

TOXIC PROMISES

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ABSTRACT

Sellers often make manipulative and dishonest claims about their products and services. Such assertions, often made in 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. Next, we recommend that courts apply a host of doctrines to mitigate toxic oral promises and restrict the enforceability of merger and integration clauses. We further suggest making use of educational campaigns. In making these recommendations, we illustrate how a clever mix of ex ante prevention tools and ex post liability measures can yield a more efficient and fairer market environment.

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INTRODUCTION

Consumer fraud is an ubiquitous problem in the United States.¹ Tens of millions of consumers are victimized by fraud every year.² According to a recent FTC report, around 40 million U.S. consumers reported having been defrauded in 2017.³ The report estimated that there were almost 62 million fraud incidents in that year.⁴ The average direct loss for consumers was one hundred dollars,⁵ which amounted to a total economic loss of approximately six billion dollars per year. This estimation does not include other social costs resulting from consumer fraud, such as forgone opportunities, emotional harm, enforcement and litigation costs, and erosion of societal values.

¹ 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> See generally ANDERSON, 2017 UPDATE, *supra* note 1.

² *Id.* at ii.

³ Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. 503 (2020).

⁴ Anderson, *supra* note 1.

⁵ *Id.* at iv.

Many defrauded consumers are deceived by sellers' representatives about a material aspect of the transaction.⁶ Often these consumers discover, after the fact, that the contract they entered into contradicts or qualifies what the salesperson promised them before they entered the agreement.⁷ This Article addresses the prevalent problem of contracts that disclaim, qualify, or nullify the seller's oral representations.

Consider the following cases. In one, an insurance salesperson promised consumers that the insurance policy covered hurricane damage. However, after hurricane Katrina hit the insureds' home, they learned that the fine print excluded such coverage, contrary to what they had been told.⁸ 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 contract significantly reduced the trade-in allowance⁹ or that the car had been sold "as is."¹⁰

Specifically, the Article focuses on inaccurate, dishonest, misleading, or manipulative promises ("toxic promises"). Of course, one should distinguish between the different types of troublesome promises (e.g., misleading, inaccurate, dishonest, unethical, and manipulative).¹¹ Nevertheless, our main interest is in pre-contractual representations sharing the following characteristics:

⁶ Furth-Matzkin & Sommers, *supra* note 3.

⁷ *Id.* See also 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).

⁸ *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, *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.").

⁹ *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).

¹⁰ *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).

¹¹ 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.

they substantially influence consumers, are commonplace and legitimized by cultural and social norms, and are largely overlooked by the law.¹² These toxic promises can prove very problematic for consumers. Although consumers regularly rely on these promises, sellers qualify such promises in the fine print, consumers find these promises hard to prove, and courts frequently dismiss such promises as “puffery.”¹³

Clearly, the law prohibits sellers from deceiving consumers about material 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.”¹⁴ However, it is often difficult for courts to determine what the seller’s agents promised consumers prior to entering into the contract.¹⁵ Even if consumers can overcome this hurdle, sellers may claim that their agents’ assertions merely constituted puffery, acceptable exaggerations, or legitimate advertising.¹⁶ 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.¹⁷

¹² 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.

¹³ See *infra* notes 15-12.

¹⁴ DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* 123 (2013).

¹⁵ See, e.g., *Bauer v. Giannis*, 834 N. E. 2d 952, 960 (Ill. App. Ct. 2005); Debra Pogrud 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); Furth-Matzkin & Sommers, *supra* note 3.

¹⁶ 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) (asserting that defendant’s claims about superior engine protection were common marketplace puffery and 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”).

¹⁷ See, e.g., *Tirapelli v. Advanced Equities, Inc.*, 813 N.E.2d 1138, 1144 (Ill. 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

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.¹⁸ The result is that toxic promises are underpoliced and continue to flourish in consumer markets, harming uninformed consumers.

This Article argues that current approaches to the oversight of sellers' 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 on consumers. We demonstrate that current approaches to toxic oral promises underestimate the scope of the problem and do not sufficiently deter sellers from misbehaving. We propose that instead of trying to encourage consumers to read or shop more diligently, policymakers should focus on eliminating toxic 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 wield significant persuasive power over consumers, one that judges, policymakers, and legal academics generally underestimate.¹⁹ Adopting an interdisciplinary approach, we

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 15, at 623; Victor Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 70 (2005).

¹⁸ *See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014); Ian Ayres & Alan Schwartz, *The No Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 545 (2014); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680; 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).

¹⁹ *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.”).

explain how trust, collaboration, and cognitive biases lead consumers to over-rely on what salespeople say before entering into a contract.²⁰ Furthermore, we suggest that consumer contracting realities exacerbate the problems arising from consumers' trust in sellers' promises and their tendency to ignore the fine print.

Most consumers do not read form contracts before signing them.²¹ In fact, sellers often draft these contracts such that the average consumer cannot read or understand them.²² Consumers, therefore, have no choice but to rely on salespeople's oral assertions. At the post-contract stage, however, consumers tend to believe that they are bound to their contracts, even if their terms are unfair or unenforceable and contradict or qualify sellers' previous oral promises.²³ Put differently, while consumers tend to rely on salespeople's oral assertions *ex ante*, they are nevertheless prone to adopting a formalistic approach *ex post*,²⁴ equating contractual acceptance with "a waiver of most rights."²⁵

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

²⁰ See *infra* Part I.

²¹ See *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).

²² 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); 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); Shmuel I. Becher & Uri Benoliel, *Law in Books and Law in Action: The Readability of Privacy Policies and the GDPR*, in: CONSUMER LAW AND ECONOMICS 179 (KLAUS MATHIS & AVISHALOM TOR eds., 2020).

²³ For a general discussion of the silencing effect of consumer form contract terms and their impact on consumers' perception and behavior, see Meirav 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).

²⁴ See, *e.g.*, Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015).

²⁵ See, *e.g.*, Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 853 (2012).

and situational forces enable them to do so.²⁶ For example, people might find it easier and more acceptable to lie or “cut corners” in oral interactions than in written statements. People might also be more likely to behave unethically when they have strong incentives to lie or face competitive pressures.²⁷ 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, to date, most of this work has focused on *written* standard form contracts, which consumers generally do not read.²⁸ In this context, scholars have examined form contracts that, in response to consumers’ non-readership, incorporate one-sided, unfair, unenforceable, or exploitative terms.²⁹

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 undertheorized.³⁰ This Article addresses this deficit, shedding much-needed light on the prevalence and power of toxic promises and exploring possible normative prescriptions.

²⁶ See generally YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES’ ABILITY TO REGULATE HUMAN BEHAVIOR* (2018).

²⁷ See *infra* Part II.

²⁸ See, e.g., Bakos et al., *supra* note 21.

²⁹ 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 23 (documenting the prevalence of unenforceable terms in residential leases).

³⁰ For notable exceptions, see, e.g., Korobkin, *supra* note 7; Furth-Matzkin & Sommers, *supra* note 3; Stark & Choplin, *supra* note 15.

We distinguish between three main types of toxic 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,³¹ 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").³² The second type of toxic promises involves misstatements about the contract's content ("fraud in the execution").³³ Examples include those where a salesperson promises that the contract contains a warranty for a product while the contract expressly denies any such warranty,³⁴ or when the salesperson promises that the insurance policy will cover certain events that are, in fact, excluded from coverage under the written agreement.³⁵ The third type of toxic promises involves misleading consumers about the role 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.³⁶ 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

³¹ *Cf.* *People v. Charter Communications, Inc.*, 2018 NY Slip Op 30253(U) (2018).

³² *See, e.g., Cirillo v. Slomin's Inc.*, 768 N.Y.S.2d 759, 768 (N.Y. Sup. Ct. 2003).

³³ 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 7; Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165 (2017).

³⁴ *See, e.g., Carpetland U.S.A. v. Payne* (1989), 536 N.E. 2d 306 (Ind. Ct. App.).

³⁵ *Cf. Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007).

³⁶ *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 signed was non-binding).

accord with the oral promises rather than the form contract they agreed to.

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.³⁷ 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, such clauses intend to declare unequivocally that the form contract *is* the real deal.³⁸

We argue that all three types of toxic oral promises warrant considerable attention. Toxic oral promises can harm consumers, disadvantage honest competitors, erode important societal norms, and undermine market efficiency.³⁹ Moreover, these promises can aggravate distributional disparities. Sellers may yield to assertive consumers who insist on upholding the oral statements despite integration or merger clauses.⁴⁰ However, non-assertive or weaker

³⁷ 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 consumers may not rely on any prior representations made by the firm or its agents. Third, sellers may use “merger” or “integration” clauses, stipulating that the written agreement supersedes any prior communications between the parties. Such clauses will typically state that any such communications cannot be relied upon to supplement or modify the agreement. *See, e.g.*, Stark & Choplin, *supra* note 15, 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).

³⁸ Another type of toxic promises 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.

³⁹ *See infra* Part III.

⁴⁰ *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*

consumers are likely to face substantial hurdles should they seek to rely upon previously exchanged oral interactions. This Article therefore suggests that policymakers and courts address the psychological forces that encourage sellers to lie to consumers and those that lead consumers to rely on these lies.

Our analysis calls for a novel approach to pre-contractual oral interactions, whether made face-to-face, on the phone, or online.⁴¹ In particular, it calls on policymakers to better scrutinize salespeople's oral statements.⁴² The Article also emphasizes that consumer protection efforts should focus not only on ex post sanctions, but also on ex ante preventative measures.⁴³ In this context, we suggest 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 toxic promises, and making use of recordings and mystery shopping to overcome the evidentiary hurdles that toxic oral promises inevitably impose. These proffered approaches may help prioritize enforcement efforts, a key challenge in the consumer law and policy landscape. Moreover, the reforms we recommend are vital given the disproportionate impact of toxic promises on older, lower-income, less educated, and minority

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).

⁴¹ Oral interactions can presently occur online, via live chat and the like. See, e.g., Lele Kang et al., *Understanding the Antecedents and Consequences of Live Chat Use in Electronic Markets*, 25 J. ORGAN. COMPT. ELECTRON. COMMER. 117 (2015).

⁴² 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).

⁴³ See *infra* Part IV.

consumers, who are considerably more vulnerable to these practices.⁴⁴

Beyond our call for stronger ex ante monitoring and policing of toxic 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 discourage consumers from taking legal action or even voice their complaints after relying on a seller's oral representations.⁴⁵

This Article proceeds as follows: Part I elucidates the power of toxic promises. It explains how oral interactions are potent given the information asymmetries between consumers and firms. Part II explains why toxic promises are prevalent and challenging to eliminate, drawing on the fields of behavioral ethics and social psychology. Part III then discusses the potential harm of toxic promises to consumers, markets, and social welfare. Based on this analysis, Part IV highlights the inadequacy of current legal approaches and doctrines in uprooting toxic 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 underpoliced and often viewed tolerantly. We also propose better training and monitoring of salespeople ex ante and increased liability and sanctions ex post.

I. THE TOXIC POWER OF ORAL PROMISES

This Part explains the psychological power of toxic promises on consumers. Section A places toxic promises 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 contracting. 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 toxic promises on consumers. It continues by clarifying how ex post realities—namely the silencing (“chilling”) effect of the

⁴⁴ See Anderson 2017, *supra* note 1; Furth-Matzkin & Sommers, *supra* note 3 (finding that female and African-American consumers are more likely to fall prey to fine print fraud); 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, COMBATING 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>.

⁴⁵ See *supra* note 23.

fine print, litigation hurdles, and the inadequacy of consumer recall—further exacerbate the problems posed by pre-contractual toxic promises.

A. *Trust and Persuasion*

Although individuals may differ in the degree to which they trust one another,⁴⁶ humans are fundamentally trusting creatures.⁴⁷ While people may assume that the content of a conversation greatly affects their tendency to trust those who speak to them, it is the cues or impressions people receive from others during these conversations that frequently establish trust.⁴⁸ In essence, people regularly trust others when they perceive them as honest and moral.⁴⁹

Promises that salespeople make to consumers during precontractual negotiations can trigger trust.⁵⁰ It is here that interpersonal trust is most prominent and, alas, perilous.⁵¹

⁴⁶ 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).

⁴⁷ See, e.g., 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).

⁴⁸ *Id.* at 291. 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).

⁴⁹ See, e.g., 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).

⁵⁰ 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). This is true for promises made both offline and online, as 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).

⁵¹ See, e.g., William O. Bearden et al., *Measurement of Consumer Susceptibility to Interpersonal Influence*, 15 J. CONSUMER RES. 473

Consumers may be especially likely to trust salespeople's assertions when they regard them as competent and experienced.⁵² Consumers may even believe that the seller's representations will override any conflicting contractual provisions. In particular, consumers may assume that salespeople are authorized to deviate from the contract to please consumers,⁵³ that firms closely monitor their agents, or that salespeople are exposed to legal liability if they lie to consumers.⁵⁴

From the business's perspective, eliciting consumer trust is critical in marketing and sales, as trust and persuasion often work in tandem.⁵⁵ The seminal work of social psychologist Robert Cialdini on persuasion shows how minor tweaks in environment and rhetoric can significantly affect consumers' information processing and decisionmaking.⁵⁶ Consistent with Cialdini's observations, marketing and sales literature offers practical advice on eliciting consumer trust.⁵⁷ To be sure, salespeople are often trained professionals and are naturally incentivized to gain expertise in persuasion and manipulation.⁵⁸

(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).

⁵² See, e.g., Arch Woodside & William Davenport, *The Effect of Salesman Similarity and Expertise on Consumer Purchasing Behavior*, 11 J. MARKET RES. 198 (1974).

⁵³ 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).

⁵⁴ See, e.g., Michael Simkovic & Meirav Furth-Matzkin, *Proportional Contracts*, 107 IOWA L. REV. __ (2021).

⁵⁵ 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); David De Meza et 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.

⁵⁶ ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1984).

⁵⁷ 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).

⁵⁸ See, e.g., DOUGLAS RUSHKOFF, *COERCION: WHY WE LISTEN TO WHAT "THEY" SAY* (1999) (detailing how sellers use marketing,

Along with people's natural tendency to trust, people are also not good at detecting lies.⁵⁹ While many believe they are able to detect lies, the evidence suggests the contrary.⁶⁰ People's ungrounded confidence in their ability to detect lies further exacerbates the effects of sellers' toxic promises.

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, becoming adept and more effective over time in eliciting consumer trust. Consumers, on the other hand, are likely to participate in only a handful of such interactions. They are therefore unlikely to develop expertise in sales communication or in detecting 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.⁶¹ Other studies have shown the impact of emotional manipulation on consumers' ability to process information.⁶² For example, studies have found that convincing consumers that the salespeople is listening to them facilitates trust and influences purchasing decisions.⁶³

This body of evidence leads to two insights. First, these studies suggest that it is easier for salespeople to create empathy, listen actively to customers, or manipulate consumers' emotions during oral interactions rather than solely utilizing language cues in written documents. Second, while the documented sales and persuasion techniques do not necessarily involve deception, they can

advertising, retail atmospherics, and other techniques to manipulate consumers and inhibit rational decision-making).

⁵⁹ See, e.g., Bella M. DePaulo, *Spotting Lies: Can Humans Learn to Do Better?*, 3 CURRENT DIRECTIONS PSYCHOL. SCI. 83 (1994).

⁶⁰ For recent evidence that people overestimate their ability to detect lies, see Marta Serra-Garcia & Uri Gneezy, *Mistakes and Overconfidence in Detecting Lies* (working paper).

⁶¹ See, e.g., Bruce K. Pilling & Sevo Eroglu, *An Empirical Examination of the Impact of Salesperson Empathy and Professionalism and Merchandise Availability on Retail Buyers' Evaluations*, 14 J. PERS. SELLING & SALES MGMT. 45 (1994).

⁶² 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).

⁶³ 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).

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.

B. 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 toxic oral promises. As detailed in this Section, various biases may motivate consumers to look for, and pay attention to, those cues and information that reinforce their pre-existing inclinations and preferences.⁶⁴ Furthermore, cognitive biases lead consumers to ignore unpleasant information that could otherwise serve as a warning. Similarly, 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. Evidence suggests that one's self-interest and existing beliefs unconsciously shape one's understanding of reality.⁶⁵ Instead of accurately analyzing the evidence or data at hand, people process information in ways that promote their ends or goals.⁶⁶

Studies have found that self-interest can affect people's ability to process visual stimuli.⁶⁷ Essentially, people tend to see different things, depending on what better serves their interests.⁶⁸ For

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).

⁶⁵ See, e.g., Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYC. BULL. 480 (1990).

⁶⁶ *Id.*

⁶⁷ 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 INTERDISCIPLINARY REV. COGNITIVE SCI. 676 (2011).

⁶⁸ See, e.g., Emily Pronin et al., *Objectivity in the Eye of the*

example, in a classic study from the 1950s, students from two colleges watched a film of a controversial football game between teams from the two schools. In this experiment, despite watching the same film, students from both schools rated the rival school's team as playing less fairly and with less sportsmanship.⁶⁹

This experiment indicates that the emotional stakes—here, affirming loyalty to one's institution—can shape what people see.⁷⁰ The existence of this effect might also shed light on sellers' marketing and communication choices. For example, it helps explain why many salespeople might be comfortable telling half-truths and emphasizing favorable aspects of the transaction while downplaying other, less favorable aspects.

This attitude among salespeople may be particularly applicable to vague statements, since greater vagueness allows people more room for self-deception and motivated reasoning.⁷¹ When using vague speech, speakers may avoid feeling that they are engaging in intentionally misleading behavior. Indeed, ordinary unethicity 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.⁷²

Motivated reasoning shares some characteristics with other behavioral phenomena. One is the confirmation bias,⁷³ which also leads people to look for information that strengthens their existing beliefs.⁷⁴ Another is the desirability effect, according to which people

Beholder: Divergent Perceptions of Bias in Self versus Others, 111 PSYCHOL. 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).

⁶⁹ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

⁷⁰ For an accessible review and explanation see Chris Mooney, *What is Motivated Reasoning? How Does It Work? Dan Kahan Answers*, DISCOVER (May 6, 2011).

⁷¹ See, e.g., 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); Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal*, 84 N.Y.U. L. REV. 980 (2009) (finding that legal ambiguity enhances motivated reasoning and self-deception).

⁷² *Infra* Section II.C.

⁷³ See ARTHUR S. REBER, THE PENGUIN DICTIONARY OF PSYCHOLOGY 151 (2d ed. 1995).

⁷⁴ See, e.g., SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION-MAKING 233 (1993); Stephanie M. Stern, *Outpsyched: The*

may believe that something will happen just because they want it to happen.⁷⁵ 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 toxic promises is the optimism bias.⁷⁶ The literature on 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.⁷⁷ 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.⁷⁸

Generally speaking, optimism is a positive quality,⁷⁹ contributing to people's happiness, health, confidence, personal relationships, and ambition.⁸⁰ However, unrealistic optimism can lead people to take excessive risks and ignore warning signs. In our context, the dangers posed by consumers' unrealistic 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.

In addition, consider the sunk cost effect, which "is manifested in a greater tendency to continue an endeavor once an investment in

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 . . .").

⁷⁵ See generally Zlatan Krizan & Paul D. Windschitl, *The Influence of Outcome Desirability on Optimism*, 133 PSYCOL. BULL. 95 (2007).

⁷⁶ 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).

⁷⁷ 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).

⁷⁸ *Id.*

⁷⁹ 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).

⁸⁰ 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).

money, effort, or time has been made.”⁸¹ Overcoming the sunk cost effect is a rather challenging task, which most people cannot undertake successfully on their own.⁸² By their very nature, precontractual oral interactions precede the form contract. Consumers’ efforts to become familiar with the transaction’s details, including their precontractual conversations with sellers’ representatives, are sunk costs. Thus, a natural tendency would be to ignore contract terms that seem to conflict or qualify the seller’s assertions.⁸³ Once consumers have spent substantial time and effort engaging with the salesperson and deciding to conclude the transaction, most consumers would prefer to capitalize on these efforts regardless of any conflicting fine print.

In essence, inspecting the contract is usually possible only after speaking with the seller. The sunk cost effect likely makes it much less probable that consumers will inspect the fine print at this relatively late stage. Fraudulent salespeople can exploit this fact by intentionally postponing the presentation of contractual terms to a later stage once the consumer has already incurred high sunk costs.⁸⁴

Finally, cognitive 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 cognitive overload when confronting a myriad of information.⁸⁵

Hence, consumers typically focus on a few salient aspects of the transaction at stake while neglecting many others.⁸⁶ In the context of consumer transactions, an agent’s representations about the transaction are likely to be more straightforward, vivid, and

⁸¹ See generally Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 *ORG. BEHAV. & HUM. DECISION PROCESS* 124 (1985).

⁸² 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).

⁸³ See, e.g., Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 *LA. L. REV.* 117, 129 (2007).

⁸⁴ *Id.* at 131. See also Simkovic & Furth-Matzkin, *supra* note 54. Note that written representations or advertisements could also be later contradicted in the agreement (or “terms and conditions” webpage).

⁸⁵ Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision-making*, 10 *J. CONS. RES.* 436 (1984); Wilkinson-Ryan, *supra* note 17.

⁸⁶ See generally Korobkin, *supra* note 29; Becher, *supra* note 83, at 166–77 (discussing information overload in general and consumer contracts in particular).

memorable than the typically lengthy and complex fine print.⁸⁷ Thus, consumers are likely to put more weight on the more salient information conveyed through their oral interactions with sellers, while ignoring the convoluted fine print.⁸⁸

C. *Toxic Promises and Consumer Contracting Realities*

This Section explains how consumer contracting realities increase the significance and the perils of toxic oral promises. 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 ante stage, 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 contract is one informational factor to be considered.⁸⁹ Indeed, contract law assumes that the contracting parties consciously agree upon a set of terms that reflect their understandings and advance their interests.⁹⁰

⁸⁷ See, e.g., Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WILLIAM & MARY L. REV. 1635, 1676 (2006) (discussing consumers' natural tendency to focus on "vivid" information rather than legalese); Cf. Hoffman, *supra* note 16, at 1396 ("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.").

⁸⁸ 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).

⁸⁹ See, e.g., Korobkin, *supra* note 29, 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.").

⁹⁰ 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 [. . .]").

However, this assumption is largely inapplicable to transactions entered into through consumer form contracts.⁹¹ Consumers rarely read such contracts,⁹² 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.⁹³ 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.⁹⁴

The fact that consumers are generally unaware of the contents of their agreements creates a potential market failure due to information asymmetry.⁹⁵ 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.⁹⁶

Numerous studies have examined the legal challenges posed by the problem of consumer contracts not being read.⁹⁷ For our

⁹¹ See, e.g., 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); Simkovic & Furth-Matzkin, *supra* note 54.

⁹² See e.g., Bakos et al., *supra* note 21.

⁹³ 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).

⁹⁴ See *supra* note 22.

⁹⁵ 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).

⁹⁶ For further explanation of how firms design the environment in order to make it harder for consumers to read and understand form contracts, see Sovern, *supra* note 87.

⁹⁷ See, e.g., Ayres & Schwartz, *supra* note 18; 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.

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.⁹⁸ As a result, other informational sources, such as oral interactions with sellers, become even more meaningful. Consumers must often rely heavily on sellers' statements, using them as a shortcut, or a substitute, for reading detailed and complex contracts.⁹⁹ Consumers' reliance on these oral interactions is highly significant, especially since most consumers are largely unaware of their rights and often misperceive the law.¹⁰⁰

Alarming, salespeople can further use oral interactions to dispel consumers' fears once consumers realize that the form contract contains onerous terms.¹⁰¹ 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.¹⁰² Such explanations can be effective in allaying consumers' suspicions even when the explanations offered are meaningless.¹⁰³ Consequently, even those consumers who read the contract, understand the risks involved, and take them into account, may still be harmed by toxic promises.

Becher, A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law, 42 U. MICH. J. L. REFORM 747 (2009); Radin, *supra* note 29.

⁹⁸ See, e.g., Furth-Matzkin, *supra* note 21.

⁹⁹ Other substitutes may be information flows and reputation mechanisms. For the idea that information flows can discipline sellers and inform consumers, see, e.g., 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 sellers see, for example, Gillette, *supra* note 28; Lucian A. Bebchuk & Richard A. Posner, *One-sided contracts in competitive consumer markets*, 104 MICH. L. REV. 827 (2005); Becher & Zarsky, *supra* note 40.

¹⁰⁰ 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); Furth-Matzkin 2019, *supra* note 23; 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).

¹⁰¹ 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).

¹⁰² *Id.* at 66.

¹⁰³ *Id.* at 69.

The discussion above elucidates how *ex ante* consumer contracting realities heighten the power of toxic promises. 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.¹⁰⁴ Consumers tend to believe that the fine print legally and morally binds them.¹⁰⁵ People's intuition is to believe in the validity of the fine print even if it contains illegal, unconscionable, or otherwise unfair terms.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ Given this understanding, one could hypothesize that consumers' consent to the form contract should be treated cautiously when the written contract contravenes the seller's 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."¹⁰⁹ 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.¹¹⁰ Consistent with this finding, research illustrates that form contract terms reduce consumers' willingness to complain, exit the contract, or otherwise challenge sellers.¹¹¹

Another study explored the incorporation of unenforceable and misleading terms in residential rental contracts.¹¹² 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

¹⁰⁴ See generally Wilkinson-Ryan & Hoffman, *supra* note 24.

¹⁰⁵ Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747–48 (2014).

¹⁰⁶ See, e.g., Furth-Matzkin 2019, *supra* note 23 (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 23; Furth-Matzkin & Sommers, *supra* note 3, at 503.

¹⁰⁷ Wilkinson-Ryan, *supra* note 105.

¹⁰⁸ *Id.* at 1747.

¹⁰⁹ *Id.* at 1748.

¹¹⁰ Wilkinson-Ryan, *supra* note 23.

¹¹¹ *Id.* at 121.

¹¹² Furth-Matzkin 2017, *supra* note 23.

“flatly contravene the law.”¹¹³ 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.”¹¹⁴

A follow-up study confirmed that unenforceable terms indeed shape tenants’ perceptions.¹¹⁵ 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.”¹¹⁶ Notably, the study also found that unenforceable terms undermine the tenant’s motivation to search for legal information online.¹¹⁷ It further showed that unenforceable terms hinder the non-drafting party’s ability to interpret and understand legal information obtained online.¹¹⁸

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.¹¹⁹ 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 misrepresentations made by sellers’ agents.¹²⁰ Once again, the findings suggest that the fine print “discourages consumers from wanting to take legal action, initiate complaints, or damage the deceptive firm’s reputation by telling others what happened.”¹²¹ Disturbingly, the study also found that informing consumers about consumer protection laws “does not completely counteract the psychological effect of the fine print.”¹²²

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.¹²³ As professor Lawrence Solan observes:

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* at 1.

¹¹⁵ Furth-Matzkin 2019, *supra* note 23.

¹¹⁶ *Id.* at 1035.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1067.

¹¹⁹ Furth-Matzkin & Sommers, *supra* note 3.

¹²⁰ *Id.* at 521.

¹²¹ *Id.* at 503.

¹²² *Id.*

¹²³ 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

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.¹²⁴

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.¹²⁵ According to the Federal Trade Commission (FTC), less than 10% of defrauded consumers make a formal complaint.¹²⁶ 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.¹²⁷ Others may prefer to avoid conflicts and confrontations due to the emotional toll involved,¹²⁸ or may simply find litigation costs to be too high a burden.¹²⁹

reached,” that “there is a desire not to mislead the finder of fact with emotional evidence,” and the written agreements enhances predictability).

¹²⁴ Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 92 (2001).

¹²⁵ See, e.g., Furth-Matzkin & Sommers, *supra* note 3, 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”).

¹²⁶ 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).

¹²⁷ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

¹²⁸ See, e.g., Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980).

¹²⁹ *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–

Furthermore, 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.¹³⁰ This reduces consumers' willingness to invest resources in complaining or otherwise pursuing legal action even further.¹³¹

Some consumers may be especially reluctant to pursue legal action due to low levels of trust in the legal system.¹³² 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.¹³³

2018 at 26 (finding that “the average hourly rate for the typical Consumer Law attorney in the United States is \$345.”).

¹³⁰ 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”).

¹³¹ 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).

¹³² 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.

¹³³ 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>; Carrie Menkel-Meadow, *What is an Appropriate Measure of Litigation? Quantification*,

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 seller's oral promise. Firms, as a result, may have strong financial incentives to implement schemes that encourage salespeople to behave unethically. Simply put, sellers may realize that since only few customers will take action, toxic oral promises 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.¹³⁴

II. DO ALL SALESPEOPLE LIE?

Part I explained the power of toxic oral promises. 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 toxic promises is prevalent, tempting, easy, and, at times, an acceptable norm among sellers.

A. *Contextualizing Toxic Promises*

Various factors may lead salespeople to mislead consumers about material aspects of the transaction. One reason may be a lack of knowledge. Take professor Solan's experience when attempting to purchase a printer, for example:

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

Qualification and Differentiation of Dispute Resolution, OÑATI SOCIO-LEGAL SERIES (2020).

¹³⁴ 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.

¹³⁵ Solan, *supra* note 124, at 112.

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.

B. A Behavioral Ethics Perspective

Salespeople who engage in unethical behavior, such as lying and deception, are not alone. Recent studies demonstrate that ordinary unethicity is pervasive: Even those who care about morality often behave unethically when faced with an opportunity to gain from cheating.¹³⁶ In fact, in some contexts, dishonesty and cheating have become the norm.¹³⁷ Some outstanding examples include stealing office supplies from work,¹³⁸ engaging in misleading audits,¹³⁹ misreporting tax benefits,¹⁴⁰ or double-parking in a way that blocks other cars.¹⁴¹

Because of its pervasiveness, routine unethicity is very harmful in the aggregate. These accumulative harms, and the fact that otherwise good people behave badly, often overshadow the more severe forms of unethicity that could rise to the level of crime.¹⁴² Furthermore, widespread unethical behavior has devastating effects on interpersonal relations and trust,¹⁴³ and could lead to more extreme forms of anti-social behavior.¹⁴⁴

¹³⁶ As explained below, we use the term “ordinary unethicity” to refer to situations where normative, law-abiding people behave in mundane yet unethical ways and find ways to justify their (un)ethical choices. See generally FELDMAN, *supra* note 26; Francesca Gino, *Understanding Ordinary Unethical Behavior: Why People who Value Morality Act Immorally*, 3 CURR. OPIN. BEHAV. SCI. 107 (2015).

¹³⁷ *Id.* See also DAN ARIELY & SIMON JONES, *THE (HONEST) TRUTH ABOUT DISHONESTY* (2012).

¹³⁸ Cella Moore et al, *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 PERS. PSYCHOL. 1 (2012); Richard C. Hollinger & Jason L. Davis, *Theft by Employees*, in *THE ENCYCLOPEDIA OF CRIME & PUNISHMENT* 1 (1983).

¹³⁹ See Max H. Bazerman et al., *Why Good Accountants do bad Audits*, 80 HARV. BUS. REV. 96 (2002).

¹⁴⁰ See Scott Rick et al., *Commentaries and Rejoinder to The Dishonesty of Honest People*, 645 J. MKT. RES. (2008).

¹⁴¹ For a relevant anecdote, see David Gonzalez, *Don't Box Me In, Double-Parker*, N.Y. TIMES (Sep. 10, 2008).

¹⁴² FELDMAN, *supra* note 26; Rick et al., *supra* note 140.

¹⁴³ Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORG. BEHAV. 1 (2003).

¹⁴⁴ See Brandon C. Welsh et al., *Reimagining Broken Windows: From Theory to Policy*, 52 J. RES. CRIME & DELINQ. 447 (2015).

Here, we focus on salespeople who make toxic promises to consumers. Our key argument is that salespeople often find ways to excuse, justify, or ignore the fact that their sales pitches include false representations. In essence, “good people” may behave unethically if they find ways to maintain a positive self-image as moral individuals.¹⁴⁵ One of the key ways to accomplish this is to use motivated reasoning and self-deception.¹⁴⁶ When “good people” can interpret what they do as a legitimate business practice, more people are likely to engage in unethical behavior. Indeed, evidence suggests that ordinary people consistently engage in supposedly minor ethical and legal violations while finding ways to excuse their unethical behavior.¹⁴⁷

The literature details several explanations for why ordinary people behave unethically.¹⁴⁸ Some people behave unethically because unconscious psychological mechanisms make it difficult for them to understand that their behavior is wrong.¹⁴⁹ In other cases, people’s decision to behave unethically could be a byproduct of more conscious, deliberate mechanisms.¹⁵⁰ In particular, people can consciously justify their unethicality by convincing themselves that their behavior would not really harm anyone, that people expect them to behave this way under the circumstances, or that such behavior is the only way to survive in their business.¹⁵¹

The power of these conscious and unconscious mechanisms becomes eminent in the context of toxic oral promises to consumers.

¹⁴⁵ See, e.g., Anna C. Merritt et al., *Moral Self-Licensing: When Being Good Frees Us to Be Bad*, 45 SOC. & PERS. PSYCOL. COMPASS 344 (2010); FELDMAN, *supra* note 26.

¹⁴⁶ See *supra* text accompanying notes 65-75.

¹⁴⁷ 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).

¹⁴⁸ 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).

¹⁴⁹ See Dana et al., *supra* note 71.

¹⁵⁰ 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).

¹⁵¹ 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*, 71 J. 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).

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.¹⁵² Indeed, serving one's interests is an automatic tendency, and refraining from doing so requires a high degree of self-control.¹⁵³ 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.¹⁵⁴

In addition, oral interactions often occur in a grey area, where salespeople are unsure whether what they say is morally acceptable or legally binding.¹⁵⁵ This grey area of legal and moral uncertainty may give salespeople greater moral wiggle room to speak freely yet inaccurately. It enables salespeople to convince themselves that their oral statements are merely pre-contractual, informal, sales talks. Salespeople may accordingly persuade themselves that their toxic promises are no more than “puffery” or legitimate marketing techniques.

Sellers can mislead consumers either by making a false statement or by 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 more morally permissible than actively lying.¹⁵⁶ Indeed, salespeople may believe that failing to disclose something is not as

¹⁵² 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).

¹⁵³ 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.

¹⁵⁴ 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).

¹⁵⁵ For a discussion of the effect of ambiguity see Dana et al., *supra* note 71.

¹⁵⁶ 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 (2004); Mark Spranca, Elisa Minsk & Jonathan Baron, *Omission and commission in judgment and choice*, 27 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 76 (1991).

morally wrong as lying, even if the effect of that omission on consumers' choices and outcomes is the same.¹⁵⁷

Furthermore, research suggests that in competitive settings, people are more likely to behave unethically.¹⁵⁸ A salesperson's pressure to "close the deal" might overcome any ethical constraints he or she might have. Salespeople may also believe that their peers utilize any possible trick to boost their sales, especially when facing competitive pressures to do so.¹⁵⁹ Indeed, people generally believe that they are more honest and moral than others.¹⁶⁰ Such a belief may lead all salespeople to engage in a race to the bottom, excusing their dishonest behavior as part of the game.¹⁶¹

C. *The Nuts and Bolts of Toxic Promises*

The mundane nature of business-to-consumers transactions enables sellers to see toxic promises as "ordinary" rather than unethical behavior. Since misleading *oral* promises may be perceived as less severe than lying to consumers in writing, salespeople may find it much easier to justify such promises. Defrauding consumers can thus quickly become a norm, even an epidemic. The perception of toxic oral promises as minor infractions, if even that, can change the accepted norms of commercial transactions.¹⁶²

The literature on compliance and enforcement illustrates that various situational forces may shape people's decisions to behave

¹⁵⁷ *Id.*

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 (2008) (showing that exaggeration in the unethicity of others might exacerbate bad behavior).

¹⁵⁹ See, e.g., Schurr & Ritov, *supra* note 154, at 1754–59; Thomas Tyson, *Does Believing That Everyone Else is Less Ethical Have an Impact on Work Behavior?*, 11 J. BUS. ETHICS 707 (1992); Cooter et al., *supra* note 154.

¹⁶⁰ See, e.g., Constantine Sedikides & Aiden P. Gregg, *Self-Enhancement: Food for Thought*, 3 PERSP. PSYCHOL. SCI. 102 (2008); Cindi May, *Most People Consider Themselves to Be Morally Superior*, SCI. AM. (2017), <https://www.scientificamerican.com/article/most-people-consider-themselves-to-be-morally-superior/>. 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 (2005).

¹⁶¹ Daniel Schwartz, *Differential Compensation and the Race to the Bottom in Consumer Insurance Markets*, 15 CONN. INS. L.J. 723 (2008).

¹⁶² Welsh et al., *supra* note 144.

unethicality.¹⁶³ For example, people are more likely to behave dishonestly when they do not expect to be the only ones benefiting from their wrongdoing.¹⁶⁴ Thus, when salespeople recognize that they will not reap the full benefit of their wrongdoing because the firm will retain most of the surplus, they may be more inclined to behave dishonestly.

Another situational factor concerns the division of labor between salespeople and other employees. Generally, salespeople are responsible for the oral interactions with consumers, while lawyers are responsible for drafting the firm's contracts, customer service representatives are responsible for addressing consumer complaints, and internal dispute officers resolve disputes between businesses and consumers.¹⁶⁵ When employees work in teams, they are more likely to engage in unethical behavior, as each employee may feel less responsible for the harm caused by the group's unethical behavior.¹⁶⁶ Another related 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

Given all of these factors, it is easy to see why toxic promises 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 In fact, sellers may mislead or deceive consumers without a clear intention

¹⁶³ Dana et al., *supra* note 71; ARIELY & JONES, *supra* note 137; 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).

¹⁶⁴ *See, e.g.*, Scott S. Wiltermuth, *Cheating More When the Spoils are Split*, 115 ORG. 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).

¹⁶⁵ *See, e.g.*, A.L. El-Ansary et al., *Sales Teamwork: A Dominant Strategy for Improving Salesforce Effectiveness*, 8 J. BUS. INDUS. MKTG. 65 (1993).

¹⁶⁶ *See* Ori Weisel & Shaul Shalvi, *The Collaborative Roots of Corruption*, 112 PROC. NAT'L. ACAD. SCI. 10651 (2015).

¹⁶⁷ Melvin J. Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 INT'L. J. ORG. THEO. & BEHAV. 405 (2003).

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).

to do so, justifying their behavior as a way to make a living. They may view toxic promises as part of their job, or believe that their employers expect (or even require) them to behave this way.¹⁶⁹

To excuse or justify their behavior, salespeople may also shift the blame onto consumers, arguing that consumers have ample sources of accurate information.¹⁷⁰ Some may believe the old maxim of “buyer beware.”¹⁷¹ Salespeople may also convince themselves that consumers *want* to be manipulated or that they derive hope from relying on the salesperson’s promises.¹⁷² For instance, a salesperson may convince herself that consumers want to believe that consuming organic food will improve their health, or that an expensive eye-cream will make them look younger—even if this is not the case.¹⁷³

In fact, sales talk may fall under the somewhat ambiguous legal doctrine of puffery.¹⁷⁴ The law protects the kind of nonfactual speech that the reasonable consumer perceives as unrealistic, humoristic, or exaggerated.¹⁷⁵ While courts may see salespeople’s toxic promises as mere puffery, many consumers might perceive them as accurate and take them into account when making their purchasing decisions.¹⁷⁶ Put differently, the puffery doctrine may further blur the line between nonbinding sales talk and legally enforceable contractual promises.

Finally, the non-verbal stimulation that characterizes most sales’ face-to-face oral communications might make it easier for salespeople to engage in self-deception and convince themselves that

¹⁶⁹ Cf. Solan, *supra* note 124, at 93–94; Stark & Choplin, *supra* note 15, at 706.

¹⁷⁰ Typically, consumers can use online platforms or reviews, the firm’s contracts and policies, or the reputation of the firm.

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).

¹⁷² 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).

¹⁷³ *Id.*

¹⁷⁴ See, e.g., Hoffman, *supra* note 16.

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* note 87; 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).

¹⁷⁶ Hoffman, *supra* note 87, at 1427–28.

their behavior is not morally dubious.¹⁷⁷ For example, it might be easier for sellers to underestimate the implications of nodding authoritatively when making inaccurate statements. At the same time, non-verbal cues from salespeople (e.g., authoritative nods or facial gestures) or non-verbal marketing techniques (e.g., pleasant scents of chocolate in a bookstore or attractive salespeople in clothes outlets) might distract consumers and make them less likely to inspect the product or service vigilantly.¹⁷⁸

Disturbingly, when the typical customer's profile is different from the typical salesperson's, salespeople may be more likely to justify toxic promises, as they may be better able to distance themselves from the particular consumer.¹⁷⁹ Salespeople are likely to favor social groups with which they associate due to in-group favoritism ("homophily bias"),¹⁸⁰ which people form quickly.¹⁸¹ Such a bias may also help salespeople justify toxic promises they make to consumers from whom they feel socially distant.

For the reasons discussed above, toxic oral promises can quickly become the norm in business-to-consumers interactions.¹⁸² While consumers may accept this reality, it nevertheless results in significant harms to consumers and society as a whole. The following Part identifies these multiple harms.

III. THE VARIOUS HARMS OF TOXIC PROMISES

Salespeople are skillful and experienced communicators. As discussed above, they are motivated to make toxic promises and often find ways to excuse and justify them.¹⁸³ At the same time, consumers want to trust sellers. As Part I revealed, cognitive biases lead consumers to trust sellers' statements. Consumer contracting realities further intensify consumers' vulnerabilities toward toxic

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).

¹⁷⁸ Aditya, *supra* note 88; Becher & Feldman, *supra* note 48.

¹⁷⁹ See, e.g., Sergio Currarini & Friederike Mengel, *Identity, Homophily and In-Group Bias*, 90 EUR. ECON. REV. 40 (2016).

¹⁸⁰ *Id.*

¹⁸¹ 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).

¹⁸² 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.

¹⁸³ See Part II, *infra*.

promises.¹⁸⁴ Toxic promises are thus bound to proliferate and affect consumer choice.

This Part identifies the various social costs of toxic promises. It explores how such promises can harm consumers, undermine important social values, put honest competitors at a disadvantage, and harm the salespeople themselves.

Harm to consumers. First and foremost, toxic promises might lead consumers to make erroneous decisions. In this context, the assumption that market transactions advance both parties' well-being might not hold because consumers are not provided with the relevant information needed to make an informed decision.¹⁸⁵ When this is the case, inefficient transactions are more likely to take place.¹⁸⁶

Of course, misleading and deceiving promises also harm consumers' autonomy and dignity. Borrowing from Kant, 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.¹⁸⁷ Along these lines, people generally agree that lying is disrespectful and morally wrong, and that it contravenes accepted social norms.¹⁸⁸ Thus, the public largely expects "that a salesperson's verbal representations would be consistent with the terms of the Sales Agreement."¹⁸⁹ Surveys also show that people expect firms to "stand behind the verbal representations of their

¹⁸⁴ These realities include consumers' tendency not to read the fine print, the chilling effect of the fine print *ex post*—when a problem or dispute arises, and the hurdles consumers must face if they seek to pursue their aggrevances. See Part I, *infra*.

¹⁸⁵ See, e.g., Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 CAN. BUS. L.J. 437, 446 (1991); Bebchuk & Posner, *supra* note 99, at 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..."); Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAN. L. REV. 1051, 1058 (1966) (stipulating that under the duty to read "more bargains will approach the economists' ideal where both leave the bargaining table in a better position than when the negotiations began.").

¹⁸⁶ Simkovic & Furth-Matzkin, *supra* note 60, at 17 ("In the absence of competition on terms, the market may converge on a monopolistic equilibrium, or at least one that is not perfectly competitive").

¹⁸⁷ 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/>.

¹⁸⁸ See, e.g., Joseph Kupfer, *The Moral Presumption Against Lying*, 36 REV. METAPHYSICS 103 (1982).

¹⁸⁹ Stark & Choplin, *supra* note 15, at 619 (reporting that 90% of consumers surveyed had this expectation).

salespeople, even if these representations contradicted the written contract.”¹⁹⁰

Certainly, consumers are heterogeneous, and some consumers are more naïve and trusting than others.¹⁹¹ Thus, consumers differ in their inclination to rely on salespeople’s toxic promises. Alarming, disadvantaged consumers are more likely to be defrauded than those who are wealthy and well-educated.¹⁹² Wealthier, better educated consumers are typically more informed about their legal rights and remedies, and are therefore less vulnerable to toxic promises and deception.¹⁹³ At the same time, those from lower socio-economic groups are typically less informed, and may be more inclined to rely on salespeople’s assertions.¹⁹⁴

The distributional effects of toxic promises become even more disturbing given firms’ profit incentives to discriminate among consumers. Firms may choose to strategically use toxic promises as a means to exploit weak consumers and increase gains.¹⁹⁵ Indeed, toxic promises can facilitate discrimination both before and after consumers enter the transaction.¹⁹⁶

Ex ante, firms can use big data and personal information to micro-target consumers.¹⁹⁷ 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, who typically feel more entitled and are more knowledgeable about their rights.¹⁹⁸

¹⁹⁰ *Id.* at 628.

¹⁹¹ *See supra* note 46.

¹⁹² *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).

¹⁹³ Stark & Choplin, *supra* note 15, at 670 (citing Kessely Hong & Irish Bohnet, *Status and Distrust: The Relevance of Inequality and Betrayal Aversion*, 28 J. ECON. PSYCHOL. 197 (2007)).

¹⁹⁴ *Id.*

¹⁹⁵ *See, e.g.*, Furth-Matzkin & Sommers, *supra* note 3; Stark & Choplin, *supra* note 15.

¹⁹⁶ *See, e.g.*, Becher & Zarsky, *supra* note 40.

¹⁹⁷ 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); 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).

¹⁹⁸ *See, e.g.*, Furth-Matzkin, *supra* note 40.

Ex post, assertive consumers might insist on enforcing salespeople's toxic promises.¹⁹⁹ Customers from higher socio-economic backgrounds are more likely to confront a deceptive firm. These consumers will more often complain about the firm's unfair practices, threaten the firm's reputation, or initiate legal action.²⁰⁰ Firms, realizing the threat, are likely to yield to assertive consumers and honor their verbal promises.²⁰¹ In contrast, poorer consumers are considerably less likely to assert their rights and confront the misleading agent or business. As noted above, poor consumers 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.²⁰² 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.²⁰³

Recall that trust facilitates relationships, enhances people's wellbeing, and promotes market efficiency.²⁰⁴ Trust is a fundamental necessity for facilitating economic activity, reducing the need to take precautions and be vigilant. On a public health level, trusting people are also happier, more tolerant, and more optimistic.²⁰⁵ Misleading oral interactions that reduce trust can thereby result in negative externalities that extend beyond the contracting parties.

Disadvantaging honest competitors. Businesses whose agents make toxic promises can harm scrupulous sellers who refrain

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See sources cited *supra* note 40.

²⁰² See, e.g., RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS (2002).

²⁰³ *Id.*

²⁰⁴ 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.”).

²⁰⁵ MAREK KOHN, TRUST: SELF-INTEREST AND THE COMMON GOOD 123 (2008).

from such practices. If scrupulous sellers need to compete with sellers who engage in misleading sales tactics, the former might be pushed out of the market or driven to adopt deceptive techniques to survive competition.²⁰⁶

In competitive markets, sellers compete over salient attributes, offsetting the price of this competition by reducing the quality of other attributes.²⁰⁷ Therefore, if consumers cannot effectively detect lies, honest sellers in competitive markets might be forced to make toxic promises to remain competitive. Sellers who do not participate in this race to the ethical bottom might compromise their earnings and eventually be pushed out of the market.²⁰⁸

Harming salespeople. Finally, ethical, law-abiding salespeople who are driven to make toxic promises to consumers might be harmed in the process. Research suggests a slippery slope process whereby engaging in more minor acts of deception might pave the way to more frequent and severe types of misbehavior.²⁰⁹ In a similar vein, salespeople who make “small lies” to consumers might become accustomed to lying and behaving unethically.

Research on social norms suggests that when a particular unethical behavior appears to be more pervasive, people view it as more legitimate.²¹⁰ 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.²¹¹ If salespeople who would not otherwise deceive consumers increasingly

²⁰⁶ See, e.g., BAR-GILL, *supra* note 29; Simkovic & Furth-Matzkin, *supra* note 54.

²⁰⁷ 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 29 (same).

²⁰⁸ Cf. Korobkin, *supra* note 29 (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”).

²⁰⁹ 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).

²¹⁰ Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCH. SCI. 393 (2009).

²¹¹ 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).

engage in making toxic promises to consumers, more and more salespeople might be driven to engage in these deceptive practices.

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.²¹² 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,²¹³ and lead to other unethical behaviors.

Finally, while the law underdeters salespeople from making toxic promises to consumers, salespeople may still be legally liable for fraud. This ubiquitous practice thus exposes salespeople to legal sanctions, potentially without them being aware of the risks.

IV. LAW AND POLICY RECOMMENDATIONS

One should not misinterpret our analysis to suggest that the law explicitly permits sellers to make toxic promises to consumers.²¹⁴ Undoubtedly, sellers cannot promise anything imaginable during the negotiations while avoiding liability by incorporating one-sided contract terms. Should sellers attempt to do so, buyers “can prevail without having to assert any rights under the contract.”²¹⁵

To be sure, the law regulates speech and does not tolerate deceptive lies and promises.²¹⁶ That being said, current consumer protections against toxic promises 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.²¹⁷

Section A of this Part reviews the current law and policy landscape of toxic oral promises. The remainder of this Part offers policy recommendations to improve the legal scrutiny of toxic promises. Section B focuses on ex ante measures, tailored for application at the pre-contractual stage. These proposals seek to prevent toxic promises from being made in the first place. Section C

²¹² 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).

²¹³ 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).

²¹⁴ 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).

²¹⁵ DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* 123 (2013).

²¹⁶ See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* § 164.

²¹⁷ With apologies to FLEETWOOD MAC, *Little Lies*, on *TANGO IN THE NIGHT* (Warner Brothers, 1987).

details ex post recommendations designed to better respond to toxic promises that transpire.

A. *The Current Landscape of Toxic Promises*

Perhaps the most relevant legal regulation of toxic oral promises relates to the parol evidence rule, codified by Section 2-202 of the Uniform Commercial Code (“U.C.C.”),²¹⁸ and the common law doctrine of fraud.²¹⁹ However, judicial implementation of the parol evidence rule has so far been inconsistent and unpredictable.²²⁰ Furthermore, the case-law on parol evidence rule varies significantly across jurisdictions.²²¹ 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.²²² Thus, extrinsic evidence, such as oral interactions, may not be allowed if the court finds that a written contract is entirely integrated and unambiguous.²²³

Fraud, which at times takes the form of misrepresentation, is an exception to this rule.²²⁴ As § 164 of the Restatement (Second) of

²¹⁸ U.C.C. § 2–202.

²¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 164.

²²⁰ See, e.g., Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEO. INQ. L. 457, 463 (2019); Solan, *supra* note 124, at 93; Korobkin, *supra* note 7, 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).

²²¹ *Id.*

²²² See also Solan, *supra* note 124, 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)).

²²³ See, e.g., Cumming, *supra* note 37, 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).

²²⁴ See, e.g., Davis, *supra* note 37; 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 37, at 1207 (“A misrepresentation action, however, undermines the evidentiary function of contract by allowing the plaintiff to introduce extrinsic evidence of prior oral representations

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.”²²⁵

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.²²⁶

Courts seem to differentiate among different types of transactions and parties when applying the parol evidence rule.²²⁷ Generally speaking, courts are more likely to strictly apply the rule when both parties to the contract are sophisticated.²²⁸ Nonetheless, courts have applied “softer” versions of the rule where at least one of the parties lacked sophistication.²²⁹ Since most consumers are considered unsophisticated parties, courts tend to apply soft rules to consumer form contracts.²³⁰

that contract law has deemed unreliable.”); Macklin, *supra* note 123, 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 3, 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 . . .”).

²²⁵ 1 RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1979).

²²⁶ Posner, *supra* note 221, at 533–534.

²²⁷ Klass, *supra* note 221, at 472.

²²⁸ *Id.*

²²⁹ 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 15.

²³⁰ Klass, *supra* note 221, at 472; Posner, *supra* note 221, at 556; Stark & Choplin, *supra* note 15, at 624.

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.²³¹ However, where consumer contracts are involved, many have argued in favor of relaxing the rule.²³² Consumers do not bargain over the contractual terms, do not necessarily read or understand them, and are rarely represented by lawyers.²³³ Instead, consumers generally believe what salespeople tell them and rely on the salesperson's word.²³⁴

That said, allowing consumers to present extrinsic evidence in the case of toxic oral promises does not cure the problem. In fact, it would be counterproductive to place the onus of initiating litigation on consumers.²³⁵ This crucial point should be borne in mind when crafting effective legal responses to toxic oral promises, some of which we will discuss in the following Sections.

Relaxing the parol evidence rule is not the only protective measure that the law can offer to consumers who are lured into transactions by toxic promises. When the transaction involves a sale of goods and the seller's toxic promises pertain to warranties, the buyer may sue for damages for breach of warranty.²³⁶ 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."²³⁷ 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.²³⁸

²³¹ See, e.g., Solan, *supra* note 116, at 89 (noting that in "agreements among business entities [...] there is likely to be real negotiation and actual familiarity with the contract's terms.").

²³² See, e.g., Posner, *supra* note 221, at 554 (explaining that "ordinary consumer contracts are good candidates for soft-PER" so as to allow consumers, but not businesses, to introduce extrinsic evidence).

²³³ See, e.g., Davis, *supra* note 37; Klass, *supra* note 221.

²³⁴ See, e.g., Stark & Choplin, *supra* note 15, at 625 (noting that "consumers principally rely on what they are told by salespeople.").

²³⁵ See, e.g., Furth-Matzkin 2019, *supra* note 23; Furth-Matzkin & Sommers, *supra* note 3.

²³⁶ U.C.C. § 2-714.

²³⁷ 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. . . .").

²³⁸ Magnusson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§2301–2312 (1976). The FTC has enacted

The rationale behind requiring conspicuous writing is straightforward. With this requirement, the law seeks to enhance the likelihood that important information is clearly disclosed and effectively communicated. In essence, this requirement attempts to empower consumers to make informed decisions and to protect consumers from unexpected warranty disclaimers.²³⁹

Nonetheless, such disclosure requirements may not produce the intended effects. Recall that the mere use of fine print makes consumers more likely to comply with the written terms of a contract.²⁴⁰ Consumers who faced such standardized terms are prone to blame themselves for not thoroughly reading the terms and analyzing their exact meaning.²⁴¹ As detailed above, this holds true even when the consumer was defrauded before entering into the contract.²⁴²

One might theoretically argue that consumers can avoid the influence of toxic 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 that govern their transactions.²⁴³ Consumers who choose not to read their contracts, the argument goes, should bear the risk of their decision.²⁴⁴

We find this reasoning unpersuasive. Imposing a duty to read on consumers will not solve the problem.²⁴⁵ 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 soothe consumers' concerns by using "a friendly

rules concerning the disclosure of product warranties. *See* 16 C.F.R. Part 700.

²³⁹ U.C.C. § 2-316, Cmt. 1.

²⁴⁰ Wilkinson-Ryan, *supra* note 23; Furth-Matzkin & Sommers, *supra* note 3.

²⁴¹ *Id.*

²⁴² *Id.* at 516.

²⁴³ *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. . . .").

²⁴⁴ *See, e.g.*, Stark & Choplin, *supra* note 15, 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.").

²⁴⁵ For similar objections to imposing a "duty to read" on consumers, *see, e.g.*, Ayres & Schwartz, *supra* note 18; Stark & Choplin, *supra* note 15; Furth-Matzkin & Sommers, *supra* note 3; Becher & Benoliel (2019), *supra* note 22.

voice” and “an assuring smile”²⁴⁶ while explaining away problematic terms.²⁴⁷ A complex, unread standard form contract should not shelter agents who opportunistically make toxic oral promises.²⁴⁸

Striving to mitigate the problems of toxic oral promises by using written means to warn consumers is bound to fail.²⁴⁹ Consumers, as discussed above, are generally likely to trust sellers, exhibit unrealistic optimism, and commit to the contract without reading it and regardless of its harsh terms. Furthermore, consumers are often one-shotters, and might consequently have no alternative but to rely on salespeople’s assertions.²⁵⁰ 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.²⁵¹

The proposed Draft Restatement of Consumer Contracts follows this logic and generally adopts a narrower parole evidence

²⁴⁶ *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.”).

²⁴⁷ *Choplin et al.*, *supra* note 101 (finding that consumers often acquiesce to problematic terms as a result of sellers’ oral assurances and explanations).

²⁴⁸ *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 221, 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 221, at 564 (arguing that when a standard form contract opportunistically contradicts misleading oral promises “[s]oft-PER is necessary. . .”).

²⁴⁹ For similar skepticism about disclosure, *see generally* *Ben-Shahar & Schneider*, *supra* note 18.

²⁵⁰ *Cf.* *Davis*, *supra* note 37, 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.”).

²⁵¹ *Federal Register*, Vol. 75, No. 185, p. 58509, 58515 (Sept. 24, 2010).

rule.²⁵² According to the proposed Restatement, contract terms that contravene a seller's precontractual representations are presumably deceptive and voidable.²⁵³ The Draft Restatement acknowledges that consumers do not systematically inspect the fine print.²⁵⁴ Thus, the drafters seek to urge firms to ensure that the form contract does not deviate from their oral promises to consumers.²⁵⁵

Beyond common law doctrines, state law may also protect consumers from toxic oral promises. For example, legislatures in all 50 states enacted Unfair and Deceptive Acts or Practices Statutes ("UDAP laws").²⁵⁶ While differing in scope, strength, and application,²⁵⁷ these laws play a central role in protecting consumers from deceptive business practices.²⁵⁸

While the above protections of consumers from deceptive practices are important in deterring sellers from engaging in deception, regulators and courts should more closely monitor and sanction sellers who make toxic oral promises. We explain this crucial point below.

* * *

The current protections that the law provides against toxic oral promises are partial in scope. These protections fall short in two critical ways. First, they seem to be based on the assumption that misleading oral interactions are the exception, not the norm. This misconception is likely related to the underreporting of such unethical behaviors to regulatory agencies due to consumers' belief that their complaints would probably be ignored.²⁵⁹ Regulators are consequently likely to underestimate the frequency of toxic oral promises. However, insights from behavioral science reveal that

²⁵² See RESTATEMENT OF CONSUMER CONTRACTS § 1 cmt. 10, at 12 (AM. LAW INST., Tentative Draft 2019).

²⁵³ *Id.* § 6 reporters' notes.

²⁵⁴ *Id.* § 6 cmt. 8(c).

²⁵⁵ *Id.* § 6 reporters' notes.

²⁵⁶ 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.").

²⁵⁷ See, e.g., Furth-Matzkin 2019, *supra* note 23, at 1059.

²⁵⁸ 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.").

²⁵⁹ For a general discussion of the factors predicting underreporting in other contexts, see, e.g., Ziggy MacDonald, *Revisiting the Dark Figure: A Microeconomic Analysis of the Under-reporting of Property Crime and its Implications*, 41 BR. J. CRIMINOL. 127 (2001).

salespeople are relatively likely to behave dishonestly when interacting with consumers. The stressful and competitive environments in which salespeople frequently operate often encourage them to make toxic oral promises. 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 toxic 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.²⁶⁰ Consumers consequently *need* to rely on salespeople's oral assertions. Here, the law overestimates consumers' ability to uncover deception by scrutinizing their contracts before entering them.

Contrary to what many may think, consumers' ability to detect lies is significantly limited.²⁶¹ 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 toxic promises.

Ex post, the law overestimates the degree to which consumers will be likely to effectively challenge toxic promises once made. As explained, many consumers are unaware of their rights and are not informed about contract and consumer law doctrines.²⁶² Consumers are also not good at identifying they were wronged. Furthermore, even when consumers realize firms' misbehavior, they still face significant barriers limiting their ability to assert their rights. Consumers may fear legal confrontation, distrust the legal system, seek to maintain their relationships with the firm, or lack resources or motivation to insist upon their rights.²⁶³ Moreover, the mere existence of contract terms, including unfair and unenforceable ones, can silence consumers and deter them from taking action.²⁶⁴ Consumers' limited ability to challenge toxic promises highlights the need to complement private action with stronger public enforcement efforts.²⁶⁵ These should include both *ex ante* preventative measures and *ex post* liability measures, as we discuss below.

²⁶⁰ See *infra* note 18.

²⁶¹ See *supra* note 58; see also Choplin et al., *supra* note 101, at 70 (explaining that "consumers frequently have difficulty detecting and acknowledging lies.").

²⁶² See, e.g., Bar-Gill & Davis, *supra* note 100.

²⁶³ See *infra* Section C.

²⁶⁴ Furth-Matzkin & Sommers, *supra* note 3, at 511.

²⁶⁵ *Id.*

B. *Mitigation and Preventative Measures*

There is a spectrum of ex ante measures that can assist in mitigating the problem of toxic oral promises. At the heart of these measures is the understanding that toxic 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 should 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 interactions with consumers, and penalizing agents who misrepresent products or services.²⁶⁶ Such measures may prove especially effective when firms employ agents whose interests are not fully aligned with those of the firm. For example, if salespeople are compensated on a commission basis, they might resort to making questionable oral statements to lure consumers into transactions.²⁶⁷

Accordingly, we call for an institutional shift in salespeople's incentive structure. Namely, we propose that firms compensate their salespeople according to behavior-based criteria, rather than based on selling targets or quotas only.²⁶⁸ Since firms may not have sufficient incentives to make these changes voluntarily,²⁶⁹ we propose imposing a general duty on firms to properly train their agents and supervise their behavior.²⁷⁰

A prime example of ex ante scrutiny involves recording agents' pre-contractual exchanges.²⁷¹ Many firms are already using automatic recordings of sales conversations for monitoring, training,

²⁶⁶ Davis, *supra* note 37, at 511.

²⁶⁷ Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 YALE L. & POL'Y REV. 289 (2007)

²⁶⁸ For similar proposals, see, e.g., Boedecker et al., *supra* note 214, at 77 (proposing that "sales managers should consider supplementing outcome-based incentives with behavior-based ones."); Schwarcz, *supra* note 267.

²⁶⁹ Boedecker et al., *supra* note 214, at 78 ("evidence suggests that legal topics rarely receive formal attention in sales training programs.").

²⁷⁰ Cf. Klass, *supra* note 221, 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.").

²⁷¹ Another ex ante monitoring tool is mystery shopping. See more detail below.

and quality purposes.²⁷² Firms are also frequently using video surveillance at stores.²⁷³ As technology advances and recorded information is easier to save and store, the relative costs of these measures decrease and their prevalence increases.²⁷⁴

Policymakers can take advantage of these developments and require firms to use recordings as a check on agents' behavior. A further step in this direction could entail requiring that recordings be made available for inspection by external parties, such as individual consumers, consumer watchdogs, or enforcement agencies. An even more forceful measure would be to generally require firms, or at least some of them,²⁷⁵ to record and make available pre-contractual interactions with consumers.

By better training their agents, firms can minimize the risks of toxic oral promises. Such training can include tutorials, updates, workshops, or presentations by lawyers, consumer representatives, and high-ranking management personnel within the firm.²⁷⁶ Becoming familiar with the topic and discussing its legal and social aspects will make it more difficult for salespeople to justify unethical behavior. Such measures will also communicate to both employees and consumers that the firm takes oral promises seriously and strives to maintain an ethical corporate culture.²⁷⁷ More generally,

²⁷² See, e.g., *Acquiring Recorded Conversations with a Business*, <https://www.hg.org/legal-articles/acquiring-recorded-conversations-with-a-business-37956>.

²⁷³ 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/>.

²⁷⁴ 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).

²⁷⁵ 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.

²⁷⁶ Cf. Boedecker et al., *supra* note 214, 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.”).

²⁷⁷ Cf. Boedecker et al., *supra* note 214, at 77 (opining that “[p]eriodic [legal] updates reinforce the impression that managers are

we propose that firms adopt a broader approach toward corporate social responsibility (CSR),²⁷⁸ acknowledging that the company's social responsibility includes a commitment to eradicate fraud.

Firms could also be required to submit a periodic report, either to the public or to a designated agency, detailing their training and monitoring efforts to eliminate 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 it.

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 programmed to do so. For example, firms can be incentivized to use potentially pre-approved platforms that are programmed to provide information to consumers rather than manipulate them.²⁷⁹ As mentioned with regard to recordings, the design of these platforms can be a factor that enforcement agencies and courts may consider when determining future disputes. Here too, the costs of employing such measures and their possible unintended consequences should be carefully evaluated.²⁸⁰

To further impel salespeople to be careful in their representations, the law can impose personal liability on salespeople who make toxic promises to consumers. Holding agents liable could encourage them to be more careful when making oral statements. To be sure, the higher the stakes, the more cautious a salesperson would be. Furthermore, the mere fact that their behavior will be

serious about the legal aspects of selling activity, contributing to a responsible corporate culture.”).

²⁷⁸ See generally 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).

²⁷⁹ 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 21st Century: The Problem of Biased Advice*, in HANDBOOK ON THE ECONOMICS OF INSURANCE LAW (2015).

²⁸⁰ 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.

reviewed ex post could encourage salespeople to be more thoughtful and cautious ex ante.²⁸¹

The most extreme version of such personal liability would take the form of heightened fiduciary duties. In the United States, many types of agents, advisors, or intermediaries bear fiduciary duties.²⁸² These include lawyers, guardians, corporate directors, trustees, and majority shareholders, among others.²⁸³ For example, investment advisors have a fiduciary duty towards investors,²⁸⁴ and employers that sponsor retirement plans have a fiduciary duty toward employees participating in those plans.²⁸⁵ However, most salespeople bear no fiduciary responsibilities toward consumers.

Imposing fiduciary duties on sellers could discourage them from making toxic promises to consumers. However, while intuitively appealing, placing legal liability or fiduciary duties 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.²⁸⁶ In this case, the imposition of liability on agents could actually harm consumers in at least two ways.²⁸⁷ First, firms would likely pass

²⁸¹ 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) (finding that when an individual knows that his or her behavior will be reviewed ex post, they are likely to engage in more thoughtful behavior ex ante).

²⁸² See, e.g., Sumit Agrawal et al., *The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY* 51, 85 (2009).

²⁸³ *Id.*

²⁸⁴ See Investment Advisers Act of 1940.

²⁸⁵ Agrawal et al., *supra* note 282, at 84.

²⁸⁶ 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).

²⁸⁷ 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).

some of the newly-added insurance costs onto consumers, charging consumers an additional premium. Second, an “insurance to mislead” might create fertile ground for even more deceptive statements.²⁸⁸ Thus, if regulators decide to impose fiduciary duties on sales agents, careful consideration should be given to preventing firms from shielding agents through insurance. Finally, even if firms do not insure agents, it has already been noted that agents are often instructed by the firm to sell aggressively, making it unfair and less effective to place full responsibility on the agents rather than on the firm.

A possibly effective measure that should be seriously consider is imposing personal liability on marketing executives. While not a complete solution, this option does have some potential advantages. Marketing executives typically bear 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 an unethical corporate culture.²⁸⁹

Marketing executives are more powerful and more knowledgeable than are salespeople, and better appreciate the problematic nature of toxic oral promises. 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.²⁹⁰

Policymakers may also choose to revise enforcement priorities, allocating more resources to the problem of toxic oral interactions. Accordingly, another measure that consumer organizations and

²⁸⁸ This concern could be mitigated if insurance companies refuse to insure firms for intentional misstatements and only cover negligent misrepresentations.

²⁸⁹ See, e.g., Benjamin Van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 ADMIN. SCI. 23 (2018).

²⁹⁰ 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>; 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).

enforcement agencies may consider is mystery shopping.²⁹¹ 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.²⁹² In this context, the FTC has broad investigative powers and enforcement authority.²⁹³ In fact, the FTC has interpreted its authority to include undercover investigations.²⁹⁴ Thus, on occasion, FTC investigators pose as consumers to directly experience real-life sales scenarios.²⁹⁵ The FTC has also employed undercover investigators to examine compliance within the media industry.²⁹⁶ However, due to legal and ethical issues, the FTC employs this practice only infrequently.

Regulatory and enforcement agencies should use this method to scrutinize toxic oral promises more regularly and systematically. By employing mystery shoppers, consumer organizations and enforcement agencies can obtain a real-world, neutral impression of how salespeople (mis)present products and services. Unlike aggrieved consumers, mystery shoppers can be more objective in reporting their experiences. They can also be better prepared to record their exchanges with the firm's agents or representatives. Importantly, this will ensure that enforcement efforts do not rely on

²⁹¹ 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>.

²⁹² Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012).

²⁹³ Likewise, UDAP Laws may facilitate administrative enforcement by state actors.

²⁹⁴ 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)

²⁹⁵ *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);

²⁹⁶ *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>.

faulty, biased, and imperfect human memory.²⁹⁷ Keeping in mind that salespeople may treat different consumers differently,²⁹⁸ we also suggest that regulatory agencies vary the demographics of mystery shoppers to better detect discrimination.

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.²⁹⁹ Along these lines, consumer educational campaigns may better inform consumers about the practice of toxic oral promises. Furthermore, educational campaigns may endeavor to make consumer complaints and legal cases more salient.³⁰⁰

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, could weaken agents' motivations to behave manipulatively. Though not an ultimate remedy in isolation, raising consumers' awareness about their rights may prove to play an important role in protecting them from toxic oral promises.

Finally, we are skeptical about the effectiveness and appropriateness of traditional disclosure requirements.³⁰¹ Consider, for example, the Federal Trade Commission Used Motor Vehicle Trade Regulation Rule.³⁰² The Rule was a response to car dealers' notorious false representations, "particularly about the extent of the seller's liability for post-sale problems."³⁰³ Attempting to mitigate this practice, the Rule requires car dealers to conspicuously and clearly warn the customer by stating, "IMPORTANT: Spoken

²⁹⁷ 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).

²⁹⁸ See *supra* note 197 and accompanying text.

²⁹⁹ Furth-Matzkin 2019, *supra* note 23; Furth-Matzkin & Sommers, *supra* note 3, at 543.

³⁰⁰ A non-exhaustive list of such tools includes the use of human narratives and stories (rather than legalese), humoristic clips, comics, social media, celebrities, and influencers.

³⁰¹ Cf. Choplin et al, *supra* note 101, at 95 (explaining how salespeople were able to convince borrowers to take unaffordable loans notwithstanding disclosure requirements).

³⁰² 16 C.F.R. § 455 (1993).

³⁰³ Burnham, *supra* note 224, at 126.

promises are difficult to enforce. Ask the dealer to put all promises in writing.”³⁰⁴

This disclosure employs plain language and is relatively straightforward. Nonetheless, we suspect that salespeople can find ways to undermine its effectiveness. 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 passing that the disclosure is a meaningless FTC requirement.³⁰⁵ Ultimately, mandated disclosures may prove counterproductive by providing salespeople with a shield against complaints and a de facto license to deceive.

C. *Judicial Tools and Other Ex Post Measures*

Efforts to minimize toxic 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 toxic 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 lies. Even when consumers detect lies, they are unlikely to complain or initiate legal procedures against the deceptive seller, especially if the contract contains terms that produce an *in terrorem* effect. This concern, in turn, suggests that public enforcement mechanisms should be seriously considered. Accordingly, public agencies and

³⁰⁴ 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>.

³⁰⁵ See Choplin et al., *supra* note 101, at 94. In addition, 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. 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” 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.” Section 455.2 (a). However, such detailed rules might be difficult to tailor, enact, and enforce in the numerous consumer markets in which they are required.

consumer organizations should be allowed to litigate cases on behalf of aggrieved, misled consumers.³⁰⁶

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.”³⁰⁷ 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.³⁰⁸

Unfortunately, some courts continue to hold that consumers should read the fine print and be held to it.³⁰⁹ These courts show a willingness to enforce the contractual language that bars parol evidence and excludes precontractual representation.³¹⁰ 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.

³⁰⁶ Cf. Furth-Matzkin 2019, *supra* note 23, at 1066 (“public agencies could be authorized to file claims against noncompliant landlords on behalf of tenants.”).

³⁰⁷ Posner, *supra* note 221, at 568.

³⁰⁸ Burnham, *supra* note 224, at 106, citing MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (1st ed. 1954), at 428.

³⁰⁹ See, e.g., Stark & Choplin, *supra* note 15, 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.”).

³¹⁰ *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).

We also call on policymakers to restrict the use of “merger,” “integration,” or “no-reliance” clauses in standardized consumer contracts, at least when the consumer is not represented by a lawyer. Companies know that consumers will typically rely on their salespeople’s oral representations. They include merger, no-reliance, or integration provisions to discourage consumers from taking action once they realize they have been defrauded.³¹¹ In view of the documented chilling effect of such clauses on consumers, legislatures should prohibit their inclusion in consumer form contracts. Alternatively, courts could rule that such clauses, when included in consumer contracts, are against public policy and thus void (unless a lawyer represented the consumer).³¹²

Courts can also apply other doctrines, such as the duty of good faith and fair dealing, in deciding cases involving toxic promises. Indeed, some courts have recognized a duty to negotiate in good faith.³¹³ Misleading precontractual oral statements that are negated by the unread fine print may fall under the category of “bad faith.”³¹⁴

Courts may also scrutinize terms that deny the validity of oral statements using the unconscionability doctrine.³¹⁵ In fact, the unconscionability doctrine is the primary tool in striking down unfair contract terms.³¹⁶ Generally, the doctrine has a procedural and a substantive prong.³¹⁷ There is a sliding scale relationship

³¹¹ See, e.g., Korobkin, *supra* note 7.

³¹² For a similar suggestion, see Stark & Choplin, *supra* note 15, 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.”).

³¹³ See, e.g., RREF BB Acquisitions, LLC v. MAS Properties, LLC, 2015 NCBC 58.

³¹⁴ 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.

³¹⁵ U.C.C. § 2–302 (2001).

³¹⁶ 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.

³¹⁷ While procedural unconscionability addresses unfairness in the bargaining process, substantive unconscionability is concerned with

between the two prongs. This means that courts are willing to relax the evidence required to sustain procedural unfairness if the term is severely oppressive and vice versa.³¹⁸ Typical cases of toxic oral promises likely satisfy both the procedural and the substantive unfairness prongs of the doctrine.

Sellers who make toxic oral promises often exploit consumers' tendency to accept a form contract without scrutinizing it.³¹⁹ They may further exploit, at times cynically, consumers' trust.³²⁰ Cunning sellers can signal to consumers trust and false intimacy or affection, further dissuading consumers from reading the fine print.³²¹ This will exacerbate consumers' tendency to believe sellers' oral statements and refrain from reading the fine print.

Section 211 of the Restatement (Second) of Contracts depicts another judicial path that courts may 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 had previously made to them.

Following this logic, one can plausibly argue that firms that turn a blind eye toward (let alone encourage) toxic oral promises engage in fraud.³²² State laws and courts can lower the bar for consumer

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).

³¹⁸ 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); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

³¹⁹ See, e.g., Choplin et al., *supra* note 101, 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.").

³²⁰ 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 7, 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.").

³²¹ See generally Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, U. ILL. L. REV. (forthcoming, 2021).

³²² 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*

fraud claims in these situations.³²³ 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.³²⁴ Likewise, courts can lower the standard for satisfying causation and consumer reliance,³²⁵ while acknowledging that even conspicuous disclosures often do not effectively inform consumers.³²⁶

Ultimately, firms seek to maximize their profits. Thus, it is imperative to be cognizant of both the relevant legal doctrines and firms' financial incentives.³²⁷ To ensure proper deterrence and improve firms' compliance, misleading firms, their marketing executives, and their salespeople, should be exposed to punitive civil fines for making toxic oral promises.³²⁸ Imposing penalties is not an unfamiliar concept in consumer law cases.³²⁹

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.³³⁰ Along these lines, informed participants expressed greater willingness to use legal and meta-legal means to insist upon their rights.³³¹

Of course, there is no guarantee that this attitude shift will translate into real-world legal action, particularly given the small-dollar claims involved in typical consumer transactions. 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

Unfairness Cost-Benefit Analysis, 83 GEO. WASH. L. REV. 1999, 2005 (2015).

³²³ See, e.g., Choplin et al., *supra* note 101, at 99.

³²⁴ 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.

³²⁵ *Id.* at 100.

³²⁶ *Cf. id.* at 98.

³²⁷ See Wilkinson-Ryan, *supra* note 23, 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.”).

³²⁸ See Wilkinson-Ryan, *id.* at 171 (suggesting that “[o]ne route is to subject firms to civil fines when they include unenforceable terms in their contracts.”).

³²⁹ *Id.* at 171–72 (discussing the example of anti-disparagement clauses in California, which can attract a penalty of up to \$10,000).

³³⁰ Furth-Matzkin & Sommers, *supra* note 3, at 543.

³³¹ *Id.*

cases.³³² The Consumer Protection Act in Montana may serve as an example.³³³ 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.”³³⁴

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.³³⁵ To encourage consumers to complain, agencies like the FTC should make their complaining processes as easy and accessible as possible.³³⁶

Interestingly, empirical data suggests that public disclosure of consumer complaints can serve as an effective consumer protection measure. A recent study examined this issue by referring consumers to the U.S. Consumer Financial Protection Bureau (“CFPB”) complaint database.³³⁷ More specifically, the study investigated the whether publicly disclosing the CFPB’s complaints data can inform mortgage borrowers.³³⁸ The study found that banks that received

³³² Furth-Matzkin & Sommers, *supra* note 3, at 544 (discussing, among other things, statutory damages and fee-shifting provisions).

³³³ Mont. Code Ann. § 30–14–133 (1993).

³³⁴ Burnham, *supra* note 224, at 118.

³³⁵ See, e.g., Arbel & Shapira, *supra* note 40.

³³⁶ 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>.

³³⁷ Yiwei Dou & Yongoh Roh, *Public Disclosure and Consumer Financial Protection* (N.Y.U. Stern School of Bus. Research Paper Series, 2020).

³³⁸ *Id.*

more complaints experienced a greater reduction in mortgage applications following the disclosure of said information.³³⁹ 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.”³⁴⁰ The researchers concluded that disclosing the consumer complaints data may “enhance [...] market discipline and consumer financial protection.”³⁴¹ We believe that this can be true in our context too.

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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 their oral interactions with sellers.³⁴² Furthermore, memory is fallible and is often shaped by worldviews, biases, and aspirations.³⁴³ People’s recollections are imprecise and prone to mistakes (especially self-serving ones).³⁴⁴ Thus, consumers might make erroneous yet honest claims about what sellers said during the negotiation process.³⁴⁵ 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

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Korobkin, *supra* note 7, at 72–73 (discussing “knowingly false claims”); Solan, *supra* note 124, at 89–90 (“Privileging the written contract serves a useful function precisely because . . . people really do testify dishonestly”).

³⁴³ Korobkin, *supra* note 7, at 73–75 (discussing “unconscious opportunism”); Solan, *supra* note 124, 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).

³⁴⁴ See generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2005).

³⁴⁵ Korobkin, *supra* note 7, at 75; Solan, *supra* note 124, at 89–90.

too motivated to litigate in the first place.³⁴⁶ 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' naivete or salespeople's enthusiasm to close deals. If anything, the evidence seems to suggest the contrary.³⁴⁷ 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 sensible for consumers to generally trust the answers they receive. In fact, trusting agents' statements is a natural and even desirable human response. Similarly, it is not negligent on the part of a consumer to refrain from reading the fine print, fail to understand it, or discount its risks.

While navigating their way through a complex and demanding world, consumers may fall into traps.³⁴⁸ 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 toxic oral promises, which sellers find ways to justify. The Article proposes a more realistic and flexible approach to scrutinizing such toxic promises. This approach, we believe, can help shift the focus from blaming consumers for trusting sellers and for failing to read unreadable fine print toward acknowledging consumers' and sellers' nuanced contracting realities and human fallibility.

³⁴⁶ See, e.g., Bar-Gill & Davis, *supra* note 100; Furth-Matzkin 2019, *supra* note 23.

³⁴⁷ Cf. Boedecker et al., *supra* note 214 (explaining that salespeople may have various motivations to employ unfounded statements and detailing possible measures that firms can adopt to minimize such behavior).

³⁴⁸ Burnham, *supra* note 224, at 142.