

The rationale behind requiring conspicuous writing is pretty straightforward. With this requirement, the law seeks to enhance the likelihood that important information is clearly disclosed and, hopefully, effectively communicated. In essence, it attempts to empower the consumer to make an informed decision and protects the consumer from unexpected disclaimers.[[230]](#footnote-230)

Nonetheless, such a disclosure requirement may not have the intended effect. Recall that the mere use of fine print makes consumers more likely to comply with the written terms of a contract.[[231]](#footnote-231) Consumers who faced such standardized terms are prone to blame themselves for not thoroughly reading the terms and analyzing their exact meaning.[[232]](#footnote-232) As detailed above, this holds true even when the weaker party was defrauded before entering into the contract.[[233]](#footnote-233)

One might theoretically argue that consumers can avoid misleading oral promises by carefully reading the fine print ex ante. According to this line of reasoning, by insisting on the duty to read the agreement, the law can incentivize consumers to become aware of the terms and conditions that govern their transactions.[[234]](#footnote-234) Consumers who choose not to read their contracts, the argument goes, should bear the risk and pay the price of their decision.[[235]](#footnote-235)

We find this reasoning unpersuasive. Imposing a duty to read on consumers will not solve the problem. As clearly shown above, consumers do not read form contract terms, notwithstanding their duty to do so. Consumers cannot understand form contracts and rationally evaluate their contents. Moreover, sellers are likely to distract consumers’ attention from the fine print. For example, salespeople can reassure consumers' concerns by using “a friendly voice” and “an assuring smile”[[236]](#footnote-236) while explaining away problematic terms.[[237]](#footnote-237) A complex, unread standard form contract should not shelter agents who opportunistically exploit misleading oral promises.[[238]](#footnote-238)

Striving to eliminate or mitigate the problems of misleading oral promises by using written means to warn consumers is bound to fail. Consumers, as discussed above, are generally likely to trust sellers, exhibit unrealistic optimism, and commit to the contract regardless of its harsh terms. Consumers, who are often (though not always) one-shotters, often have no alternative but to rely on salespeople and agents.[[239]](#footnote-239) As the Federal Reserve Board observed in the context of mortgage transactions:

Consumers generally lack expertise in complex mortgage transactions because they engage in such mortgage transactions infrequently. Their reliance on loan originators is reasonable in light of originators’ greater experience and professional training in the area, the belief that originators are working on their behalf, and the apparent ineffectiveness of disclosures [about originators’ compensation structure] to dispel that belief.[[240]](#footnote-240)

The proposed Draft Restatement of Consumer Contracts follows this logic and generally adopts a narrow (“soft”) parol evidence rule.[[241]](#footnote-241) According to the proposed Restatement, contract terms that contravene precontractual representations are presumably deceptive and voidable.[[242]](#footnote-242) The Draft Restatement acknowledges that consumers do not systematically inspect the fine print.[[243]](#footnote-243) Thus, the drafters seek to urge firms to ensure that the form contract does not deviate from the oral promise.[[244]](#footnote-244) Yet again, this is merely the first step. There is still a need to monitor misleading oral promises better and mitigate the problematic chilling effect of unfair and unenforceable terms.

Beyond common law doctrines, state law may also protect consumers from misleading oral promises. For example, legislatures in all 50 states enacted Unfair and Deceptive Acts or Practices Statutes (“UDAP laws”).[[245]](#footnote-245) While differing in scope, strength, and application,[[246]](#footnote-246) these laws play a central role in protecting consumers from deceptive and unfair business practices.[[247]](#footnote-247) However, since they primarily rely on private enforcement by individual consumers, such laws are unlikely to yield the anticipated protection.[[248]](#footnote-248) Furthermore, in many jurisdictions, it is unclear whether the statutes prohibit misstatements of law in addition to misstatements of facts.[[249]](#footnote-249) We return to this crucial point below.

\* \* \*

The current protections that the law provides against misleading oral promises are partial in scope. Such protections fall short in two critical ways. First, the current state of the law appears to assume that misleading oral interactions are the exception, not the norm. Thus, the law underestimates both the likelihood that sellers will mislead consumers orally and the frequency of misleading oral promises. However, insights from behavioral science reveal that people are relatively likely to behave dishonestly quite often. Given the stressful selling environment in which salespeople often operate, there is little doubt that many of them engage in misleading or deceptive oral interactions. This pressing reality highlights the need for forceful *preventative* measures, which is the focus of Section B.

Second, current protections fall short in their expectations from consumers, both ex ante and ex post. Ex ante, the law unrealistically expects consumers to read and understand contracts and refrain from relying on misleading oral promises. Consumers face overwhelming amounts of contracts in their everyday lives and cannot possibly review or understand most of the terms and conditions governing their transactions. Consumers consequently *need* to rely on salespeople’s oral assertions. Here, the law overestimates consumers’ ability to uncover deception.

Contrary to what many may think, consumers’ ability to detect lies is significantly limited.[[250]](#footnote-250) Various social and behavioral forces compromise consumers’ capacity to identify misleading promises and ignore them when making decisions. These factors further emphasize the need for a nuanced and comprehensive consumer protection approach to misleading oral promises.

Ex post, the law overestimates the degree to which consumers will be likely to challenge effectively misleading statements once made. As explained, many consumers are unaware of their rights and are not informed about contract and consumer law doctrines. Consumers are also not good at identifying harms. Even if these challenges were mitigated somehow, consumers still face significant barriers limiting their ability to assert their rights or seek justice. Consumers may fear legal confrontation with stronger parties, distrust the legal system, seek to maintain their relationship with the firm, or lack resources or motivation to insist upon their rights. These consumers' attitudes indicate a need to encourage consumers to stand up for and assert their rights. They also highlight a need for better public enforcement of consumer rights.

Moreover, the mere existence of contract terms, including unfair and unenforceable ones, can silence consumers. As emphasized throughout this Article, empirical findings “raise questions about the effectiveness of legal interventions and consumer protection regimes that put the onus on victims of fraud to challenge the enforceability of their standard form contracts.”[[251]](#footnote-251) Bearing this in mind, we now proceed to discuss legal and policy recommendations.

## Mitigation and Preventative Measures

There is a spectrum of ex ante measures that can assist in mitigating the problem of misleading oral interactions. At the heart of these measures is the understanding that precontractual misleading oral promises are more prevalent and harmful than is commonly assumed. Consequently, more consideration should be given to preventative approaches. This Section presents some such measures that policymakers could examine.

As a starting point, we suggest regarding firms as the most effective cost-avoiders. Firms can minimize agents’ misrepresentations by monitoring their statements, limiting their interaction with negotiating parties, and penalizing agents who misrepresent products or services.[[252]](#footnote-252) Such measures may prove determinative when firms employ agents whose interests might not be fully aligned with those of the firm.[[253]](#footnote-253) For example, a salesperson who is compensated on a commission basis might be overly eager to convince consumers to make purchases and resort to making questionable oral statements.[[254]](#footnote-254)

Accordingly, we call for a cultural shift regarding firms’ expectations from salespeople, where salespeople would not be measured solely according to selling targets or quotas.[[255]](#footnote-255) As a first step, we suggest imposing a general duty on firms to properly train their agents and supervise their behavior.[[256]](#footnote-256) A prime example of ex ante scrutiny involves recording agents’ pre-contractual exchanges.[[257]](#footnote-257) Many firms are already using automatic recordings of sales conversations for monitoring, training, and quality purposes.[[258]](#footnote-258) Firms are also frequently using video surveillance at stores.[[259]](#footnote-259) As technology advances and recorded information is easier to store and save, the relative costs of these measures decrease, and their prevalence increases.[[260]](#footnote-260)

Policymakers can take advantage of these developments and require firms to use these recordings as a check on agents’ behavior. A further step in this direction could entail requiring that these recordings be made available for inspection by external parties, such as individual consumers, consumer watchdogs, and enforcement agencies. An even more forceful measure would be to generally require firms, or at least some of them,[[261]](#footnote-261) to record and make available pre-contractual interactions with consumers. Determining the exact scope of such a duty requires a close analysis of the costs involved.[[262]](#footnote-262)

By better training their agents, firms can minimize the risk of misleading oral promises. Such training can include tutorials, updates, workshops, or presentations by lawyers, pro-consumer representatives, and high-ranking management personnel within the firm.[[263]](#footnote-263) Becoming familiar with the topic and discussing its legal and social aspects will make it less likely that salespeople will justify unethical behaviors. Such measures will also communicate to employees and consumers that the firm takes the topic seriously and strives to maintain an ethical corporate culture.[[264]](#footnote-264)

The need for companies to behave in socially responsible ways has been widely acknowledged.[[265]](#footnote-265) Firms increasingly adopt corporate social responsibility (CSR) principles to ensure values-based corporate governance, encompassing a commitment to multiple stakeholders, environmental protection, social equity, and economic growth.[[266]](#footnote-266) We believe that CSR should also include a commitment to ethical behavior, entailing, *inter alia*, holding firms accountable for unethical behavior on the part of their employees. Such accountability is especially warranted when such behaviors are profit-generating and thus may be otherwise encouraged by firms. We propose that firms adopt a broader approach toward CSR that would acknowledge the company’s social responsibility as encompassing a commitment to eradicate fraud.

Firms could also be required to report regularly to the public or a designated agency on their training efforts meant to reduce misrepresentations. Alternatively, they could be required to detail these efforts in cases of disputes or regulatory checks. The relevant court or regulatory agency can then consider these efforts—or lack thereof—when deciding the dispute, case, or issue before them.

The same logic may apply to automating precontractual exchanges, which is another way to minimize the risks of agents’ misrepresentations. While machine bias is a genuine and legitimate concern, robots will not lie unless programed to do so. For example, firms can be incentivized to use potentially pre-approved platforms that are programed to provide information to consumers rather than to manipulate them.[[267]](#footnote-267) As mentioned with regard to recordings, the design of these platforms can be a factor that enforcement agencies and courts can consider when determining future disputes. Here too, the costs of employing such measures and their possible unintended consequences should be carefully evaluated.[[268]](#footnote-268)

To further impel salespeople to be careful in their representations, the law can impose personal responsibility on them. Holding agents liable for misrepresentations will encourage them to be more careful and accurate when making oral statements. The higher the risks and stakes, the more cautious a salesperson would be. Furthermore, the mere fact that an individual knows that their behavior will be reviewed ex post encourages more thoughtful behavior ex ante.[[269]](#footnote-269)

The most extreme version of such personal liability would take the form of heightened fiduciary duties.[[270]](#footnote-270) In the United States, many types of agents, advisors, or intermediaries bear fiduciary duties. These include lawyers, guardians, corporate directors, trustees, and majority shareholders, among others. In the context of financial products, some salespeople already have fiduciary duties toward consumers. For example, investment advisors have a fiduciary duty under the Investment Advisers Act of 1940. Employers that sponsor retirement plans also have a fiduciary duty toward employees participating in those plans.[[271]](#footnote-271) However, most salespeople and firms’ agents bear no fiduciary responsibilities toward consumers.

 Imposing fiduciary duties on sellers could discourage them from making manipulative promises to induce consumers to make purchases. However, while intuitively appealing, placing legal liability or fiduciary responsibility on salespeople is not a panacea. First, mandating such duties would impose high administrative and compliance costs. Second, salespeople might still be pressured by firms to manipulate or mislead consumers, while consumers may not remember precisely with whom they spoke, rendering personal liability much more difficult, if not impossible, to impose. Moreover, even if the wrongdoer *is* identified, initiating legal procedures against the firm rather than its agents may be more economically sensible, as firms typically have far more resources than individual agents.

In addition, motivated firms might attempt to circumvent such a measure by providing agents with insurance against claims,[[272]](#footnote-272) in which case the imposition of liability on agents could actually harm consumers in at least two ways.[[273]](#footnote-273) First, firms would likely pass some of these additional insurance costs onto consumers, charging consumers an additional premium. Second, an “insurance to mislead” might create fertile ground for even more aggressive misleading selling statements (unless insurance companies refuse to insure firms for *intentional* misstatements and only cover negligent misrepresentations). Thus, if regulators decide to impose fiduciary responsibilities on sales agents, careful consideration should be given to preventing firms from shielding agents through insurance. Lastly, even if firms do not insure agents, it has already been noted that agents are often motivated and incentivized by the firm to sell aggressively, making it unfair and less effective to place full responsibility on the agents.

A possibly effective measure to consider seriously is imposing personal liability on marketing executives. While not a complete solution, this option does have some important potential advantages. Marketing executives typically have most of the responsibility for the firm’s marketing strategy, and rank relatively high in a firm’s hierarchy. They participate in crafting incentive schemes for salespeople, some of which could encourage a toxic corporate culture concerning people’s ethicality.[[274]](#footnote-274)

Marketing executives are more powerful and more knowledgeable than are salespeople, and better appreciate the problematic nature of misleading oral interactions. They also have more to lose, in terms of wealth and reputation, than do ordinary salespeople. Placing much of the responsibility on executives also frees consumers from the need to recall the specific agent with whom they interacted. Making marketing executives’ legal responsibility commensurate with their status and authority within the firm may thus prove beneficial.[[275]](#footnote-275)

Policymakers may also choose to revise enforcement priorities, allocating more resources to the problem of misleading oral interactions. Accordingly, another measure that consumer organizations and enforcement agencies may consider is mystery shopping.[[276]](#footnote-276) Like telephone recordings, mystery shopping has been used by firms mainly to evaluate the service in their stores. However, federal and state agencies can advance a more deliberate and systematic use of mystery shoppers.

Section 5 of the Federal Trade Commission Act authorizes the FTC to take appropriate action against unfair or deceptive acts or practices.[[277]](#footnote-277) In this context, the FTC has broad investigative powers and enforcement authority.[[278]](#footnote-278) In fact, the FTC interprets its legal authority to include conducting undercover investigations. Thus, on occasion, FTC investigators pose as consumers to directly experience real-life sales scenarios.[[279]](#footnote-279) The FTC also has used undercover investigators to investigate whether media industry players were complying with their self-regulatory systems.[[280]](#footnote-280) However, due to legal and ethical issues, the FTC employs this practice only infrequently.

Regulatory and enforcement agencies should use this method to scrutinize misleading oral promises more regularly and systematically. By employing mystery shoppers, consumer organizations and enforcement agencies can get a real-world, neutral impression of how salespeople present products and services. Unlike harmed consumers, mystery shoppers can be more objective in reporting their experiences. They can also be better prepared and briefed on recording their exchanges with the firm’s agents or representatives. Importantly, this will ensure that enforcement efforts do not rely on faulty, biased, and imperfect human memory.[[281]](#footnote-281) We also suggest that undercover investigations ideally should not rely solely on the employees of enforcement and consumer agencies. Keeping in mind that salespeople may treat different consumers differently,[[282]](#footnote-282) it is also essential to consider the demographics of mystery shoppers.

To supplement these efforts and proposals, policymakers and consumer organizations can also embark on consumer informational campaigns. Experimental evidence suggests that informing consumers about the law can influence their perceptions.[[283]](#footnote-283) Along these lines, consumer educational campaigns may seek to better inform consumers about the practice of misleading oral interactions and the risk of manipulating trust. Furthermore, educational campaigns may endeavor to make related complaints and legal cases more salient to consumers. A not exhaustive list of such tools includes the use of human narratives and stories (rather than legalese), humoristic clips, comics, social media, celebrities, and influencers.

Additional educational initiatives may include literacy efforts in schools and local community centers and programs targeting marginalized communities. Educating consumers will make them less likely to fall prey to such practices, which, in turn, weakens an agents’ motivation to be manipulative. Though not an ultimate remedy in isolation, raising consumers’ awareness about their rights may prove to play an important role in protecting them from oral misrepresentations.

Finally, we are skeptical about the effectiveness and appropriateness of traditional disclosure requirements.[[284]](#footnote-284) Consider, for example, the Federal Trade Commission Used Motor Vehicle Trade Regulation Rule.[[285]](#footnote-285) The Rule was a response to car dealers’ notorious false representations, “particularly about the extent of the seller's liability for post-sale problems.”[[286]](#footnote-286) Attempting to mitigate this practice, the Rule requires car dealers to conspicuously and clearly warn the customer by stating, “IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing.”[[287]](#footnote-287)

This disclosure employs plain language and is relatively straightforward. Nonetheless, we suspect that salespeople can find ways to undermine its effectiveness.[[288]](#footnote-288) For example, salespeople may allay consumers’ concerns by telling them that they should not worry, assuring them that the fine print is merely a formality, explaining that the terms would not govern the parties’ relationship, or even stating in a meaningless way that the disclosure is an FTC requirement.[[289]](#footnote-289) Ultimately, formalistic approaches such as mandated disclosures may prove counterproductive by providing salespeople with a shield against complaints and a de facto authorization to deceive.

## Judicial Tools and other ex post Measures

Efforts to minimize toxic oral promises ex ante are important. However, they are unlikely to eliminate the practice. Despite genuine mitigating efforts, some agents may still employ, at times unintentionally, misleading oral promises. This Section proposes some ex post measures that can further mitigate manipulative precontractual oral promises.

First and foremost, the law should not rely on consumers to discipline sellers via legal action. Private enforcement is not likely to yield the desired equilibrium between consumers and sellers. As explained, the average consumer is not good at detecting oral lies. Even when they detect a lie, consumers are unlikely to complain or otherwise initiate legal procedures against firms. As repeatedly emphasized, this is especially true when the form contract contains terms that may silence consumers. This concern, in turn, suggests that public enforcement mechanisms should be seriously considered. Accordingly, public agencies and consumer organizations should be allowed to litigate cases on behalf of aggrieved, misled consumers.[[290]](#footnote-290)

Furthermore, we join others who have called for the revision and crafting of the law of merger clauses and the parol evidence rule so as to better protect consumers. In this respect, we agree that “the parol evidence rule… allows merchants to mislead consumers by making oral representations that are inconsistent with the writings.”[[291]](#footnote-291) As Burnham observes, the parol evidence rule “indirectly favors the party with stronger bargaining power,” who is likely to make oral representations the weaker party seeks to escape.[[292]](#footnote-292)

Unfortunately, some courts rule that consumers should read the fine print and be held to it.[[293]](#footnote-293) These courts show a willingness to enforce the contractual language that bars parol evidence and excludes precontractual representation.[[294]](#footnote-294) Our analysis raises severe doubts about this approach. We propose that courts adopt a significantly narrower interpretation of the “duty to read” in the context of consumer contracts.

Companies know that consumers will typically rely on the oral representations of their salespeople. Therefore, they include no-reliance provisions to immunize the contradictory or qualifying fine print from judicial scrutiny, knowing that such clauses might discourage defrauded consumers from taking action. In view of the documented chilling effect of “merger,” “integration,” or “no-reliance” clauses on consumers, we also suggest restricting the use of these clauses in standardized consumer contracts where the consumer is not represented by a lawyer.[[295]](#footnote-295) For instance, courts can rule that such clauses in consumer contracts are against public policy and thus unenforceable (unless a lawyer represented the consumer).

Courts can also apply other judicial tools in deciding cases of misleading oral promises. One such tool involved the duty of good faith and fair dealing. In this context, some courts have recognized a duty to negotiate in good faith.[[296]](#footnote-296) Misleading precontractual oral statements that are negated by fine print that consumers do not read may fall into the category of “bad faith.”[[297]](#footnote-297) Indeed, “[b]ad faith is lack of ‘honesty in fact,’ and … a party who makes an intentional material misrepresentation during negotiations probably exhibits bad faith.”[[298]](#footnote-298)

Courts may also scrutinize terms that deny the validity of oral statements employing the doctrine of unconscionability.[[299]](#footnote-299) The unconscionability doctrine is the primary tool in striking down unfair contract terms.[[300]](#footnote-300) Generally, the doctrine has a procedural and a substantive component,[[301]](#footnote-301) with a sliding scale relationship.[[302]](#footnote-302) Courts are willing to relax the evidence required to sustain the procedural unfairness if the term is severely oppressive and vice versa.[[303]](#footnote-303) Typical cases of misleading oral promises likely satisfy both the procedural and the substantive unfairness components of the doctrine.

Misleading oral promises often exploit social norms, including accepting a form contract without scrutinizing it.[[304]](#footnote-304) They further exploit, at times cynically, consumer trust.[[305]](#footnote-305) It is important to recall that trust is an essential dimension in our human interactions. Therefore, acts that provoke distrust are likely to trigger negative responses that people prefer to avoid. Accordingly, buyers will tend to believe sellers’ oral statements and refrain from reading the fine print. Such behavior maintains trust, conformity, and cooperation. Cunning sellers can take advantage of this natural human trait, signaling to consumers trust and false intimacy or affection.[[306]](#footnote-306) Consequently, consumers will not have a reasonable opportunity to consider the substantially unfair fine print that negates oral promises. Clearly, this makes the imposition of the duty to read imprudent.

Section 211 of the Restatement (Second) of Contracts depicts another judicial path that courts can take. This section reads that ‘‘[w]here the other party has reason to believe that the party manifesting…assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.’’Accordingly, there is no apparent reason to believe that consumers would simply assent to fine print terms that contravene the promises agents previously made.

Following this logic, one can plausibly argue that firms that turn a blind eye toward (let alone encourage) misleading oral promises engage in fraud.[[307]](#footnote-307) State laws and courts can thus lower the bar for consumer fraud claims in these situations.[[308]](#footnote-308) For example, they can waive the requirement to prove the seller’s intention or knowledge. Alternatively, they can shift the burden of proof and presume the seller’s knowledge, placing the burden on the firm to prove the contrary. Such an approach may be specifically warranted where firms construct payment schemes—such as rewarding agents for closing deals (e.g., in the form of commissions)—that encourage salespeople to mislead consumers orally. Likewise, courts can lower the required standard for satisfying causation and consumer reliance,[[309]](#footnote-309) while realizing that often even conspicuous disclosures cannot effectively inform consumers.[[310]](#footnote-310)

Ultimately, firms seek to maximize their profits. Thus, it is imperative to be cognizant of both the relevant legal doctrines and firms’ financial implications and incentives.[[311]](#footnote-311) To ensure proper deterrence and improve firms’ compliance, misleading firms, their marketing executives, and their salespeople, could be subject to punitive civil fines when employing misleading oral promises.[[312]](#footnote-312) Imposing monetary penalties is not an unfamiliar concept in consumer law cases.[[313]](#footnote-313)

Beyond judicial or administrative control over misleading oral interactions, consumer educational campaigns can prove beneficial in this context as well. At least in laboratory settings, informed consumers were more morally and legally critical of misleading practices.[[314]](#footnote-314) Along these lines, informed participants expressed greater willingness to use legal and meta-legal means to insist upon their rights.[[315]](#footnote-315)

Of course, there is no guarantee that this attitude shift will translate into real-world legal action, particularly given the small-dollar claims typically involved.[[316]](#footnote-316) The current legal landscape, which supports class action waivers and mandatory arbitration clauses in consumer contracts, exacerbates this challenge. We therefore echo the call to provide more substantial economic incentives to lawyers who represent consumers in such cases.[[317]](#footnote-317) The Consumer Protection Act in Montana may serve as an example.[[318]](#footnote-318) Under this Act, successful plaintiffs “may recover minimum damages, treble damages, and attorneys’ fees, provisions clearly intended to have a deterrent effect on those who engage in deceptive practices.”[[319]](#footnote-319)

Similarly, educational campaigns should urge consumers to complain and air their grievances. To begin, consumers should be encouraged to complain to consumer organizations and law enforcement agencies. These complaints may further help identify wrongdoers, prioritize enforcement resources and efforts, and tailor educational and policy efforts. As part of these educational efforts, consumers can also be encouraged to share their complaints using online platforms, including those that rank or grade firms. Many of these platforms, including Amazon, eBay, Google, Facebook, Yelp, and TripAdvisor, to name a few, have clear reputational impacts on firms. Consumer complaints may help firms channel their improvement efforts and deter agents from behaving unethically.[[320]](#footnote-320) To encourage consumers to complain, agencies like the FTC should make their complaining processes as easy and accessible as possible.[[321]](#footnote-321)

Interestingly, empirical data suggests that public disclosure of consumer complaints can serve as an effective consumer protection measure. A recent study examined this point by referring to the U.S. Consumer Financial Protection Bureau (“CFPB”) complaint database.[[322]](#footnote-322) Specifically, the study investigated the effectiveness of publicly disclosing the CFPB’s complaints in protecting mortgage borrowers.[[323]](#footnote-323) The study found that banks that received more complaints experienced a greater reduction in mortgage applications.[[324]](#footnote-324) Moreover, the research found the effect to be stronger “in areas with more sophisticated consumers and higher credit competition, and for banks receiving more severe complaints.”[[325]](#footnote-325) Therefore, the authors concluded that disclosing the data regarding consumer complaints may “enhance product market discipline and consumer financial protection.”[[326]](#footnote-326) We believe this can be true in our context too.

\* \* \* \* \*

Before concluding, we wish to address an important caveat. One might argue that our suggestions do not account for the risk of post-contractual exploitation by aggrieved consumers. According to this line of reasoning, our suggestions expose firms to ex post opportunistic claims. Realizing the courts’ inclination to protect non-drafting parties, consumers might make false claims about oral interactions.[[327]](#footnote-327) Furthermore, memory is fallible and is often shaped by worldviews, biases, and aspirations.[[328]](#footnote-328) In addition, people’s recollections are imprecise and prone to mistakes (especially self-serving ones).[[329]](#footnote-329) Thus, consumers might make erroneous yet honest claims about what sellers said during the negotiation process.[[330]](#footnote-330) Our suggestion to better protect consumers, this argument goes, neglects to consider the potential harm that such protections might inflict on firms.

Our response to this important concern is fivefold. First, we strongly prefer ex ante measures tailored to *prevent* toxic oral promises and educate consumers over ex post measures that facilitate consumers’ litigation efforts. Second, consumers are not likely to be very familiar with legal doctrines and thus may not be too motivated to litigate in the first place.[[331]](#footnote-331) Third, consumers encounter many limitations in seeking justice, and it is not realistic to expect that they will flood the courts with fabricated cases. Fourth, we have already seen how the fine print may chill consumer action and weaken consumers’ motivation to insist upon their rights. Fifth, there is no reason to believe that consumers’ opportunism and faulty memory pose a greater risk than firms’ incentives to exploit consumers' or salespeople’s enthusiasm to close deals. If anything, the evidence seems to indicate the contrary.[[332]](#footnote-332) In the end, our suggestions should be measured against the current state of the world, not against a perfect, utopian reality.

# Conclusion

Consumers face an ever-increasing number of complex products and services. It is inevitable that they ask salespeople and agents questions about the products, services, and transactions they consider. It is not foolish for consumers to generally trust the answers they get. In fact, trusting agents is quite natural and even desirable. Similarly, it is also not negligent for a consumer to not read the fine print, not understand it, or discount its risks.

While navigating their way through a complex and demanding world, consumers may fall into traps.[[333]](#footnote-333) Unfortunately, some of these traps are cleverly designed by firms and salespeople, who exploit consumers’ trust and psychological vulnerabilities. This Article argues that such traps often take the form of misleading oral promises, which sellers find subtle ways to excuse. The Article thus proposes a more realistic and flexible approach to scrutinizing misleading oral promises. Such an approach, we believe, can help shift the focus from excessive formality that relies on fine print toward a much-needed humanistic approach that acknowledges nuanced realities and human fallibility.

1. \* Professor of Law, Victoria University of Wellington. J.S.D., LL.M (Yale University). [↑](#footnote-ref-1)
2. ♦ Mori Lazarof Professor of Legal Research and Associate Dean for Research Bar-Ilan University School of Law. Ph.D. (UC Berkeley). [↑](#footnote-ref-2)
3. † Assistant Professor, UCLA School of Law. S.J.D., LL.M. (Harvard University).

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4. Keith B. Anderson, Fed. Trade Comm’n, Mass-Market Consumer Fraud in the United States: A 2017 Update (2019), <https://www.ftc.gov/system/files/documents/reports/mass-market-consumer-fraud-united-states-2017-update/p105502massmarketconsumerfraud2017report.pdf> (reporting that 15.9% of participants—representing 40 million U.S. adult consumers—had been victims of consumer fraud during 2017). [↑](#footnote-ref-4)
5. *See, e.g.*, Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 Cal. L. Rev. 51 (2013); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud,* 72 Stan. L. Rev. 503 (2020). [↑](#footnote-ref-5)
6. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 436 (5th Cir. 2007) (concluding that since the coverage exclusion clause is “unambiguous and not otherwise voidable under state law,” then “it must stand”). *See also* United States Fid. & Guar. Co. v. Knight, [882 So. 2d 85](https://www.courtlistener.com/opinion/1702044/united-states-fidelity-guar-v-knight/), \*436 92 (Miss. 2004) (“[I]nsurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain and to ensure that rates have been properly calculated”). [↑](#footnote-ref-6)
7. Williams v. Spitzer Autoworld Canton, L.L.C., 913 N.E.2d 410, 417 (Ohio 2009) (holding that the parol evidence rule barred the consumer-plaintiff from presenting extrinsic evidence contradicting the parties’ final written agreement). [↑](#footnote-ref-7)
8. Curtis v. Bill Byrd Automotive, Inc., 579 So. 2d 590 (Ala. 1990). Another typical example involves mortgage agreements. Lenders often promise borrowers fixed-rate mortgages for specific time frames (e.g., a five-year term). However, before the time frame expires, lenders sometimes invoke a contractual term that allows them to apply a higher interest rate. *See, e.g.,* Belleville Nat’l Bank v. Rose, 119 Il. App. 3d 56, 456 N.E.2d 281 (Il. App. Ct. 5th Dist. 1983). [↑](#footnote-ref-8)
9. The distinction can be based, for instance, on the degree of intention or malice and the magnitude of the gap between the oral promise and reality. [↑](#footnote-ref-9)
10. We therefore use terms such as “toxic,” “misleading,” and “manipulative” interchangeably. Though they convey different behaviors, they are all largely equally relevant to our analysis. [↑](#footnote-ref-10)
11. Douglas G. Baird, Reconstructing Contracts 123 (2013). [↑](#footnote-ref-11)
12. *Id.* [↑](#footnote-ref-12)
13. *See, e.g.*, Bauer v. Giannis, 834 N. E. 2d 952, 960 (III. App. Ct. 2005); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 648 (2009); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud,* 72 Stan. L. Rev. 503 (2020). [↑](#footnote-ref-13)
14. *See, e.g.,* David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395–1448 (2005). Castrol Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993) (defendant asserted that its claims regarding superior engine protection were common marketplace puffery, and thus did not violate the Lanham Act); Leal v. Holtvogt, 702 N.E.2d 1246 (1998) (concluding that the seller’s statements regarding warranties were no more than “puffing”). [↑](#footnote-ref-14)
15. *See, e.g.,* Tirapelli v. Advanced Equities, Inc., 813 N.E.2d 1138, 1144 (III. App. Ct. 2004); Yocca v. Pittsburgh Steelers Sports, Inc., 854 A. 2d 425 (Pa. 2004); Davis v. G.N. Mortgage Corp., 396 F. 3d 869 (7th Cir. 2005). *See also* Torres v. State Farm, 438 So. 2d 757,758–59 (Ala. 1983). In most jurisdictions, legislators enacted consumer fraud statutes to enable consumers to initiate fraud cases without having to prove “reasonable reliance” on the seller’s misrepresentation. Nevertheless, some courts have interpreted even these statutes as requiring “reasonable” reliance to recover for fraud and refused to void contracts that disclaimed or qualified sellers’ oral misrepresentations as long as consumers had an opportunity to review the terms before signing. *See, e.g.,* Stark & Choplin, *supra* note 10, at 623; Victor Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 70 (2005). [↑](#footnote-ref-15)
16. *See, e.g.,* Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (2014); Press Release, Better Bus. Bureau, *Consumer Fraud Task Force Warns Consumers to Be Careful When Shopping Online* (Aug. 4, 2017) (recommending that consumers read the fine print to avoid falling prey to fraudulent or unfair business practices); Bob Sullivan, *It Pays to Read the Fine Print in Contracts*, Am. Ass’n of Retired Press (Sept. 9, 2019), <https://perma.cc/5G7V-Y3QW> (advising consumers that standardized contracts may disclaim certain assertions made by sellers or reveal that the advertised assertions are too good to be true). [↑](#footnote-ref-16)
17. *See, e.g.,* Urschel Farms, Inc. v. Dekalb Swine Breeders, Inc., 858 F. Supp. 831 (N.D. Ind. 1994) (holding that buyers of boars failed to show reasonable reliance on the sellers’ misrepresentations); Sofaer Glob. Hedge Fund v. Brightpoint, Inc., No. 1:09-CV-1191-TWP-DML, 2011 WL 2413831 (S.D. Ind. June 10, 2011) (“Plaintiff’s unduly optimistic behavior was not reasonably prudent and, to the extent plaintiff relied on defendant’s ‘99.9% done’ statement, such reliance was unreasonable.”). [↑](#footnote-ref-17)
18. *See infra* Part I. [↑](#footnote-ref-18)
19. *See* *infra* note 23. [↑](#footnote-ref-19)
20. *See, e.g.,* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. Rev. 240 (2013) (finding that end-user license agreements (EULAs) are difficult to read);Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices,* 49 Wake Forest L. Rev. 1431 (2014) (documenting the unreadability of social network user agreements); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B. C. L. Rev. 2255 (2019) (finding sign-in-wrap consumer contracts generally unreadable). [↑](#footnote-ref-20)
21. For a general discussion of the silencing effect of consumer form contract terms and their impact on consumers’ perception and behavior, seeMeirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market,* 9 J. Leg. Analysis 1 (2017); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 Ala. L. Rev. 1031 (2019); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017)*.*  [↑](#footnote-ref-21)
22. Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 Stan. L. Rev. 1269 (2015). [↑](#footnote-ref-22)
23. Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract,* 47 Wake Forest L. Rev. 843, 853 (2012)*.*  [↑](#footnote-ref-23)
24. *See generally* Yuval Feldman, The Law of Good People: Challenging States' Ability to Regulate Human Behavior (2018). [↑](#footnote-ref-24)
25. *See infra* Part II. [↑](#footnote-ref-25)
26. *See, e.g.,* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1 (2014) (providing empirical evidence that consumers very rarely read online EULAs); *see also* Ian Ayres & Alan Schwartz, *[The No Reading Problem in Consumer Contract Law](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0402385103&pubNum=0001239&originatingDoc=I10e9de7bb9a211e498db8b09b4f043e0&refType=LR&fi=co_pp_sp_1239_579&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)" \l "co_pp_sp_1239_579)*[, 66 Stan. L. Rev. 545, 545 (2014)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0402385103&pubNum=0001239&originatingDoc=I10e9de7bb9a211e498db8b09b4f043e0&refType=LR&fi=co_pp_sp_1239_579&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)" \l "co_pp_sp_1239_579); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L. Rev. 679, 680. [↑](#footnote-ref-26)
27. The literature here is vast. For some examples, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 Colum. L. Rev. 629 (1943); Karl n. Llewellyn, the common law tradition: deciding appeals 362–71 (1960) (analogizing signing a form contract to “lay[ing] [one’s] head into the mouth of a lion); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 Calif. L. Rev. 1151, 1162 (1976) (writing that the majority of standardized terms “are candidates for nonenforcement”); Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction*, 96 Harv. L. Rev. 1174, 1176, 1242, 1250–55, 1258 (1983) (suggesting that non-negotiated, non-salient boilerplate terms ought to be considered presumptively unenforceable); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, U. Chi. L. Rev. 1203 (2003); Oren Bar-Gill, Seduction by Contract (2012) (explaining how firms can exploit consumers’ cognitive biases); Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) (criticizing the current legal treatment of standard form contracts); Furth-Matzkin 2017 *supra* note 18 (documenting the prevalence of unenforceable terms in residential leases). [↑](#footnote-ref-27)
28. For notable exceptions, *see, e.g.,* Korobkin, *supra* note 2; Furth-Matzkin & Sommers, *supra* note 2. [↑](#footnote-ref-28)
29. *Cf.* People v. Charter Communications, Inc*.*, 2018 NY Slip Op 30253(U) (2018). [↑](#footnote-ref-29)
30. *See, e.g.,* Cirillo v. Slomin’s Inc., 768 N.Y.S.2d 759, 768 (N.Y. Sup. Ct. 2003). [↑](#footnote-ref-30)
31. While the parol evidence rule precludes claims of “fraud in the inducement,” it allows for claims of “fraud in the execution.” This distinction prohibits nondrafting parties from challenging the enforcement of a signed writing on the grounds that prior misrepresentations, which are subsequently disclaimed in the writing, induced them to sign. However, nondrafters may invoke the fraud rule if the drafting party represented that the writing itself contained representations that are different from those it actually included. *See* Korobkin, *supra* note 2; Nancy S. Kim, *Relative Consent and Contract Law*, 18 Nev. L.J. 165 (2017). [↑](#footnote-ref-31)
32. *See, e.g.,* Carpetland U.S.A. v. Payne (1989), 536 N.E. 2d 306 (Ind. Ct. App.). [↑](#footnote-ref-32)
33. *Cf.* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007). [↑](#footnote-ref-33)
34. *Cf.* In re First Commodity Corp. of Boston (1987), 119 F.R.D. 301 (D. Mass.) (salesperson downplaying the importance of warnings in securities prospectus while suggesting they can be ignored); Dynamic Energy Sols., LLC v. Pinney, 387 F. Supp. 3d 176 (N.D.N.Y. 2019) (plaintiff’s agent misrepresented to defendant that the document he singed was non-binding). [↑](#footnote-ref-34)
35. When drafting consumer contracts, firms will often employ such clauses. For example, they may use a “no-representation” clause declaring that the firm and its salespeople have made no representations other than those detailed in the form contract. Second, drafters may include a “no-reliance” clause, stating that the consumer does not rely on any prior representations made by the firm or its agent. Third, sellers may use a “merger” or “integration” clause, stipulating that the written agreement supersedes any prior communications between the parties. Such a clause will typically state that any such communications cannot be relied upon to supplement or modify the agreement. *See, e.g.*, Stark & Choplin, *supra* note 10, at 618–19; Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 Val. U. L. Rev. 485, 489–90 (1999); Joseph Wylie, *Using No-Reliance Clauses to Prevent Fraud-in-the-Inducement Claims,* 92 Ill. B.J. 536 (2004); Elizabeth Cumming, *Balancing the Buyer’s Right to Recover for Precontractual Misstatements and the Seller’s Ability to Disclaim Express Warranties*, 76 Minn. L. Rev. 1189, 1202 n.55 (1992) (referring to Black’s Law Dictionary 726 (5th ed. 1979)). [↑](#footnote-ref-35)
36. Another type of misleading oral interaction that warrants attention occurs when the salesperson makes a deceptive statement about the product or its attributes, while the contract remains silent about the issue. For example, a salesperson may tell a consumer that the diet pills on offer are effective when they are not. Similarly, salespeople may unjustly disparage competitors. While much of the analysis below is relevant to these types of fraud, they are beyond the scope of this Article. [↑](#footnote-ref-36)
37. *See infra* Part III. [↑](#footnote-ref-37)
38. *See infra* Part II; *see also* R. Ted Cruz & Jeffery J. Hinck, *Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 Hastings L.J. 635 (1996) (discussing ex post discrimination in consumer transactions); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 Pepp. L. Rev. 279 (2012) (explaining how less vocal consumers or those who are perceived to be less worthy based on gender or race may find it harder to receive redress); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap,* 51 Conn. L. Rev. 69 (2019) (discussing firms’ strategies of being selectively lenient at the ex post stage toward some groups of consumers); Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 Vand. L. Rev. 929 (2020) (discussing the potential role of assertive and pedantic consumers in disciplining sellers and advancing efficient markets); Meirav Furth-Matzkin, *The Distributive Impacts of Nudnik-Based Activism*, Vand. L. Rev. En Banc (forthcoming 2021); Meirav Furth-Matzkin, *Selective Enforcement of Consumer Contracts: Evidence from the Retail Market* (working paper) (on file with authors) (finding that sellers are significantly more likely to accept non-receipted returns despite a formal receipt requirement when consumers complain). [↑](#footnote-ref-38)
39. While our analysis is general in nature, we focus more on brick-and-mortar sales, which still account for the vast majority of consumer spending in the United States. *See* US Department of Commerce *Quarterly Retail E-Commerce Sales,* US Census Bureau News (Feb. 19, 2020), <https://www2.census.gov/retail/releases/historical/ecomm/19q4.pdf>; *Retail Sales Share Forecast in the United States for 2020, by Channel*, Statista (Feb. 6, 2020), <https://www.statista.com/statistics/1094319/retail-sales-share-forecast-by-channel/>. [↑](#footnote-ref-39)
40. Accordingly, pre-contractual written statements are beyond the scope of this Article. For one study that finds unrealistically positive and imbalanced written representations of service attributes, see Li Du & Shmuel I. Becher, *Genetic and Genomic Consultation: Are We Ready for Direct-to-Consumer Telegenetics?*, 9 Front. Genet. (2018) [↑](#footnote-ref-40)
41. *See infra* Part IV. [↑](#footnote-ref-41)
42. *See* Anderson, 2017 Update, *supra* note 1; *see also Protecting Seniors from Fraud: Hearing Before the S. Spec. Comm. on Aging*, 106th Cong. 29 (2000) (statement of Rolando Berrelez, Rep. on Consumer Protection, Fed. Trade Comm’n); Fed. Trade Comm’n, Combatting Fraud in African American and Latino Communities: The FTC’s Comprehensive Strategic Plan 1–2, n.6 (2016), <https://www.ftc.gov/system/files/documents/reports/combating-fraud-african-american-latino-communities-ftcs-comprehensive-strategic-plan-federal-trade/160615fraudreport.pdf>*.* [↑](#footnote-ref-42)
43. *See supra* note 19*. See also* Michael Simkovic & Meirav Furth-Matzkin, *Proportional Contracts* (working paper, on file with the authors). [↑](#footnote-ref-43)
44. *See* *generally* Karen S. Cook, *Trust in Society*, *in* Trust in Society xi (Karen S. Cook ed., 2001); Russell Hardin, *Conceptions and Explanations of Trust, in* Trust in Society 3(Karen S. Cook ed., 2001); Karen S. Cook & Robin M. Cooper, *Experimental Studies of Cooperation, Trust, and Social Exchange*, *in* Trust and Reciprocity: Interdisciplinary Lessons from Experimental Research 209 (Elinor Ostrom & James Walker eds., 2003); Tom R. Tyler, *Why Do People Rely on Others? Social Identity and Social Aspects of Trust*, *in* Trust in Society 285 (Karen S. Cook ed., 2001). [↑](#footnote-ref-44)
45. *See, e.g.,* William O. Bearden et al., *Measurement of Consumer Susceptibility to Interpersonal Influence,* 15 J. Consumer Res. 473 (1989); Emily A. Goad & Fernando Jaramillo, *The Good, the Bad and the Effective: A Meta-Analytic Examination of Selling Orientation and Customer Orientation on Sales Performance,* 34 J. Pers. Selling & Sales Mgmt. 285 (2014). [↑](#footnote-ref-45)
46. *See* Paul M. Herr et al., *Effects of Word-of-Mouth and Product-Attribute Information on Persuasion: An Accessibility-Diagnosticity Perspective*, 17 J. Consumer Res. 454 (1991). [↑](#footnote-ref-46)
47. Tyler, *supra* note 39, at 291. Such perceptions are frequently established by the cues or impressions people receive when others speak to them, rather than by the content of what is said. *See* Herr et al., *supra* note 41. Consumers can also be affected by non-verbal cues. *See, e.g.,* Shmuel I. Becher & Yuval Feldman, *Manipulating, fast and slow: The law of non-verbal market manipulations*, 38 Cardozo L. Rev. 459 (2016). [↑](#footnote-ref-47)
48. *See generally* Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (2020); Cook, *supra* note 39, at xxxvii. [↑](#footnote-ref-48)
49. John E. Swan et al., *Customer Trust in the Salesperson: An Integrative Review and Meta-Analysis of the Empirical Literature*, 44 J. Bus. Res. 93 (1999);Klaus Wertenbroch & Bernd Skiera, *Measuring Consumers' Willingness to Pay at the Point of Purchase*, 39 J. Mkt. Res. 228 (2002). [↑](#footnote-ref-49)
50. *See, e.g.,* William O. Bearden et al., *Measurement of Consumer Susceptibility to Interpersonal Influence,* 15 J. Consumer Res. 473 (1989); Emily A. Goad & Fernando Jaramillo, *The Good, the Bad and the Effective: A Meta-Analytic Examination of Selling Orientation and Customer Orientation on Sales Performance,* 34 J. Pers. Selling & Sales Mgmt. 285 (2014). [↑](#footnote-ref-50)
51. *See, e.g.,* Arch Woodside & William Davenport, *The Effect of Salesman Similarity and Expertise on Consumer Purchasing Behavior*, 11 J. Market Res. 198 (1974) (discussing the effect of salespeople’s perceived competence and expertise on consumers’ purchasing behavior). [↑](#footnote-ref-51)
52. *See, e.g.,* Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857, 858 (2005). [↑](#footnote-ref-52)
53. This is true for both offline and online markets: websites can also gain consumer trust. *See, e.g.,* Ming-Hsien Yang et al., *The Effect of Perceived Ethical Performance of Shopping Websites on Consumer Trust*, 50 J. Computer Info. Sys. 15 (2009); Paolo Guenzi & Georges Laurent, *Interpersonal Trust in Commercial Relationships*, 44 Eur. J. Mkt. 114 (2010). [↑](#footnote-ref-53)
54. *See, e.g.,* Ronald E. Milliman & Douglas L. Fugate, *Using Trust-Transference as A Persuasion Technique: An Empirical Field Investigation,* 8 J. Pers. Selling & Sales Mgmt. 1 (1998)*; see also* David De Mezaet al., *Disclosure, Trust and Persuasion in Insurance Markets*, (Inst. for the Study of Labor, IZA Discussion Paper No. 5060, 2010)*,* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648345>*.*  [↑](#footnote-ref-54)
55. Cialdini’s book on influence and persuasion has become the bible of behavioral approaches to marketing. *See* Robert B. Cialdini, Influence: The Psychology of Persuasion (1984). [↑](#footnote-ref-55)
56. *See, e.g.,* John E. Swan & Jones Nolan Johannah, *Gaining Customer Trust: A Conceptual Guide for the Salesperson,* 5 J. Pers. Selling & Sales Mgmt. 39 (1985). *See also* Kenny Basso et al., *The Impact of Flattery: The Role of Negative Remark,* 21 J. Retail. & Cons. Serv. 185 (2014); Rosemary P. Ramsey & S. Sohi Ravipreet, *Listening to Your Customers: The Impact of Perceived Salesperson Listening Behavior on Relationship Outcomes, 25* J. Acad. Mkt. Sci. 127 (1997). [↑](#footnote-ref-56)
57. *See, e.g.,* Douglas Rushkoff, Coercion: Why We Listen to What "They" Say(1999) (detailing how sellers use marketing, advertising, retail atmospherics and other techniques to manipulate consumers and inhibit rational decision-making). [↑](#footnote-ref-57)
58. *See, e.g.,* Bella M. DePaulo, *Spotting Lies: Can Humans Learn to Do Better?*, 3 Current Directions Psychol. Sci. 83 (1994). [↑](#footnote-ref-58)
59. For a recent account see Marta Serra-Garcia & Uri Gneezy, *Mistakes and Overconfidence in Detecting Lies* (working paper). [↑](#footnote-ref-59)
60. *See, e.g.,* Bruce K. Pilling & Sevo Eroglu, *An Empirical Examination of the Impact of Salesperson Empathy and Professionalism and Merchandise Salability on Retail Buyers' Evaluations*, 14 J. Pers. Selling & Sales Mgmt. 45 (1994). [↑](#footnote-ref-60)
61. *See, e.g.,* Barry J. Babin et al., *Salesperson Stereotypes, Consumer Emotions, and their Impact on Information Processing*, 23.2 J. Acad. Mktg. Sci. 94 (1995). [↑](#footnote-ref-61)
62. *See, e.g.,* Ramsey Rosemary P. & Ravipreet S. Sohi, *Listening to Your Customers: The Impact of Perceived Salesperson Listening Behavior on Relationship Outcomes*, 25 J. Acad. Mktg. Sci. 127 (1997); Ko de Ruyter & Martin G. M. Wetzels, *The Impact of Perceived Listening Behavior in Voice to Voice Service Encounters*, 2 J. Serv. Res. 276, 281 (2000). [↑](#footnote-ref-62)
63. Note, however, that firms increasingly use online design schemes, or “dark patterns,” to influence consumers’ emotions and trigger biases. *See, e.g.,* Ryan Calo, *Digital Market Manipulation*, 82 Geo. Wash. L. Rev. 995–1051 (2013); Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns* (Univ. of Chi. Pub. Law Working Paper Series, Paper No. 879, 2019). [↑](#footnote-ref-63)
64. *See, e.g.,* David Dunning, *Self‐Image Motives and Consumer Behavior: How Sacrosanct Self‐Beliefs Sway Preferences in the Marketplace*, 17 J. Cons. Psych. 237 (2007). [↑](#footnote-ref-64)
65. *See, e.g.,* Ziva Kunda, *The Case for Motivated Reasoning,* 108 Psyc. Bull. 480 (1990). [↑](#footnote-ref-65)
66. *See* Emily Balcetis & David Dunning, *What You Want to See: Motivational Influences on Visual Perception*, 91 J. Pers. & Soc. Psych.612 (2006);Emily Balcetis & David Dunning, *Cognitive Dissonance and the Perception of Natural Environments*, 18 Psych. Sci. 917 (2007); Jonathan R. Zadra & Gerald L. Clore, *Emotion and Perception: The Role of Affective Information*, 2 InterdisciplinaryRev. Cognitive Sci. 676 (2011). [↑](#footnote-ref-66)
67. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. Abnormal & Soc. Psychol. 129 (1954); *see also* Emily Pronin et al.*, Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self versus Others,* 111Psychol. Rev. 781 (2004); Dan M. Kahan et al., *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 Stan. L. Rev. 851 (2012) (finding that culturally motivated cognition influences how people interpret political demonstrations). [↑](#footnote-ref-67)
68. For an accessible review and explanation see Chris Mooney, *What is Motivated Reasoning? How Does It Work? Dan Kahan Answers,* Discover (May 6, 2011). [↑](#footnote-ref-68)
69. For a discussion of how people use ambiguity to deceive themselves see Jason Dana et al., *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 Econ. Theo. 67 (2007); *see also* Francesca Gino et al., *Motivated Bayesians: Feeling Moral While acting egoistically*, 30 J. econ. Percp. 189 (2016). For an experimental illustration of how legal ambiguity enhances the process of motivated reasoning and self-deception see Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal,* 84 N.Y.U. L. Rev*.* 980 (2009). [↑](#footnote-ref-69)
70. *Infra* Section II.C. [↑](#footnote-ref-70)
71. *See* Arthur S. Reber, The Penguin Dictionary of Psychology 151 (2d ed. 1995). [↑](#footnote-ref-71)
72. *See, e.g.*, Scott Plous*,* The Psychology of Judgment and Decision-making233 (1993); Stephanie M. Stern, *Outpsyched: The Battle of Expertise in Psychology-Informed Law*, 57 Jurimetrics J. 45, 53 (2016) (explaining that “we process information in ways that support our goals, including the goal of maintaining preexisting beliefs…”). [↑](#footnote-ref-72)
73. *See generally* Zlatan Krizan & Paul D. Windschitl, *The Influence of Outcome Desirability on Optimism,* 133 Psycol. Bull. 95 (2007). [↑](#footnote-ref-73)
74. *See, e.g.,* Neil D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 J. Personality & Soc. Psychol. 806 (1980); Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 Acta Psychologica 143 (1981). [↑](#footnote-ref-74)
75. *See, e.g.*, Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 Science 1232 (1989); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993); Neil D. Weinstein & William M. Klein*, Unrealistic Optimism: Present and Future,* 15 J. Soc. & Clinical Psychol. 1 (1996). [↑](#footnote-ref-75)
76. *Id*. [↑](#footnote-ref-76)
77. *See, e.g.*, Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 Psychol. Bull. 193 (1988). [↑](#footnote-ref-77)
78. *See, e.g.*, Gustavo E. de Mello & Deborah J. MacInnis, *Why and How Consumers Hope: Motivated Reasoning and the Marketplace* 61–62, Inside Consumption (2005); Becher et al., *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans*, in Legal Applications of Marketing Theories (forthcoming 2021). [↑](#footnote-ref-78)
79. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost,* 35 Org. Behav. & Hum. Decision Process 124 (1985). [↑](#footnote-ref-79)
80. Arkes & Blumer, *id.* at 132. [↑](#footnote-ref-80)
81. *See, e.g.*, Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*,1999 Utah L. Rev. 205, 214 (1999); Mark Seidenfeld, *Symposium: Getting Beyond Cynicism: New Theories of the Regulatory State Cognitive Loading, Social Conformity, and Judicial Review of Agency Rulemaking*,87 Cornell L. Rev. 486, 500, 517 (2002). [↑](#footnote-ref-81)
82. *See, e.g.,* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 La. L. Rev. 117, 129 (2007). [↑](#footnote-ref-82)
83. *Id.* at 131. Note that written representations or advertisements could also be later contradicted in the agreement (or “terms and conditions” webpage). [↑](#footnote-ref-83)
84. Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision-making*, 10 J. Cons. Res. 436 (1984). [↑](#footnote-ref-84)
85. *See generally* Russell Korobkin, *supra* note 24; Becher, *supra* note 77, at 166–77 (discussing information overload in general and consumer contracts in particular). [↑](#footnote-ref-85)
86. *Cf.* David A. Hoffman, *The Best Puffery Article Ever,* 91 Iowa L. Rev. 1395, 1396 (2006) (“We are constantly exposed to speech…encouraging us to buy goods …and transact for services. This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it”). [↑](#footnote-ref-86)
87. *Cf.* Ram N Aditya, *The Psychology of Deception in Marketing: A Conceptual Framework for Research and Practice*, 18 Psychol. & Marketing 735, 748 (2001) (explaining how the state of arousal brought about by visual and verbal appeals [can] make some product features salient and others inconspicuous). [↑](#footnote-ref-87)
88. *See, e.g.,* Korobkin, *supra* note 24, at 1206 (“Terms that govern the contractual relationship between buyers and sellers are attributes of the product in question, just as are the product’s price and its physical and functional characteristics”). [↑](#footnote-ref-88)
89. *See, e.g.,* Restatement (Second) of Contracts § 201 cmt. C (Am. Law Inst. 1981) (stating that when interpreting a contract, “the primary search is for a common meaning of the parties”); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 Harv. L. Rev. 1135, 1138 (2018) (“Regardless of one's normative theory of contract, the central focus of justification is on the enforcement of common terms that parties agree to when they form contracts. Without the presence of an actual agreement freely reached, the state is not easily justified in enforcing a contract […]”). [↑](#footnote-ref-89)
90. *See* sources cited in *supra* note 23*; see also* Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 Depaul Bus. & Com. L.J. 199, 206 (2010); Richard A. Epstein, *Contract, Not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in Consumer Protection In The Age Of The ‘Information Economy’ 227 (Jane K. Winn ed., 2006) (“[I]t seems clear that most consumers—of whom I am proudly one—never bother to read these terms anyhow: we know what they say on the issue of firm liability, and adopt a strategy of ‘rational ignorance’ to economize on the use of our time”). For a recent anecdote, see *Planet Money: Summer School 8: Risk & Disaster,* Nat’l Public Radio 11:00 (Aug. 26, 2020) (downloaded using iTunes) (opining that in the course of five years, only three out of thousands of consumers read the insurance fine print and raised issues to be discussed). [↑](#footnote-ref-90)
91. *See supra* note 16. [↑](#footnote-ref-91)
92. *See, e.g.*, Shmuel I. Becher, *Asymmetric Information in Consumer Contracts:* *The Challenge That Is Yet to Be Met*, 45 Am. Bus. L. J. 723 (2008). [↑](#footnote-ref-92)
93. For further explanation of how firms design the environment in order to make it harder for consumers to read and understand form contracts, see Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs,* 47 William & Mary L. Rev. 1635 (2006). [↑](#footnote-ref-93)
94. *See, e.g.*, Ayres & Schwartz, *supra* note 23; *see also* Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 Hous. L. Rev. 975 (2005); Todd D. Rakoff, *The Law and Sociology of Boilerplate*,104 Mich. L. Rev. 1235, 1243 (2006); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 Wash. L. Rev. 227 (2007); Shmuel I. Becher, *A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. Mich. J. L. Reform 747 (2009); Radin, *supra* note 24. [↑](#footnote-ref-94)
95. Other substitutes may be information flows and reputation mechanisms. For the idea that information flows can discipline sellers and inform consumers, see, for example, Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 Mich. Telecomm. & Tech. L. Rev. 303 (2008); Yonathan Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets,* 54 Wake Forest L. Rev. 1239 (2019). For the idea that reputation can discipline sellerssee, for example,Clayton P. Gillette, *supra* note 23; Lucian A. Bebchuk & Richard A. Posner, *One-sided contracts in competitive consumer markets*, 104 Mich. L. Rev. 827 (2005); Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 Hous. L. Rev. 975 (2005); Clayton P. Gillette, *Rolling contracts as an agency problem*, Wis. L. Rev. 679 (2004); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857 (2005); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 Conn. L. Rev. 69 (2019). [↑](#footnote-ref-95)
96. *See, e.g.,* Oren Bar-Gill & Kevin E. Davis, *(Mis)perceptions of Law in Consumer Markets*, 19 American Law and Economics Review 245–286 (2017); Jeff Sovern et al., *Whimsy little contracts with unexpected consequences: An empirical analysis of consumer understanding of arbitration agreements*, 75 Md. L. Rev. 1 (2015) (finding that consumers fail to understand the implications of arbitration clauses, while overestimating the extent that the law protects them against waivers of their rights to access courts). [↑](#footnote-ref-96)
97. *See* Jessica M. Choplin et al., *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implication*, 35 Law & Psychol. Rev. 61 (2011) (explaining why consumers might be especially vulnerable to deception). [↑](#footnote-ref-97)
98. *Id.* at 66. [↑](#footnote-ref-98)
99. *Id.* at 69. [↑](#footnote-ref-99)
100. *See generally* Wilkinson-Ryan & Hoffman, *supra* note 17. [↑](#footnote-ref-100)
101. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print,* 99 Iowa L. Rev. 1745, 1747–48 (2014). [↑](#footnote-ref-101)
102. *See, e.g.,* Furth-Matzkin 2019, *supra* note 18 (finding that tenants are deterred by the terms of their leases once a dispute arises even if those terms are unenforceable); Wilkinson-Ryan, *supra* note 97; Wilkinson-Ryan, *supra* note 19; Furth-Matzkin & Sommers, *supra* note 2, at 503. [↑](#footnote-ref-102)
103. Wilkinson-Ryan, *supra* note 97. [↑](#footnote-ref-103)
104. *Id.* at 1747. [↑](#footnote-ref-104)
105. *Id.* at 1748. [↑](#footnote-ref-105)
106. Wilkinson-Ryan, *supra* note 19. [↑](#footnote-ref-106)
107. *Id.* at 121. [↑](#footnote-ref-107)
108. Furth-Matzkin 2017, *supra* note 18. [↑](#footnote-ref-108)
109. *Id.* at 3. [↑](#footnote-ref-109)
110. *Id.* at 1. [↑](#footnote-ref-110)
111. Furth-Matzkin 2019, *supra* note 18. [↑](#footnote-ref-111)
112. *Id.* at 1035. [↑](#footnote-ref-112)
113. *Id*. [↑](#footnote-ref-113)
114. *Id*. at 1067. [↑](#footnote-ref-114)
115. Furth-Matzkin & Sommers, *supra* note 2. [↑](#footnote-ref-115)
116. *Id.* at 521. [↑](#footnote-ref-116)
117. *Id.* at 503. [↑](#footnote-ref-117)
118. *Id.*  [↑](#footnote-ref-118)
119. *See, e.g.,* Alicia W. Macklin, *The Fraud Exception to the Parol Evidence Rule: Necessary Protection for Fraud Victims or Loophole for Clever Parties*, 82 S. Cal. L. Rev. 809, 810 (2008) (explaining that “written evidence is more accurate than human memory,” it helps “to avoid fraud and unintentional invention after an agreement has been reached,” that “there is a desire not to mislead the finder of fact with emotional evidence,” and the written agreements enhances predictability). [↑](#footnote-ref-119)
120. Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 Chi.-Kent L. Rev. 87, 92 (2001). [↑](#footnote-ref-120)
121. *See, e.g.*, Furth-Matzkin & Sommers, *supra* note 2, at 510 (suggesting that consumers “may become demoralized by contractual language and […] blame *themselves* for failing to read” and providing evidence that “consumers are disinclined to renegotiate with sellers, and […] express little appetite for complaining or even telling others what happened”). [↑](#footnote-ref-121)
122. Keith B. Anderson, FTC, Consumer Fraud in The United States: An FTC Survey 80–81, 80 tbl.5-1 (2004), <https://perma.cc/H23N-Q2UP>. *See also* Keith B. Anderson, *To Whom Do Victims of Mass-Market Consumer Fraud Complain?* (2021), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3852323> (observing, based on FTC surveys from 2005, 2011, and 2017, that less than 3% of defrauded consumers complain to a government entity). [↑](#footnote-ref-122)
123. See the classic article Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc. Rev. 95 (1974). [↑](#footnote-ref-123)
124. See the seminal article Felstiner et al., *supra* note 36. [↑](#footnote-ref-124)
125. *Id.* at 26. For generally discussing the high costs of litigation see, for example, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 74 (1983); Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 Ark. L. Rev. 261, 288 (2003); *see also* Ron Burdge, United States Consumer Law Attorney Fee Survey Report 2017–2018 at 26 (finding that “the average hourly rate for the typical Consumer Law attorney in the United States is $345”). [↑](#footnote-ref-125)
126. *Cf.* Amy J. Schimtz, *Enforcing Consumer and Capital Markets Law in the United States,* *in* Enforcing Consumer And Capital Market Law—The Diesel Emissions Scandal 339–40 (2020) (explaining that class actions are especially relevant to “small dollar claims, where the cost to individually litigate is disproportionate to the eventual judgment”). [↑](#footnote-ref-126)
127. This has been a traditional concern in many consumer markets. For a discussion about the underenforcement of consumer harm see, for example, Iain D.C Ramsay, *Consumer Redress Mechanisms for Poor-Quality and Defective Products*, 31 U. Toronto L.J. 117 (1981); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 Tex. Int’l L.J. 135 (1999). [↑](#footnote-ref-127)
128. For a discussion about the public (dis)trust in the legal system, see, for example, Benjamin H. Barton, *American (Dis)Trust of the Judiciary*, *in* Are We at a Boiling Point? (Inst. for the Advancement of the Am. Legal Sys., 2019), <https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf>; James M. Lyons, *Trump and the Attack on the Rule of Law*, *in* Are We at a Boiling Point? (Inst. for the Advancement of the Am. Legal Sys., 2019), <https://iaals.du.edu/sites/default/files/documents/publications/lyons_trump_and_the_attack_on_the_rule_of_law.pdf>; Hon. Chase Rogers and Stacy Guillon, *Giving Up on Impartiality: The Threat of Public Capitulation to Contemporary Attacks on the Rule of Law,* *in* Are We at a Boiling Point? (Inst. for the Advancement of the Am. Legal Sys., 2019), <https://iaals.du.edu/sites/default/files/documents/publications/rogers-guillon_giving_up_on_impartiality.pdf>. [↑](#footnote-ref-128)
129. *See, e.g.,* Frank A. Luchak, *Consumer Contracts and Class Actions,* New Jersey Lawyer 6 (April 2016); Kristina Moore, *The Future of Class-Action Waivers in Consumer Contract Arbitration Agreements after DIRECTV, Inc. v. Imburgia*, 67 Case W. Res. L. Rev. 611 (2016); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice,* N.Y. Times (Oct. 31, 2015), https:// [www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html). For a recent critique of mandatory arbitration and class waivers, see, e.g., Carrie Menkel-Meadow, *What is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution*, Oñati Socio-Legal Series (2020); Albert H. Choi & Kathryn E. Spier, *The Economics of Class Action Waiver* (working paper), <https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3665283&dgcid=ejournal_htmlemail_consumer:law:ejournal_abstractlink> (finding that in many settings class action waivers may compromise product safety, undermine competition, and harm social welfare); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, Fl. L. Rev. (forthcoming (2020). [↑](#footnote-ref-129)
130. *See, e.g*., Keith B. Anderson, Fed. Trade Comm’n, Consumer Fraud in the United States, 2011: The Third FTC Survey 4–16 (2013), <https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf>. [↑](#footnote-ref-130)
131. *See generally* Anderson, 2017 Update, *supra* note 1. [↑](#footnote-ref-131)
132. *Id.* at ii. [↑](#footnote-ref-132)
133. *Id*. [↑](#footnote-ref-133)
134. *Id*. at iv. [↑](#footnote-ref-134)
135. Solan, *supra* note 115, at 112. [↑](#footnote-ref-135)
136. As explained below, we use the term “ordinary unethicality” to refer to situations where normative people behave in mundane yet unethical ways and still feel comfortable with their (un)ethical choices. *See generally* Feldman, *supra* note 20. [↑](#footnote-ref-136)
137. *Id. See also* Dan Ariely & Simon Jones, The (Honest) Truth About Dishonesty (2012). [↑](#footnote-ref-137)
138. Cella Moore et al, *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavio*r, 65 Pers. Psychol. 1 (2012); Richard C. Hollinger & Jason L. Davis, *Theft by Employees, in* The Encyclopedia of Crime & Punishment 1 (1983)‏. [↑](#footnote-ref-138)
139. *See* Max H. Bazerman et al., *Why Good Accountants do bad Audits,* 80 Harv. Bus. Rev. 96 (2002). [↑](#footnote-ref-139)
140. *See* Scott Rick et al., *Commentaries and Rejoinder to The Dishonesty of Honest People*, 645 J. Mkt. Res. (2008).‏ [↑](#footnote-ref-140)
141. For a relevant anecdote, see David Gonzalez, *Don’t Box Me In, Double-Parker,* N.Y. Times (Sep. 10, 2008). [↑](#footnote-ref-141)
142. Feldman, *supra* note 131; Rick et al., *supra* note 135.‏ [↑](#footnote-ref-142)
143. Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 Res. Org. Behav. 1 (2003).‏ [↑](#footnote-ref-143)
144. See Brandon C. Welsh et al., *Reimagining Broken Windows: From Theory to Policy*, 52 J. Res. Crime & Delinq. 447 (2015). [↑](#footnote-ref-144)
145. *See, e.g.,* Anna C. Merrittet al., *Moral Self‐Licensing: When Being Good Frees Us to Be Bad,* 4.5 Soc. & Pers. Psycol. Compass 344 (2010); Feldman, *supra* note 131. [↑](#footnote-ref-145)
146. *See supra* text accompanying notes 60-68. [↑](#footnote-ref-146)
147. Feldman, *supra* note 131. [↑](#footnote-ref-147)
148. Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 Current Opinion Psyc. 107 (2015)‏; Kim B. Serota & Timothy R. Levine, *A few Prolific Liars: Variation in the Prevalence of Lying*, 34 J. Lang. & Soc. Psychol. 138 (2015). [↑](#footnote-ref-148)
149. *See* Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty,* 8 Ann. Rev. L.& Soc. Sci. 85 (2012)*; see also* Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 Pers. & Soc. Psych. Bull.330 (2011). [↑](#footnote-ref-149)
150. *See* Dana et al., *supra* note 64. [↑](#footnote-ref-150)
151. *See* Yoella Bereby-Meyer & Shaul Shalvi, *Deliberate Honesty*, 6 Current Opi. Psyc*.* 195 (2015);Nils C. Köbis et al., *Intuitive Honesty versus Dishonesty: Meta-Analytic Evidence*, 14 Persp. Psyc. Sci. 778 (2019). [↑](#footnote-ref-151)
152. For a taxonomy of the justifications people use to rationalize unethical behavior, see Albert Bandura et al., *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71J. Pers. & Soc. Psyc. 364 (1996)*;* Ayal Shahar & Francesca Gino, *Honest Rationales for Dishonest Behavior,* *in* The Social Psychology of Morality: Exploring the Causes of Good and Evil 149 (2011). [↑](#footnote-ref-152)
153. Shaul Shalvi et al., *Honesty Requires Time (and Lack of Justifications)*, 23 Psyc. Sci*.* 1264 (2012); Köbis et al., *supra* note 147; Ine Van der Cruyssen et al., *Does Honesty Require Time? Two Preregistered Direct Replications of Experiment 2 of Shalvi, Eldar, and Bereby-Meyer (2012)*, 31 Psychol. Sci. 460 (2020). [↑](#footnote-ref-153)
154. Don A. Moore & George Lowenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 Soc. Just. Res. 189 (2004); Shalvi et al., *supra* note 149, at 1265. [↑](#footnote-ref-154)
155. Jennifer M. Rodd et al., *Localising Semantic and Syntactic Processing in Spoken and Written Language Comprehension: An Activation Likelihood Estimation Meta-Analysis*, 141 Brain & Lang. 89 (2015). [↑](#footnote-ref-155)
156. For a discussion of the effect of ambiguity see Dana et al., *supra* note 64. [↑](#footnote-ref-156)
157. This distinction could be attributed to omission bias—defined as “the preference for harm caused by omissions over equal or lesser harm caused by acts.” *See* Jonathan Baron & Ilana Ritov, *Omission bias, individual differences, and normality*, 94 Organizational Behavior and Human Decision Processes 74–85 (2004); Mark Spranca, Elisa Minsk & Jonathan Baron, *Omission and commission in judgment and choice*, 27 Journal of experimental social psychology 76–105 (1991). [↑](#footnote-ref-157)
158. *See* Amos Schurr & Ilana Ritov, *Winning a Competition Predicts Dishonest Behavior*, 113 Proc. Nat'l. Acad. Sci. 1754 (2016) (showing that competition enhances dishonesty); Robert D. Cooter et al., *The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium*, 4 Rev. L. & Econ. 889, 889–911 (2008) (showing that exaggeration in the unethicality of others might exacerbate bad behavior). [↑](#footnote-ref-158)
159. See, e.g., Schurr & Ritov, *supra* note 154, at 1754–59; Thomas Tyson, *Does* B*elieving* T*hat* E*veryone* E*lse is* L*ess* E*thical* H*ave an* I*mpact on* W*ork* B*ehavior?*, 11 J. Bus. Ethics 707, 707–717 (1992); Cooter et al., *supra* note 154. [↑](#footnote-ref-159)
160. See, e.g., Constantine Sedikides & Aiden P. Gregg, Self-Enhancement: Food for Thought, 3 Persp. Psychol. Sci. 102–116 (2008); Cindi May, *Most People Consider Themselves to Be Morally Superior*,Scientific American (Jan. 31, 2017), https://www.scientificamerican.com/article/most-people-consider-themselves-to-be-morally-superior/ (last visited Dec. 21, 2020).This self-perception of moral superiority could be seen as one illustration of the “better-than-average” effect—people’s tendency to rank themselves as better than others on desirable traits in ways that are statistically impossible. *See, e.g.,* Mark D. Alicke & Olesya Govorun, *The better-than-average effect*, 1 The self in social judgment 85–106 (2005). [↑](#footnote-ref-160)
161. Daniel Schwartz, *Differential Compensation and the Race to the Bottom in Consumer Insurance Markets*, 15 Conn. Ins. L.J. 723 (2008). [↑](#footnote-ref-161)
162. Optimism bias could exacerbate this problem. This is because salespeople may underestimate the probability that their false representations will adversely affect consumers. [↑](#footnote-ref-162)
163. Welsh et al., *supra* note 139. [↑](#footnote-ref-163)
164. Dana et al., *supra* note64; Ariely & Jones, *supra* note 132; Yuval Feldman & Yotam Kaplan, *Bounded Ethicality & Big Data* 29 Cornell J. L. & Pub. Pol's. 39, 48 (2019).‏ In some situations, an overwhelming percentage of individuals will behave unethically. Behavioral experiments have even identified situations in which most people lie consistently. *See, e.g.,* Philipp Gerlach, *The Games Economists Play: Why Economics Students Behave More Selfishly Than Other Students*, 12 Plus One (2017); Yuval Feldman et al., *Corporate Law for Good People* 115 Nw. U. L. Rev. 3, 17–18 (2020). [↑](#footnote-ref-164)
165. *See, e.g.,* Scott S. Wiltermuth, *Cheating More When the Spoils are Split,* 115Org. Behav. & Hum. Decision Proc. 157 (2011); Francesca Gino et al., *Self-Serving Altruism? The Lure of Unethical Actions that Benefit Others*, 93 J. Econ. Behav. Org. 285 (2013). [↑](#footnote-ref-165)
166. *See* Ori Weisel & Shaul Shalvi, *The Collaborative Roots of Corruption*, 112 Proc. Nat’l. Acad. Sci. 10651 (2015). [↑](#footnote-ref-166)
167. Melvin J. Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 Int’l. J. Org. Theo. & Behav. 405 (2003). [↑](#footnote-ref-167)
168. Archishman Chakraborty & Rick Harbaugh, *Persuasive Puffery,* 33 Mktg. Sci.382 (2014);Pedro M. Gardete, *Cheap-Talk Advertising & Misrepresentation in Vertically Differentiated Markets*, 32 Mktg. Sci. 609 (2013). [↑](#footnote-ref-168)
169. *Cf.* Solan, *supra* note 115, at 93–94; Stark & Choplin, *supra* note 10, at 706. [↑](#footnote-ref-169)
170. Typically, consumers can use online platforms or reviews, the firm’s contracts and policies, or the reputation of the firm. [↑](#footnote-ref-170)
171. *See, e.g.,* Steven C. Tyszka, *Remnants of the Doctrine of Caveat Emptor May Remain Despite Enactment of Michigan's Seller Disclosure Act*, 41 Wayne L. Rev. 41 1497 (1994); Cullen Goretzke, *The Resurgence of Caveat Emptor: Puffery Undermines The Pro-Consumer Trend in Wisconsin's Misrepresentation Doctrine*, Wis. L. Rev. 171 (2003). [↑](#footnote-ref-171)
172. For instance, consumers might want to believe that consuming organic food improves their health or that an expensive eye-cream will make them look younger– even if this is not objectively true. *See* Seth Godin, All Marketers Are Liars: The Power of Telling Authentic Stories in a Low-Trust World (2005);Theodore Levitt, *The Morality (?) of Advertising,* 48 Harv. Bus. Rev. 84, 85 (1970). [↑](#footnote-ref-172)
173. *See, e.g.,* Sergio Currarini & Friederike Mengel, *Identity, Homophily and In-Group Bias*, 90 Eur. Econ. Rev. 40 (2016). [↑](#footnote-ref-173)
174. *See, e.g.,* Dale T. Miller et al., *Minimal Conditions for the Creation of a Unit Relationship: The Social Bond Between Birthdaymates*, 28 Eur. J. Soc. Psyc. 475 (1998) (finding that sharing a fictitious birthday was sufficient to create an ingroup bias among participants). [↑](#footnote-ref-174)
175. *See* Fed. Trade Comm’n, Policy Statement On Deception 4 (Oct. 14, 1983), <https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf>; *see also* Hoffman, *supra* note81; Leonard v. Pepsico, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), aff'd 210 F.3d 88 (2d Cir. 2000); All-Tech Telecom, Inc. v. Amway Corp. 174 F.3d 862, 868 (7th Cir. 1999). [↑](#footnote-ref-175)
176. Hoffman, *supra* note 81, at 1427–28. [↑](#footnote-ref-176)
177. *See* Ronald E. Riggio & Howard S. Friedman, *The Interrelationships of Self-Monitoring Factors, Personality Traits, and Nonverbal Social Skills,* 7 J. Nonverbal Behav. 33 (1982). [↑](#footnote-ref-177)
178. Aditya, *supra* note 82. [↑](#footnote-ref-178)
179. Of course, this is not to say that all salespeople engage in unethical behavior. Rather, we argue that it is easy for people to fall into a pattern of routine unethicality. [↑](#footnote-ref-179)
180. *See, e.g.,* Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 Can. Bus. L.J. 437, 446 (1991). [↑](#footnote-ref-180)
181. *Cf.* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 827 (2006) (“The usual assumption in economic analysis of law is that in a competitive market without informational asymmetries, the terms of contracts between sellers and buyers will be optimal…’’). [↑](#footnote-ref-181)
182. On the Kantian probation on treating people as means, see *Treating Persons as Means,* Stan. Encyclopedia Phil. (2019), <https://plato.stanford.edu/entries/persons-means/>. [↑](#footnote-ref-182)
183. *See, e.g.,* Joseph Kupfer, *The Moral Presumption Against Lying*, 36 Rev. Metaphysics 103 (1982). [↑](#footnote-ref-183)
184. *Id.*  [↑](#footnote-ref-184)
185. Stark & Choplin, *supra* note 10, at 619 (reporting that 90% of consumers surveyed had this expectation). [↑](#footnote-ref-185)
186. *Id.* at 628. [↑](#footnote-ref-186)
187. *See supra* note 40. [↑](#footnote-ref-187)
188. *See generally* Peter Alexander Lichtenberg et al., *Psychological and Functional Vulnerability Predicts Fraud Cases in Older Adults: Results of a Longitudinal Study*, 39 Clin. Gerontol. 48 (2016). [↑](#footnote-ref-188)
189. Stark & Choplin, *supra* note 10, at 670 (citing Kessely Hong & Irish Bohnet, *Status and Distrust: The Relevance of Inequality and Betrayal Aversion*, 28 J. Econ. Psychol. 197 (2007)). [↑](#footnote-ref-189)
190. *Id.*  [↑](#footnote-ref-190)
191. *Id.*  [↑](#footnote-ref-191)
192. There is ample literature on a firm’s ability to cleverly target consumers based on their demographics, emotional state, and use patterns. *See, e.g.,* Bin Yu & Munindar P. Singh, *A Social Mechanism of Reputation Management in Electronic Communities*, *in* Cooperative Information Agents IV: The Future of Information Agents in Cyberspace 154 (Matthias Klusch & Larry Kershberg eds., 2000); Schmitz, *supra* note 43; Sam Machkovech*, Report: Facebook Helped Advertisers Target Teens who Feel “Worthless” [Updated],* Arstechnica (Jan. 5, 2017); Mark Bartholomew, *The Law of Advertising Outrage*, 19 Advert. & Soc’y Q. (2018); Shaun B. Spencer, *The Problem of Manipulation*, 2020 U. Ill. L. Rev. 959 (2020). [↑](#footnote-ref-192)
193. *See, e.*g., Meirav Furth-Matzkin, *The Distributive Consequences of Nudnik-Based Activism,* V.L.R. \_\_(forthcoming, 2021) (surveying the empirical literature showing that wealthier and more educated consumers are more likely to complain when dissatisfied with the seller’s behavior or product). [↑](#footnote-ref-193)
194. *See* sources cited *supra* note 33. [↑](#footnote-ref-194)
195. *Id*. [↑](#footnote-ref-195)
196. *See, e.g.* Gimun Kim & Hoonyoung Koo, *The Causal Relationship Between Risk and Trust in the Online Marketplace: A Bidirectional Perspective*, 55 Comput. Hum. Behav. 1020, 1025 (2015) (“[T]rust continues to reduce perceived risk overtime…[B]uyers trust to the point that their intention to engage in transactions is decisively enhanced, and perceived risk begins to encourage purchase behavior rather than discouraging buyers from engaging in transactions”); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. Econ. 1251, 1252 (1997) (“Individuals in higher-trust societies spend less to protect themselves from being exploited in economic transactions”); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 Econ. J. 295, 296 (2001) (“Because trust reduces the cost of transactions ([that is,] less time is spent investigating one’s broker), high trust societies produce more output than low trust societies”). [↑](#footnote-ref-196)
197. Marek Kohn, Trust: Self-Interest and The Common Good 123 (2008). [↑](#footnote-ref-197)
198. *See* Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & Econ. 461, 485 (1974) (arguing that firms are likely to compete over price at the expense of nonprice terms); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 Mich. L. Rev. 215, 287 (1990); Bar-Gill, *supra* note 24. [↑](#footnote-ref-198)
199. *Cf.* Korobkin, *supra* note 24 (explaining how competitive markets may result in a race to bottom among firms to exploit information asymmetries); Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 Proc. ACM Hum.-Comp. Interact. 81 (2019) (observing that “dark patterns [that manipulate consumers] are more likely to appear on popular websites”). [↑](#footnote-ref-199)
200. David T. Welsh et al., *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 J. Applied Psych*.* 114 (2015). [↑](#footnote-ref-200)
201. Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 Psych. Sci. 393 (2009). [↑](#footnote-ref-201)
202. *See, e.g.* Eric Abrahamson & Lori Rosenkopf, *Institutional and Competitive Bandwagons: Using Mathematical Modeling as a Tool to Explore Innovation Diffusion*, 18 Acad. Mgmt. Rev. 487 (1993). [↑](#footnote-ref-202)
203. Madan M. Pillutla & Xiao-Ping Chen, *Social Norms and Cooperation in Social Dilemmas: The Effects of Context and Feedback*, 78 Org. Behave. & Hum. Decision Processes 81 (1999). [↑](#footnote-ref-203)
204. *See* Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 Am. Psychol. 621 (1993); Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 Psychol. Rev. 265 (2003). [↑](#footnote-ref-204)
205. For an analysis from a law and marketing perspective, see Karl A. Boedecker, et al., *Legal Dimensions of Salespersons’ Statements: A Review and Managerial Suggestions*, 55 J. Marketing 70 (1991). [↑](#footnote-ref-205)
206. Douglas G. Baird, Reconstructing Contracts 123 (2013). [↑](#footnote-ref-206)
207. *See, e.g.,* Restatement (Second) of Contracts § 164. [↑](#footnote-ref-207)
208. With apologies to Fleetwood Mac, *Little Lies,* on Tango in the Night(Warner Brothers, 1987). [↑](#footnote-ref-208)
209. U.C.C. § 2–202. [↑](#footnote-ref-209)
210. *See, e.g.,* Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 Theo. Inq. L. 457, 463 (2019); Solan, *supra* note 115, at 93); Korobkin, *supra* note 2, at 55–56; Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Penn. L. Rev. 533, 540 (1998). [↑](#footnote-ref-210)
211. *See also* Solan, *supra* note 115, at 91 (“A typical statement of the rule is: ‘[I]f the parties assent to a writing as the final and complete expression of the terms of their agreement, evidence of prior or contemporaneous agreements may not be admitted to contradict, vary, or add to the terms of the writing'”, citing Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 Fordham L. Rev. 35, 36 (1985)). [↑](#footnote-ref-211)
212. *See, e.g.,* Cumming, *supra* note 30, at 1196 (1992) (“The parol evidence rule is a rule of substantive contract law that prevents a factfinder from considering extrinsic evidence that would create or alter obligations under the contract”). Parol evidence may, however, be introduced to interpret an ambiguous contract term. *See, e.g., Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* 442 P.2d 641 (1968). [↑](#footnote-ref-212)
213. *See, e.g.,* Davis, *supra* note 32; Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 Mont. L. Rev. 93 (1994); Richard F. Broude, *The Consumer and the Parol Evidence Rule: Section 2–202 of the Uniform Commercial Code*, 1970 Duke L. J. 881, 899 (1970); *see also* Cumming, *supra* note 30, at 1207 (“A misrepresentation action, however, undermines the evidentiary function of contract by allowing the plaintiff to introduce extrinsic evidence of prior oral representations that contract law has deemed unreliable”); Macklin, *supra* note 114, at 810 (“The bright-line PER does, however, contain exceptions, including the fraud exception...typically arises in cases in which one party makes misrepresentations to another to induce that party to sign an agreement”); Furth-Matzkin & Sommers, *supra* note 2, at 513–14 (“Courts often find that contractual exculpatory clauses, or other types of clauses disclaiming or qualifying a seller’s prior representations, generally do not bar consumers from bringing fraud claims. …”). [↑](#footnote-ref-213)
214. 1 Restatement (Second) Of Contracts § 164 (Am. Law Inst. 1979). [↑](#footnote-ref-214)
215. Posner, *supra* note 208, at 533–534. [↑](#footnote-ref-215)
216. Klass, *supra* note 207, at 472. [↑](#footnote-ref-216)
217. *Id.*  [↑](#footnote-ref-217)
218. Posner, *supra* note 208, at 534 (“Under what I will call the ‘hard-PER [parol evidence rule],’ the court generally excludes extrinsic evidence and relies entirely on the writing”). [↑](#footnote-ref-218)
219. *See, e.g.,* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol’y Rev. 233, 242–243 (2002) (surveying cases in which court relaxed the duty to read with respect to illiterate buyers); Stark & Choplin, *supra* note 10. [↑](#footnote-ref-219)
220. Posner, *supra* note 208, at 534 (“Under the ‘soft-PER,’ the court gives weight both to the writing and to the extrinsic evidence”). [↑](#footnote-ref-220)
221. Klass, *supra* note 207, at 472; Posner, *supra* note 208, at 556; Stark & Choplin, *supra* note 10, at 624 [↑](#footnote-ref-221)
222. Many commentators agree with such an approach. *See, e.g.,* Solan, *supra* note 116, at 89 (noting that “situations concerning agreements among business entities are often quite different. In these instances, there is likely to be real negotiation and actual familiarity with the contract's terms”); Klass, *supra* note 207. [↑](#footnote-ref-222)
223. *See, e.g.,* Posner, *supra* note 208, at 554 (explaining that “ordinary consumer contracts are good candidates for soft-PER” so to allow consumers, but not businesses, to introduce extrinsic evidence). [↑](#footnote-ref-223)
224. *See also* Davis, *supra* note 32; Klass, *supra* note 207. [↑](#footnote-ref-224)
225. *See, e.g.,* Stark & Choplin, *supra* note 10, at 625 (noting that “consumers principally rely on what they are told by salespeople”). [↑](#footnote-ref-225)
226. *See, e.g.,* Furth-Matzkin 2019, *supra* note 18; Furth-Matzkin & Sommers, *supra* note 2. [↑](#footnote-ref-226)
227. U.C.C. § 2–714. [↑](#footnote-ref-227)
228. U.C.C. § 2–216(2) (“…to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous…”). [↑](#footnote-ref-228)
229. Magnusson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§2301–2312 (1976). The FTC has enacted rules concerning the disclosure of product warranties. *See* 16 C.F.R. Part 700. [↑](#footnote-ref-229)
230. U.C.C. § 2–316, Cmt. 1. [↑](#footnote-ref-230)
231. Wilkinson-Ryan, *supra* note 19. [↑](#footnote-ref-231)
232. *Id.* [↑](#footnote-ref-232)
233. Furth-Matzkin & Sommers, *supra* note 2, at 516. [↑](#footnote-ref-233)
234. *Cf.* Stewart Macaulay, *Private Legislation and the Duty to Read–Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 Vand. L. Rev. 1051, 1058 (1966) (“If one knows he will be legally bound to what he signs, he will take care to protect himself…”). [↑](#footnote-ref-234)
235. *See, e.g.,* Stark & Choplin, *supra* note 10, at 620 (“Companies…argue that …if a consumer fails to read the contract that she signed and to object to those clauses, such action is unreasonable and imprudent and must be discouraged by the courts”). [↑](#footnote-ref-235)
236. *Cf.* Foremost Ins. Co. v. Parham, 693 So. 2d 409, 440 (Ala. 1997) (“It is no surprise that even educated consumers…often rely so heavily upon representations that are made to them…particularly when they are made in a friendly voice and with an assuring smile”). [↑](#footnote-ref-236)
237. Jessica M. Choplin et al., *supra* note 92 (finding that consumers often acquiesce to problematic terms as a result of sellers' oral assurances and explanations). [↑](#footnote-ref-237)
238. *See, e.g.,* Cirillo v. Slomin’s Inc., 768 N.Y.S.2d (Sup. Ct. 2003) (stating that a strict parole evidence rule can “invite sale agents, armed with impenetrable contracts, to lie to their customers”); *see also* Klass, *supra* note 207, at 483 (“In fact, it is difficult to see why a predictably unread standard term in a consumer contract should ever prevent the enforcement of other affirmations or promises that the consumer is likely to see and understand”); Posner, *supra* note 208, at 564 (arguing that when a standard form contract opportunistically contradicts misleading oral promises “[s]oft-PER is necessary…”). [↑](#footnote-ref-238)
239. *Cf.* Davis, *supra* note 32, at 524 (“it may be inappropriate to enforce disclaimers of liability for pre-contractual misrepresentations against people who systematically invest an undue amount of trust in their trading partners”). [↑](#footnote-ref-239)
240. Federal Register, Vol. 75, No. 185, p. 58509, 58515 (Sept. 24, 2010). [↑](#footnote-ref-240)
241. *See* Restatement of Consumer Contracts § 1 cmt. 10, at 12 (Am. Law Inst., Tentative Draft 2019). [↑](#footnote-ref-241)
242. *Id*. § 6 reporters’ notes. [↑](#footnote-ref-242)
243. *Id*. § 6 cmt. 8(c). [↑](#footnote-ref-243)
244. *Id*. § 6 reporters’ notes. [↑](#footnote-ref-244)
245. *See, e.g.,* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*. 81 Antitrust L.J. 911, 911 (2016) (“State consumer protection statutes, otherwise known as Unfair and Deceptive Acts or Practices (UDAP) laws, have been on the books of all states for some 40-plus years”). [↑](#footnote-ref-245)
246. *See, e.g.,* Furth-Matzkin 2019, *supra* note 18, at 1059. [↑](#footnote-ref-246)
247. National Consumer Law Center, Unfair and Deceptive Acts and Practices(9th ed. 2016)<https://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html> (“In billions of transactions annually, UDAP statutes provide the main protection to consumers against predators and unscrupulous businesses”). [↑](#footnote-ref-247)
248. Some UDAP laws allow for public enforcement, but current regulatory efforts to protect consumers are insufficient. [↑](#footnote-ref-248)
249. *See, e.g.,* Furth-Matzkin 2019, *supra* note 18, at 1059–60 (noting that “[s]ome UDAP laws contain a general prohibition on deception, some prohibit misstatements of fact, and some address both misstatements of fact and law”). [↑](#footnote-ref-249)
250. *See supra* note 52; *see also* Choplin et al., *supra* note 92, at 70 (explaining that “consumers frequently have difficulty detecting and acknowledging lies”). [↑](#footnote-ref-250)
251. Furth-Matzkin & Sommers, *supra* note 2, at 511. [↑](#footnote-ref-251)
252. Davis, *supra* note 32, at 511. [↑](#footnote-ref-252)
253. Korobkin, *supra* note 2, at 75. [↑](#footnote-ref-253)
254. *See, e.g.,* Boedecker et al., *supra* note 202, at 77 (proposing that “sales managers should consider supplementing outcome-based incentives with behavior-based ones”); Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 Yale L. & Pol’y Rev. 289 (2007). [↑](#footnote-ref-254)
255. *Cf. id.* (suggesting that firm adopt an approach that “emphasizes the intrinsic reward orientation among salesperson, encouraging them to derive satisfaction from the performance of job tasks, not just from achieving quota”). [↑](#footnote-ref-255)
256. *Cf.* Klass, *supra* note 207, at 483 (noting that one can “expect much better results if businesses undertake the costs of training and monitoring to ensure that employee communications accord with standard terms, rather than relying on consumers to read standard terms and recognize when not to rely on an employee’s promises or representations”). Alas, however, “[i]ndirect evidence suggest that legal topics rarely receive formal attention in sales training programs.” Boedecker et al., *supra* note 202, at 78. [↑](#footnote-ref-256)
257. Another ex ante monitoring tool is mystery shopping. See more detail below. [↑](#footnote-ref-257)
258. *See, e.g., Acquiring Recorded Conversations with a Business,* <https://www.hg.org/legal-articles/acquiring-recorded-conversations-with-a-business-37956>. [↑](#footnote-ref-258)
259. *See, e.g., How and Why Retail Stores Are Spying on You,* Consumer Reports (Mar. 2013), <https://www.consumerreports.org/cro/2013/03/how-stores-spy-on-you/index.htm>; *Retail Surveillance Strategies: 5 Emerging Trends You Need to Know*, Supreme Security Systems: Blog (Feb. 2017), <https://supremealarm.com/retail-surveillance-strategies-5-emerging-trends-need-know/>. [↑](#footnote-ref-259)
260. *See, e.g.,* Andy Klein, *Hard Drive Cost Per Gigabyte*, Backblaze (July 11, 2017); Lucas Mearian, *CW@50: Data Storage Goes from $1M to 2 Cents per Gigabyte,* Computerworld (Mar. 23, 2017); Mitch Tulloch, *Business Data Storage Is Getting Cheaper—Or Is It?,* TechGenix (Jan. 8, 2019). [↑](#footnote-ref-260)
261. The criteria for imposing such a duty should be left for future discussion. At this stage, suffice it to say that such criteria may include the size of the firm, the number of its customers and employees, the nature of the product or service, and previous complaints. [↑](#footnote-ref-261)
262. These costs include both the costs to the regulated firms and the regulatory costs of enforcing these regulations. [↑](#footnote-ref-262)
263. *Cf.* Boedecker et al., *supra* note 202, at 76 (proposing the development of a training program that includes “modules on legal guidance” and “updated information…about the most recent judicial and statutory developments related to communications with prospects and customers”). [↑](#footnote-ref-263)
264. *Cf.* Boedecker et al., *supra* note 202, at 77 (writing that “[p]eriodic [legal] updates reinforce the impression that managers are serious about the legal aspects of selling activity, contributing to a responsible corporate culture”). [↑](#footnote-ref-264)
265. Moir Lance, *What Do We Mean by Corporate Social Responsibility?*, 1 Corp. Governance Int'l J. Bus. Soc'y 16 (2001); Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility,* 78 Harv. Bus. Rev. 88 (2006); Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries,* 83 Chi.-Kent L. Rev. 199 (2008). [↑](#footnote-ref-265)
266. *See, e.g.,* Denis Leonard & Rodney McAdam, Corporate Social Responsibility, 36 Quality Progress 27 (2003), https://search.proquest.com/openview/498bfe796fd2e0a4fba70919f13e2c63/1?pq-origsite=gscholar&cbl=34671. [↑](#footnote-ref-266)
267. Such incentives may include tax benefits, legal immunity, positive publicity, and the like. For a similar proposal in the context of insurance, *see* Daniel Schwarcz & Peter Siegelman, *Insurance Agents in the 21*st *Century: The Problem of Biased Advice*, *in* Handbook on the Economics of Insurance Law (2015). [↑](#footnote-ref-267)
268. In addition to raising the cost to businesses, that may respond by rolling these costs onto consumers, policymakers need to consider the ways such systems may affect the labor market and the benefits that contracting parties derive from social, humane interactions. These concerns relate to automation more generally and are not unique to our suggestions. [↑](#footnote-ref-268)
269. Paul R. Kleindorfer, *What If You Know You Will Have to Explain Your Choices to Others Afterwards? Legitimation in Decision-making*, *in* The Irrational Economist: Making Decisions in a Dangerous World 72 (2010). [↑](#footnote-ref-269)
270. Imposing fiduciary duties on sellers has been previously proposed in the context of financial products. *See, e.g.,* Sumit Agrawal et al., *The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation*, Brookings Papers on Economic Activity51, 85 (2009). [↑](#footnote-ref-270)
271. *Id.* at 84. [↑](#footnote-ref-271)
272. In the context of law enforcement, it was found that police officers are almost always indemnified: governments pay approximately 99.9% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement. *See* Joana Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014). [↑](#footnote-ref-272)
273. Here (and elsewhere) the warning that “firms can easily evade whatever regulators pass, meeting the ‘form but not the spirit of the law’” is worth noting. *See generally* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. Chi. L Rev. 1309, 1327 (2015). [↑](#footnote-ref-273)
274. *See, e.g.,* Benjamin Van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 Admin. Sci. 23 (2018). [↑](#footnote-ref-274)
275. Similarly, in corporate law, the director oversight liability doctrine imposes monitoring duties on directors to ensure compliance with applicable regulations. *See, e.g.,* Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 Wash. U. L. Rev. (forthcoming, 2021), [https://ssrn.com/abstract=3732838](https://ssrn.com/abstract%3D3732838); Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 Minn. L. Rev. 2135, 2146 (2019); Robert C. Bird & Stephen Kim Park, *Organic Corporate Governance*, 59 B.C. L. Rev. 21, 44–45 (2018); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & Bus. 965 (2018). [↑](#footnote-ref-275)
276. Mystery shoppers make purchases and then report back on the experience they had. *See, e.g.*, *Mystery Shopper Scam,* Fed. Trade Comm’n(June 2012),<https://www.consumer.ftc.gov/articles/0053-mystery-shopper-scams>. [↑](#footnote-ref-276)
277. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012). [↑](#footnote-ref-277)
278. Likewise, UDAP Laws may facilitate administrative enforcement by state actors. [↑](#footnote-ref-278)
279. Fed. Trade Comm’n, Privacy Impact Assessment(Oct. 2019) (explaining that the FTC often uses the Lab’s capabilities to make undercover purchases in investigations); *FTC Releases Funeral Home Compliance Results, Offers New Business Guidance on Funeral Rule Requirements*, Fed. Trade Comm’n (June 8, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-releases-funeral-home-compliance-results-offers-new-business> (reporting the finding of undercover investigations of funeral rules as part of our enforcement of the Funeral Rule); [↑](#footnote-ref-279)
280. *See FTC Undercover Shopper Survey on Entertainment Ratings Enforcement Finds Compliance Highest Among Video Game Sellers and Movie Theaters*, Fed. Trade Comm’n (Mar. 25, 2013), <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-undercover-shopper-survey-entertainment-ratings-enforcement>. [↑](#footnote-ref-280)
281. There is wealth of research demonstrating that people’s memory for verbal statements is especially poor. Therefore, in our context, both consumers and salespeople might not remember the exact words used. On one hand, this can relieve some of the guilt associated with deceit for the salesperson. On the other hand, it may elevate the consumer’s frustration, who is likely to remember mostly the positive oral promises, rather than the qualifications or reservations. For an elaboration on the imperfection of human memory see, e.g., Dan Simon, In doubt: The psychology of the criminal justice process 109 (2012). [↑](#footnote-ref-281)
282. *See supra* note 168 and accompanying text. [↑](#footnote-ref-282)
283. Furth-Matzkin & Sommers, *supra* note 2, at 543. [↑](#footnote-ref-283)
284. *Cf.* Choplin et al, *supra* note 92, at 95 (explaining how salespeople were able to convince borrowers to take unaffordable loans notwithstanding disclosure requirements). [↑](#footnote-ref-284)
285. 16 C.F.R. § 455 (1993). [↑](#footnote-ref-285)
286. Burnham, *supra* note 211, at 126. [↑](#footnote-ref-286)
287. 16 C.F.R. § 455 (1993). The FTC rules have been revised in 2016. For a summary of these changes, see *FTC Approved Final Changes to Used Car Rule*, Fed. Trade Comm’n(Nov. 10, 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-approves-final-changes-used-car-rule>. [↑](#footnote-ref-287)
288. For instance, sellers may display the sticker in a way that makes it harder to observe; ensure the sticker is seen at a late negotiation stage, thus exploiting consumers’ sunk costs and self-commitment; use small font or colors that make the text illegible, etc. Interestingly, the FTC rule strives to minimize firms’ ability to do so by explicitly stating that “[t]he Buyers Guide shall be displayed prominently and conspicuously in any location on a vehicle and in such a fashion that both sides are readily readable” and that “[t]he capitalization, punctuation and wording of all items, headings, and text on the form must be exactly as required by this Rule. The entire form must be printed in 100% black ink on a white stock no smaller than 11 inches high by 7 1/4 inches wide in the type styles, sizes and format indicated.” Section 455.2 (a). Such detailed rules might be hard to tailor, enact, and enforce in the numerous consumer markets in which they are required. [↑](#footnote-ref-288)
289. *See* Choplin et al., *supra* note 92, at 94. [↑](#footnote-ref-289)
290. *See also* Furth-Matzkin 2019, *supra* note 18, at 1066 (“public agencies could be authorized to file claims against noncompliant landlords on behalf of tenants”). [↑](#footnote-ref-290)
291. Posner, *supra* note 208, at 568. [↑](#footnote-ref-291)
292. Burnham, *supra* note 211, at 106, citing McCormick, Handbook of The Law of Evidence (1st ed. 1954), at 428. [↑](#footnote-ref-292)
293. *See, e.g.,* Stark & Choplin, *supra* note 10, at 621 (“Some courts have interpreted it to be unreasonable or unjustifiable for a consumer to rely on a parol false statement of fact when the contract, which the consumer could read or did read, contains a no reliance type clause or contains contradictory terms”). [↑](#footnote-ref-293)
294. *Id.* at 630 (“While, in general, a claim of ‘fraud’ is an exception to the well-known ‘parol evidence rule,’ courts have sometimes concluded that the presence of these clauses or contradictory terms in the contract cause even a fraud action to fail”); *see also* Foremost Ins. Co. v. Parham, 693 So. 2d 409, 433 (Ala. 1997) (holding that a consumer who relies on a precontractual representation that contradicts the final written contract cannot argue he was defrauded since he did not exercise sufficient precautions to protect his interest); Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 531 (W.D. Pa. 2000) (limiting the fraud exception to fraud in the execution, while excluding fraud in inducement, which is the more relevant type of misleading oral promise); MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 213, 218 (3d Cir. 2005) (anticipating that Delaware courts may enforce anti-reliance clauses in order “to bar a subsequent fraud claim”); Tirapelli v. Advanced Equities, Inc., 813 N.E.2d 1138, 1144 (Ill. App. Ct. 2004) (finding that the plaintiffs’ reliance on precontractual oral statements was unreasonable as a matter of law because they were sophisticated investors who agreed in writing that they did not rely on any representations found outside the contract). [↑](#footnote-ref-294)
295. For a similar suggestion, see Stark & Choplin, *supra* note 10, at 100 (suggesting that “courts should not enforce this type of exculpatory provision, since rather than reflecting reality, [their] enforcement instead creates a license for unscrupulous companies to deceive consumers”). [↑](#footnote-ref-295)
296. *See, e.g.,* RREF BB Acquisitions, LLC v. MAS Properties, LLC, 2015 NCBC 58*.*  [↑](#footnote-ref-296)
297. Likewise, not honoring oral promises and hiding behind fine print might be understood as bad faith performance. *See* U.C.C.§§ 1–203, 2–305(2), 2–306(1), 2–311(1), 2–615(a) (Am. Law Inst. & Unif. Law Comm’n 2012) (detailing the duty to perform in good faith). However, even if courts were to impose a duty to negotiate in good faith and interpret it to include oral representations that are subsequently qualified in the fine print, consumers would still face the hurdle of proving that the sellers’ agents misled them. Oral statements are more difficult to prove because they are typically not accompanied by written documentation. This could be addressed either by stronger monitoring efforts (e.g., recordings and mystery shopping) or by shifting the burden of proof to firms. [↑](#footnote-ref-297)
298. Burnham, *supra* note 211, at 120. [↑](#footnote-ref-298)
299. U.C.C. § 2–302 (2001). [↑](#footnote-ref-299)
300. *See, e.g.,* W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 Mich. St. L. Rev. 853, 858–62. [↑](#footnote-ref-300)
301. While procedural unconscionability addresses unfairness in the bargaining *process*, substantive unconscionability is concerned with unfairness in the contractual *outcome*. *See, e.g.,* Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741, 752–53 (1982). [↑](#footnote-ref-301)
302. *See, e.g.,* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism-The Sliding Scale Approach to Unconscionability*, 44 Loy. U. Chi. L.J. 44 1 (2012). [↑](#footnote-ref-302)
303. *See, e.g*., Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000). [↑](#footnote-ref-303)
304. *See, e.g.,* Choplin et al., *supra* note 92, at 98 (“Some consumers…feel pressure to conform with the social norm to sign contracts presented to them, and trust in the salesperson based upon the concept of reciprocity of trust and respect”). [↑](#footnote-ref-304)
305. *See, e.g.* Robert A. Hillman & Jeffery J. Rachlinski, *Standard-form Contracting in the Electronic Age,* 77 N.Y.U. L. Rev. 429, 448 (2002) (“Consumers will feel uncomfortable suddenly indicating distrust to the reassuring agent by studying terms covering unlikely events”); Korobkin, *supra* note 2, at 83 (“By signing the form without reading it, the nondrafter signals her trust that the drafter will not exploit her. In contrast, by reading the document carefully, the nondrafter signals something less than complete trust in her counterpart”). [↑](#footnote-ref-305)
306. *See generally* Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness,* U. Ill. L. Rev. (forthcoming, 2021). [↑](#footnote-ref-306)
307. The FTC applies similar reasoning in somewhat similar contexts, such as false advertising. *See, e.g.,* Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis*, 83 Geo. Wash. L. Rev. 1999, 2005 (2015). [↑](#footnote-ref-307)
308. *See, e.g.,* Choplin et al., *supra* note 92, at 99. [↑](#footnote-ref-308)
309. *Id.* at 100. [↑](#footnote-ref-309)
310. *Cf. id.*at 98. [↑](#footnote-ref-310)
311. *See* Wilkinson-Ryan, *supra* note 19, at 172 (“Interventions that target unfair terms may be most effective if they make clear that firms that get it wrong—firms that include terms that a court deems unenforceable—will suffer real costs”). [↑](#footnote-ref-311)
312. *See* Wilkinson-Ryan, *supra* note 19, at 171 (suggesting that “[o]ne route is to subject firms to civil fines when they include unenforceable terms in their contracts”). [↑](#footnote-ref-312)
313. *Id.* at 171–72(discussing the example of anti-disparagement clauses in California, which can attract a penalty of up to $10,000). [↑](#footnote-ref-313)
314. Furth-Matzkin & Sommers, *supra* note 2, at 543. [↑](#footnote-ref-314)
315. *Id.* [↑](#footnote-ref-315)
316. *See* sources cited in *supra* note 121. [↑](#footnote-ref-316)
317. Furth-Matzkin & Sommers, *supra* note 2, at 544 (discussing, among other things, statutory damages and fee-shifting provisions). [↑](#footnote-ref-317)
318. Mont. Code Ann. § 30–14–133 (1993). [↑](#footnote-ref-318)
319. Burnham, *supra* note 211, at 118. [↑](#footnote-ref-319)
320. *See, e.g.,* Arbel & Shapira, *supra* note 33. [↑](#footnote-ref-320)
321. The FTC is already taking steps in this direction. For example, it has recently launched a new website to facilitate consumer complaints (https://reportfraud.ftc.gov). One new feature of the website is that consumers who submit a report will receive advice from the FTC based on their report, including recommendations on next steps. *See FTC Launches New Website to Report Consumer Fraud,* Auto Remarketing (2020), [https://www.autoremarketing.com/subprime/ftc-launches-new-website-report-consumer-fraud#:~:text=People%20reported%20losing%20more%20than,latest%20Consumer%20Protection%20Data%20Spotlight.&text=The%20FTC%20has%20more%20information,explaining%20how%20the%20site%20works](https://www.autoremarketing.com/subprime/ftc-launches-new-website-report-consumer-fraud%22%20%5Cl%20%22%3A~%3Atext%3DPeople%20reported%20losing%20more%20than%2Clatest%20Consumer%20Protection%20Data%20Spotlight.%26text%3DThe%20FTC%20has%20more%20information%2Cexplaining%20how%20the%20site%20works). [↑](#footnote-ref-321)
322. Yiwei Dou & Yongoh Roh, *Public Disclosure and Consumer Financial Protection* (N.Y.U. Stern School of Bus. Research Paper Series, 2020). [↑](#footnote-ref-322)
323. *Id.*  [↑](#footnote-ref-323)
324. *Id*. [↑](#footnote-ref-324)
325. *Id.* [↑](#footnote-ref-325)
326. *Id.* [↑](#footnote-ref-326)
327. Korobkin, *supra* note 2, at 72–73 (discussing “knowingly false claims”); Solan, *supra* note 115, at 89–90 (“Privileging the written contract serves a useful function precisely because...people really do testify dishonestly…”). [↑](#footnote-ref-327)
328. Korobkin, *supra* note 2, at 73–75 (discussing “unconscious opportunism”); Solan, *supra* note 115, at 90 (opining that people’s testimony can be inaccurate yet consistent “…with a self-serving reality that they have created in their own minds about events underlying a litigation”). For a discussion of how people are more likely to forget facts and rules that threaten their moral self-view, see, for example, Lisa L. Shu & Francesca Gino, *Sweeping Dishonesty Under the Rug: How Unethical Actions Lead to Forgetting of Moral Rules*, 102 J. Personality & Soc. Psychol. 1164, 1164 (2012). [↑](#footnote-ref-328)
329. *See generally* Daniel Gilbert, Stumbling on Happiness (2005). [↑](#footnote-ref-329)
330. Korobkin, *supra* note 2, at 75; Solan, *supra* note 115, at 89–90. [↑](#footnote-ref-330)
331. *See, e.g.,* Bar-Gill & Davis, *supra* note 91; Furth-Matzkin 2019, *supra* note 18. [↑](#footnote-ref-331)
332. *Cf.* Boedecker et al., *supra* note 202 (explaining that salespeople may have various motivations to employ unfounded statements and detailing possible measures that firms can adopt to minimize such behavior). [↑](#footnote-ref-332)
333. Burnham, *supra* note 211, at 142. [↑](#footnote-ref-333)