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Meaning, Purpose, and Cause in the Law of Deception

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TABLE OF CONTENTS

INTRODUCTION

Many laws address the flow of information between private parties. Familiar examples include the torts of deceit, negligent misrepresentation, nondisclosure, and defamation; criminal fraud statutes; securities law, which includes both disclosure duties and penalties for false statements; false advertising law; labeling requirements for food, drugs, and other consumer goods; and, according to recent scholarship, information-forcing penalty defaults in contract law and elsewhere. Taken together, these and similar laws constitute what I will call the "law of deception." They regulate the flow of information between private

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parties to prevent dishonesty, disinformation, artifice, cover-up, and other forms of trickery, or to avert mistake, misunderstanding, miscalculation, and other types of false belief. This Article argues that the law of deception is a natural legal kind: one encounters similar problems of design, function, and justification throughout the category. Yet, with the exception of several important articles by Richard Craswell,[1] legal scholars have considered only this or that species, ignoring the genus as a whole. This Article makes a start on a general theory.

My more specific claim is that one can distinguish three regulatory methods within the law of deception. Interpretive laws prohibit the making of untrue statements. These laws require fact-finders to interpret the meaning and then test the veracity of what was said, an inquiry that employs everyday semantic norms to achieve legal ends. Purpose-based laws target acts done with the wrong intent, such as with the aim of concealing the truth. Rather than employing an objective standard of behavior, these laws define the object of regulation by an actor's wrongful state of mind. Causal-predictive laws employ everyday folk psychology, empirical studies and cognitive theory to predict a behavior's deceptive or informative effects. The causal-predictive method can be indifferent to the meaning and truth of the acts it regulates, as well as to the purpose with which they are done. Each method has its strengths and its weaknesses. After describing them in general terms, the Article applies the analytic framework to the Lanham Act's false advertising provisions. Judicial interpretation of the Lanham Act has arrived at a mix of these three approaches that, by and large, recognizes the limits and exploits the strengths of each. The proposed theory's ability to explain this part of the law of deception demonstrates its value for understanding the whole.

The distinction between the interpretive, purpose-based, and causal-predictive approaches might appear to be of primarily theoretical interest. If all of these laws aim to prevent deception, why should it matter how they do so? Lawmakers should simply use the best tools at their disposal, mixing and matching as they go along. But the theory has a practical upshot. It explains, for example, why the law of fraud contains so few interpretive rules. It suggests that there is a deep error in the common law tendency to conflate fraud by misrepresentation, fraud by concealment, and fraud by nondisclosure, which in fact involve different regulatory approaches and therefore require attention to different aspects of a transaction. The theory suggests a new category of fraud

1. *See generally* Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981); Richard Craswell, *"Compared to What?" The Use of Control Ads in Deceptive Advertising Litigation*, 65 ANTITRUST L.J. 757 (1997) [hereinafter Craswell, *Control Ads*]; Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657 (1985); Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549 (1991); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006) [hereinafter Craswell, *Taking Information Seriously*].

by misdirection, which belongs together with fraud by concealment in the category of purpose-based regulation. It identifies both the strengths and the limitations of new techniques for using cognitive theory and empirical methods to regulate deception. It maps out a general division of labor between courts and regulatory agencies. And it recommends specific reforms to judicial interpretation of the false advertising provisions of the Lanham Act.

With all that, the proposed framework is only the first step toward a complete theory of the law of deception. This Article focuses on the regulation of transaction between private parties, leaving to the side laws that govern the flow of information between private parties and the state, as well as laws that aim to structure informational ecosystems, such as the Internet or the press, more broadly. In addition, this Article focuses on one aspect of laws of deception: techniques for determining the object of regulation, the behavior to be regulated. It does not systematically examine the different legal responses to that behavior—such as the choice between liability rules and property rules, or that between traditional command-and-control regulation and the methods that go under the heading of "new governance."

The proposed tripartite division is also a theory of design. This Article pays only limited attention to the function or justification of laws of deception. The law regulates information both for consequentialist and nonconsequentialist reasons. Deceptive behavior is a costly activity that aims primarily at the redistribution rather than the production of value and often causes poor decision making. Deception is often also a wrong that warrants public condemnation, punishment, and compensation. I discuss the differences between these reasons for regulating deception only by noting that some regulatory methods are more suited to some ends than to others.

Lastly, the proposed theory is constructive rather than critical. It considers the law of deception from within, as an instrument with an internal logic oriented by its functions and justifications. The question is how such laws are *supposed* to work, in both senses of the word. There are other important questions about the law of deception. One group concerns practical hurdles to effective regulation. Richard Craswell, for example, has argued that much legal thinking in this area employs an oversimplified picture of how information works, resulting in wasted efforts, lost opportunities, and unintended consequences.[2] One can also ask about any area of law whether it doesn't serve hidden ends. Laws purporting to be about deception can be used for other, less attractive purposes. An example here is Jennifer Roback's description of how Southern lawmakers employed the law of promissory fraud during reconstruction as part of a systematic effort to bind African-American workers to their employers.[3] That

2. *See generally* Craswell, *Taking Information Seriously*, *supra* note 1.

3. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1166–68 (1984), *reprinted in* LABOR LAW AND THE EMPLOYMENT MARKET 217 (Richard A. Epstein & Jeffrey Paul eds., 1985).

this Article poses a somewhat different question does not reflect a judgment about the importance of these other inquiries. The law of deception is a complex object of study, and light dawns only gradually over the whole.

All that said, the proposed analytic framework describes a large swath of the law of deception. That framework reveals a set of regulatory challenges and solutions that reappear across areas of law we commonly treat as distinct. And it puts us on the road to a more complete understanding of the law of deception as a whole.

Part I of the Article identifies three methods the law uses to regulate deception between private parties, which correspond to three types of laws of deception: interpretive, purpose-based, and causal-predictive. Part II examines the reach of each method, that is to say, the types of informationally significant behavior each can effectively regulate, and the institutional capacities necessary for each. Finally, Part III applies that typology to describe and explain developments in judicial interpretation of the Lanham Act's false advertising provisions.

I. THREE REGULATORY APPROACHES

The design of a primary law must answer two questions:[4] What acts should the law target? And how should the law regulate those acts? The first question is about the direct object of regulation: what, for example, counts as a legal wrong?[5] The second is about regulatory technique: how should the law respond to such wrongs? The law of theft, for example, has as its direct object intentional nonconsensual takings of physical property and responds to them with criminal penalties. Nonconsensual takings are also among the direct objects of the tort of conversion, but the tort attaches different legal consequences. Same direct object, different technique. The law of criminal conspiracy, on the contrary, targets different behavior than does the law of theft—agreements to steal, as distinguished from stealing—but attaches similar penalties to that behavior. Different direct objects, similar technique.

A complete analysis of legal design should address both the object of regulation and regulatory technique. The questions are not independent. The choice of regulatory technique depends in part on what behavior the law targets. Criminal punishment is an appropriate response to intentional nonconsensual takings; it is not the right response to nuisance. At the same time, the choice of regulatory object depends on the costs and benefits, broadly conceived, of the best available techniques of regulating different forms of behavior.

This Article focuses on ways that laws of deception determine their regula-

4. "[P]rimary rules," according to H.L.A. Hart, are rules "concerned with the actions that individuals must or must not do . . . [whereas] secondary rules are all concerned with the primary rules themselves." H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. 1994).

5. Only duty-imposing laws define legal wrongs as such, and not all primary laws impose duties. The law of wills, for example, defines a legal power rather than imposing a legal duty. That power, however, might be designed to take consideration of the law's informational effects, and as such might belong to the law of deception.

tory objects. I describe three methods for identifying behavior informationally significant enough to merit legal attention. Interpretive laws identify the object of regulation by piggybacking on everyday extralegal norms of interpretation and truth-telling. A familiar example is the common law of deceit by misrepresentation. Purpose-based laws target acts done for the wrong reasons, on the premise that acts intended to deceive or otherwise wrong others are likely to do so. The law of fraudulent concealment serves as an example of purpose-based regulation. Yet other laws employ what we know about human psychology to identify behavior that is likely to cause or prevent deception. Some such laws, like the regulation of fine print, employ our everyday knowledge of how humans work. Others apply more sophisticated empirical methods or cognitive theories to predict informational effects. These causal-predictive laws identify acts to be regulated without regard to whether those acts involve false communications or the purposes with which they are done. Much of the Federal Trade Commission's information-based consumer protection regulation belongs to this third type.

These three regulatory types do not identify the whole of the law of deception. The *Second Restatement of Torts*, for instance, recommends that disclosure duties be based in part in "customs of the trade" and "modern business ethics."[6] Alternatively, some scholars have suggested that we should look to economic reasoning to determine when there is a duty to disclose.[7] That said, the three regulatory approaches I describe below represent the most widespread and successful techniques in the law of deception, and constitute something like its contemporary core.

A. INTERPRETIVE LAWS: DECEIT

As Joseph Raz has emphasized, law is an open system: "[I]t contains norms the purpose of which is to give binding force within the system to norms which do not belong to it."[8] That is, such laws give legal force to nonlegal norms. Examples are manifold. Matrimonial law has traditionally given legal effect to religious norms governing marriage; corporate law recognizes private articles of incorporation and bylaws; contract law incorporates norms that govern entering into and keeping agreements. Interpretive laws are another example. Such laws identify deceptive behavior by giving legal force to everyday norms of interpretation and truth telling. They identify the legal wrong by way of an extralegal one. This section describes how interpretive laws work, using as an example the

6. RESTATEMENT (SECOND) OF TORTS § 551(2)(e) & cmt. l (1977).

7. *See generally, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 273–74 (3d ed. 2000); Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 15–16 (1978); Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. ECON. 20 (1994).

8. Joseph Raz, *The Institutional Nature of Law*, 38 MOD. L. REV. 489, 502 (1975), *reprinted in* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 103, 119 (1979).

common law of deceit, narrowly defined to include only intentional and reckless misrepresentation, or lying.[9]

The *Second Restatement of Torts* describes the elements of deceit as follows:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.[10]

The comments define "misrepresentation" as "not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth."[11] The requirement that there be an assertion and that it be false is the hallmark of interpretive laws. The common law of deceit is perhaps the most familiar example, but there are many others. They include the torts of negligent misrepresentation, defamation, and slander; the misrepresentation defense in contract; criminal fraud statutes; civil and criminal securities fraud laws; and laws prohibiting false advertising. While these laws have different scienter, causation, materiality, and other requirements, all define the direct object of regulation in the same way: false representations.

Not all deceptive acts involve misrepresentations. One who engages in fraudulent concealment, for example, need not tell a lie. In *Schneider v. Heath*, a ship owner kept a boat afloat to prevent the buyer from discovering its rotten hull.[12] In *Salzman v. Maldaver*, the defendant seller allegedly placed undamaged aluminum plates on the top of bundles to conceal corroded ones beneath.[13] In neither case did the alleged wrongful acts include false assertions, though it was argued that they were calculated to deceive.[14] Misdirection can also deceive without misrepresentation. In *In re Wells Fargo Securities Litigation*, the Ninth Circuit held that Wells Fargo might have committed securities fraud by, among other things, underfunding its loan loss reserves, on the basis of which sophisticated investors would likely underestimate the risk of loss posed by the bank's outstanding loans.[15] While the loan loss reserve amounts were not assertions about the bank's risk profile, they could have been calculated to deceive investors. Another example can be found in *In re Lages*, in which the

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9. Legal sources often employ the terms "deceit" and "fraud" more broadly to cover not only lying, but also concealment, the failure to disclose, and other informational wrongs. One of my claims in this Part is that this way of speaking obscures important differences between how the law gets at these wrongs.

10. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

11. *Id.* at cmt. b.

12. (1813) 170 Eng. Rep. 1462 (Ct. Com. Pls.) 1462–63, 3 Camp. 506, 506–08.

13. 24 N.W.2d 161, 167 (Mich. 1946).

14. *See id.*; *Schneider*, 170 Eng. Rep. at 1462–63.

15. 12 F.3d 922, 926 (9th Cir. 1993), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), *as recognized in* Howard v. Everex Sys., Inc., 228 F.3d 1057, 1063–64 (9th Cir. 2000).

bankruptcy court held that bringing a third party to discussions about a real estate purchase was calculated to give a false impression that the buyer was represented by an agent.[16] Again, deception without misrepresentation.[17]

The difference between these cases and misrepresentation proper is what Paul Grice calls the difference between "getting someone to think" and "telling."[18] It is sometimes possible to induce a false belief in another by manipulating the evidence in a way that plays on the inferences she is likely to draw. Buyers assume that aluminum sheets in the middle of the bundle are similar to those on the outside; sophisticated investors take a bank's loan loss reserves as evidence of its outstanding loan amount. As Grice points out, such acts differ from inducing a belief by telling a person something.[19] Only in the latter case is there a misrepresentation.

I call laws that target misrepresentation, as distinguished from other forms of deception, "interpretive" because they require decision makers charged with applying the rule to interpret the meaning of what was said.[20] In order to find a misrepresentation, one must first determine that there was a representation, and if so, what its content was.

Given that every deceit case begins with an act of interpretation, it is remarkable how little courts and commentators have had to say on the subject. The dearth of interpretive rules in the law of deceit is especially striking when compared to the surplus of such rules in the law of contract.[21] Tort jurisprudence contains no analogs to contract law's hierarchies of interpretive evidence, rules of construction, or mandatory and default terms. There is no parol evidence rule, no plain meaning rule, no contra proferentem rule. There are no

16. 386 B.R. 590, 600 (Bankr. W.D. Pa. 2008).

17. It has been suggested to me that concealment and misdirection belong with the law of deceit because both rest on implicit misrepresentations: that one has not hidden any material facts, or that things are as they appear. (One occasionally encounters a similar explanation of why warranties belong to the law of contract: because there is an implicit promise that the representation is true or the sample representative.) But these hypothesized implicit representations do no explanatory work. One can certainly say that by classifying concealment and misdirection as forms of deceit, the law acts as though there are such implicit representations. And to the extent that actors are aware of the law, the rule might even enter into their everyday interpretive practices. Legal rules influence extralegal interpretive norms. But the law here is not recognizing an independently existing representation. It is not piggybacking on our everyday interpretive practices in the way that the law of misrepresentation does.

18. Paul Grice, *Meaning*, 66 PHIL. REV. 377, 382 (1957), *reprinted in* PAUL GRICE, STUDIES IN THE WAY OF WORDS 213, 218 (1989). Richard Moran has recently rethought Grice's distinction in a way that brings out the normative aspect of telling. Richard Moran, *Getting Told and Being Believed*, 5 PHILOSOPHERS' IMPRINT, Aug. 2005, at 1, 1. In Moran's view, the crucial difference is that in telling someone that P, the speaker assumes responsibility for the truth of P. *See id.* at 16–23. Moran's theory provides a starting point for thinking about the moral bases of the law of deceit, a topic beyond the scope of this Article.

19. *See* Grice, *supra* note 18.

20. There is also a broader sense of "interpretation," the sense in which we interpret other's beliefs and intentions based on their behavior. Other laws regulating information—most obviously purpose-based laws—are interpretive in this broader sense.

21. For a critical overview of the contract law rules, see generally Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997).

rules favoring interpretations in the public interest, directing courts how to fill missing terms, or imposing mandatory interpretations in certain circumstances. The *Second Restatement of Torts* provides absolutely no guidance as to how a court should determine the meaning of a deceit defendant's words or actions. The *Second Restatement of Contracts*, when addressing the same issue, provides only that "[w]hether a statement is false depends on the meaning of the words [or other conduct] in all the circumstances, including what may fairly be inferred from them."[22] This is not so much a rule as an anti-rule: the fact-finder should consider any relevant facts, giving each the weight it deems appropriate.

This difference is explained by the almost exclusive reliance of the common law of deceit, unlike the law of contract, on the everyday, extralegal practices we use to interpret the meaning of what people say.[23] Interpretation in these cases is not rule-free. But the relevant rules are not legal ones. They are the social norms that govern the meaning and veracity of speech acts. The common law of deceit, like other interpretive laws, recognizes and incorporates extralegal norms of interpretation and truth telling.[24]

One of the strengths of interpretive laws lies in the context sensitivity of these everyday interpretive norms. We often use words to say things that are different from, and even at odds with, those words' literal meaning. The law of deceit and

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22. RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. a (1981). One occasionally finds the same anti-rule rule expressed in the cases. Thus Missouri courts have stated that a deceit defendant's representations are to be interpreted "in the light of the meaning which the plaintiffs would reasonably attach to them in existing circumstances and the words employed must be considered against the background and in the context in which they were used." Haberstick v. Gordon A. Gundaker Real Estate Co., 921 S.W.2d 104, 109 (Mo. Ct. App. 1996) (quoting Toenjes v. L.J. McNeary Constr. Co., 406 S.W.2d 101, 105 (Mo. Ct. App. 1966)) (internal quotation marks omitted).

23. Interpretive laws sometimes also work to change those norms. Cases finding misrepresentation on the basis of a home seller's failure to disclose termite damage, for instance, have arguably changed the way sellers and buyers interpret what gets said in those transactions. *See generally* E.T. Tsai, Annotation, *Duty of Vendor of Real Estate To Give Purchaser Information as to Termite Infestation*, 22 A.L.R.3d 972 (2011). I discuss this phenomenon in Part II.

24. This suggests that courts should exercise special caution in crafting legal interpretive defaults for deceit cases. It does not follow that such defaults are never appropriate. As Ian Ayres and I have discussed in detail, there are good reasons to interpret contractual promises as implicitly representing an intent to perform. IAN AYRES & GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT 19–45 (2005). We suggest, however, that contextual factors should sometimes suffice to defeat that default interpretation. *Id.* at 105–12. And there are reasons to think that the implicit representation of an intent to perform is a conventional, rather than a context-specific, one. *See* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 54–62 (1969). Another example is the judicially crafted rules for implied certification under the False Claims Act, which hold that a claim for payment under a government contract implicitly represents compliance with material terms, statutes, and regulations. *See* Michael Holt & Gregory Klass, *Implied Certification Under the False Claims Act*, 41 PUB. CONT. L.J. 1 (2011). Here there are good reasons to impose on government contractors' representations that might be contrary to the everyday meaning of their speech acts. *Id.* If this is right, the implied certification doctrine is not an interpretive rule as I am using the term. While there is a large literature on interpretive defaults in the law of contract, we as yet have no general theory of the narrower class of cases in which interpretive defaults are appropriate in the law of deceit.

other interpretive laws address that fact by incorporating not only dictionary meanings and the generic rules of syntax and semantics, but also the rules that determine what a speaker means in context.

Paul Grice was the first twentieth-century philosopher to describe those rules in detail. We can define "speaker meaning" as the meaning a competent language user would attach to a speech act in the context in which that speech act is performed. Speaker meaning often includes a speech act's literal meaning, what the law calls its *plain meaning*. Literal meaning is largely context independent, governed by dictionary meanings and the rules of formal semantics.[25] In many instances, however, speaker meaning also includes nonliteral meanings and implications, sometimes at the expense of a literal interpretation of the speaker's words. Grice described rules of conversational implicature that govern how we decide which meanings attach to a given speech act, that is, how we interpret speaker meaning.

As an example, consider the well-worn facts of *Laidlaw v. Organ*, in which the U.S. Supreme Court held that a tobacco buyer did not have a duty to disclose to the seller news of the end of the War of 1812, but that "at the same time, each party must take care not to say or do any thing tending to impose upon the other."[26] The latter holding addressed the seller's allegation that, before the sale, its agent had asked "if there was any news which was calculated to enhance the price or value of the article about to be purchased," in response to which the buyer had remained silent.[27] The seller's attorneys argued that "[t]his reserve, when such a question was asked, was equivalent to a false answer, and as much calculated to deceive as the communication of the most fabulous intelligence."[28] While Marshall's opinion is not entirely clear on the point, it appears that the Court remanded the case for additional findings on that misrepresentation claim.

The theory of conversational implicature explains that holding. Grice observes that in our everyday talk, a speaker's choice of what to say is governed by commonly understood rules. At any given point in a conversation, a participant's possible conversational "moves" are limited by what Grice calls the "Cooperative Principle": "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."[29] The Cooperative Principle entails four categories of more specific conversational maxims, in a list that is not meant to be exhaustive:

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25. "Largely" because, among other things, of the use of indexical terms like "you," "I," and "this," whose meaning in a sentence is context dependent.

26. 15 U.S. (2 Wheat.) 178, 195 (1817).

27. *Id.* at 183, 188–89.

28. *Id.* at 189–90.

29. H.P. Grice, *Logic and Conversation*, *in* THE LOGIC OF GRAMMAR 64 (Donald Davidson & Gilbert Harman eds., 1975), *reprinted in* PAUL GRICE, STUDIES IN THE WAY OF WORDS 22, 26 (1989).

> Quantity . . .
> 1. Make your contribution as informative as is required (for the current purposes of the exchange).
> 2. Do not make your contribution more informative than is required.
>
> Quality . . .
> 1. Do not say what you believe to be false.
> 2. Do not say that for which you lack adequate evidence.
>
> Relation . . .
> 1. Be relevant.
>
> Manner . . .
> 1. Avoid obscurity of expression.
> 2. Avoid ambiguity.
> 3. Be brief (avoid unnecessary prolixity).
> 4. Be orderly.[30]

Assuming arguendo that the seller in *Laidlaw* asked whether there was any news, it would have been inappropriate for the buyer to respond that it was a beautiful day. That response would have violated the maxims of relation and quantity, being neither relevant nor as informative as was required for the purposes of the exchange.

But the Cooperative Principle is not only a rule of conversational etiquette. It also describes how we go about determining a speech act's meaning in the context in which it is produced. The above rules enable one to identify nonliteral and implicit meanings. When a speech act's literal meaning appears to violate one or more of the maxims, a general presumption of cooperation requires that we look for an implied meaning to bring it into conformity with the Cooperative Principle. The seller's argument in *Laidlaw* was in effect that the Cooperative Principle required that if there was any important news, the buyer respond to his question. More precisely, if the buyer knew of any news, the failure to respond violated the first maxim of quantity: make your contribution as informative as required. In the context of the question, it was therefore reasonable to interpret the buyer's silence as indicating that he knew of no news, bringing his behavior into apparent conformity with the conversational maxims. (Whether the argument was a good one is not my concern. The point is that it was plausible, which is why the Supreme Court remanded the case.) The Gricean maxims are not simply guides for how to behave in conversation. They determine what is said, the meaning of a speaker's words or actions in context.

The reason for the above detour into linguistic theory is that interpretive laws work by picking up and giving legal effect to the everyday semantic norms—the rules of conversational implicature—together with the familiar moral prohibition on lying. The common law of deceit is filled with applications of these rules to determine speaker meaning. For example, *V.S.H. Realty, Inc. v. Texaco,*

30. *Id.* at 26–27 (internal quotation marks omitted).

Inc., a classic half-truth case, applies the maxim of quantity.[31] V.S.H. purchased an oil storage facility from Texaco. After the sale, V.S.H. discovered multiple leaks in the facility and alleged misrepresentation, arguing among other things that after its "repeated inquiries" about leaks in the facility, Texaco disclosed the existence of one leak but not others.[32] The First Circuit concluded that, in context, the disclosure of one leak could carry with it "some implication of exclusivity"—an implication that Texaco knew of no other leaks.[33] Given V.S.H.'s repeated inquiries and the obvious importance of leaks in an oil storage facility, disclosing a single leak without disclosing other known leaks would not be "as informative as is required" for the purposes of the exchange.[34] The buyer was warranted in interpreting the disclosure as implying that there were no other leaks. The court in *Field v. Mans* applied the maxim of relation: Be relevant.[35] Here the defendant allegedly asked the plaintiffs for permission to sell a property after the sale had already been made, thereby causing them to forego their right to accelerate a note pursuant to a due-on-sale clause. The bankruptcy court had concluded that the request for permission implied that the property had not already been sold.[36] The request was relevant only if the defendant still owned the property. The First Circuit held that plaintiffs were therefore warranted in understanding from the request that the defendant had not sold it.[37]

Yet another example can be found in the generally applicable rules for distinguishing actionable representations of fact from nonactionable sales talk or puffery. In *Prudential Insurance Co. of America v. Jefferson Associates*, for example, the Texas Supreme Court held that a building manager's statements to a prospective purchaser that the building was "'superb,' 'super fine,' and 'one of the finest little properties in the City of Austin'" were not statements of fact, but mere sales talk.[38] Interpreted literally, the statements were so vague as to violate the first maxim of quantity, "make your contribution as informative as is required," and so hyperbolic as to violate the second maxim of quality, "do not say that for which you lack adequate evidence."[39] In the context of the conversation, it was therefore more sensible to understand them as exhortations to purchase rather than as statements of fact.

In these and other cases the law of deceit piggybacks on the everyday conversational norms that govern the meaning of what a speaker says. Laws that

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31. 757 F.2d 411, 414–15 (1st Cir. 1985). For a general account of half-truths, see Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87 (1999).

32. *V.S.H. Realty*, 757 F.2d at 413–14.

33. *Id.* at 415.

34. *See* Grice, *supra* note 29, at 26.

35. 157 F.3d 35 (1st Cir. 1998).

36. *Id.* at 38.

37. *Id.* at 46.

38. 896 S.W.2d 156, 163 (Tex. 1995).

39. *See* Grice, *supra* note 29, at 26–27.

enforce the simple rule "do not lie" pick up and deploy the very complex and context-sensitive rules of conversational implicature. This explains why the tort of deceit does not include an array of legal interpretive rules. It is designed instead to incorporate the highly structured, if rarely explicitly formulated, rules we use in everyday conversation. I argue in Part II that the recognition and incorporation of these familiar extralegal norms has a distinct benefit. It allows interpretive laws to issue rules that cover a broad range of otherwise difficult to define behavior, while at the same time putting people familiar with those norms on notice of what the law requires of them.

I have focused on a single element of a deceit plaintiff's case: misrepresentation. My suggestion is that the misrepresentation requirement is central to the design of the common law of deceit in a way that other elements—scienter, materiality, reasonable reliance, and harm[40]—are not. This is not to say that those other elements are not important. But they play a secondary role. Their purpose is not to identify the legal wrongs, but to sort out the correct legal response to them.[41]

B. PURPOSE-BASED LAWS: CONCEALMENT

Interpretive laws adopt an objective definition of the informationally significant behavior they target. Whether or not a defendant made a misrepresentation is an objective fact.[42] Thus proof of negligent misrepresentation does not require that the defendant knew that she was misrepresenting the facts,[43] a material falsehood can render a contract voidable even if made nonfraudulently,[44] and the Lanham Act imposes strict liability for all literally false advertisements, with limited attention to the advertiser's state of mind.[45]

But not all deception involves misrepresentation. Courts have long observed that "it is part of the equity doctrine of fraud not to define it, lest the craft of men should find ways of committing fraud which might evade such a defini-

40. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984) (listing the elements of deceit).

41. Like many useful conceptual distinctions, if pushed too far the difference between defining the regulatory object and determining the right regulatory response breaks down. To define the regulatory object is to decide between two regulatory responses: legal action and legal inaction. Alternatively, if we take the lines between different regulatory responses as given, we might say that scienter, materiality, and similar tests define different regulatory objects. But the distinction is useful in understanding how different laws work.

42. It is true, as Grice also points out, that interpretation commonly requires the identification of a speaker's communicative intention. "'*A* meant[] something by *x*' is (roughly) equivalent to '*A* intended the utterance of *x* to produce some effect in an audience by means of the recognition of this intention' . . . ." GRICE, *supra* note 18, at 220. But a speech act's meaning depends not on the speaker's subjective, possibly private, intent. It depends, rather, on her manifest intent. Meaning depends, to revert to a legal formulation, on the communicative intent that a reasonable person would attribute in light of all the circumstances known to her audience.

43. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977).

44. *See* RESTATEMENT (SECOND) OF CONTRACTS § 163 (1981).

45. 15 U.S.C. § 1125(a)(1) (2006).

tion."[46] No objective definition can capture in advance all possible deceptive acts. The law has responded by looking not only to what people say, but also to their intent. As distinguished from interpretive laws, purpose-based laws define the regulatory object by the purpose with which persons act. I have already mentioned two examples: concealment and misdirection. I will use concealment to illustrate the category.[47]

The *Second Restatement of Torts* provides that a party commits fraudulent concealment only if she "intentionally prevents the other from acquiring material information."[48] Although the drafters do not emphasize it, the definition suggests that there is no such thing as mistaken, negligent, or even reckless concealment. Concealment requires acting with the *purpose* of hiding material information.[49] If the ship owner in *Schneider* had kept the boat in the water not in order to cover its rotten hull but because the dry dock was full, he would not be liable for concealment. The *Schneider* plaintiff might have still had a case if he could show that the defendant had somehow misrepresented, implicitly or explicitly, the hull's condition. If he were to bring his case today, he might argue that the ship owner had a duty to disclose the state of the hull. But neither of those arguments would involve an alleged concealment in the sense that interests me. Concealment proper requires that the defendant acted with the purpose to conceal.

My claim is that, whereas interpretive laws identify the object of regulation by way of violations of extralegal norms of meaning and truth telling, the law of fraudulent concealment identifies the object of regulation by an actor's wrongful purpose.[50] Acts done with the purpose of concealing material information are likely to do just that. By targeting acts done with that bad purpose, the law captures a range of harmful behavior that would otherwise be impossible to define in advance.

Sam Buell has proposed a similar explanation of what he sees as a de facto "consciousness of wrongdoing" requirement in the law of criminal fraud.[51]

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46. Smith v. Harrison, 49 Tenn. (2 Heisk.) 230, 242–43 (1870).

47. Courts sometimes use "concealment" to include also "mere non-disclosure when a party has a duty to disclose." Reed v. King, 193 Cal. Rptr. 130, 131 (Cal. Ct. App. 1983). These courts use "active concealment" to distinguish the comissive wrong from mere failure to disclose. *Id.* at 131 n.2. The discussion in this section concerns only active concealment. I discuss failure to disclose in the last section of this Part. *See infra* section I.C.

48. RESTATEMENT (SECOND) OF TORTS § 550 (1977).

49. Prosser and Keeton do not define concealment in a way that requires intent, though they do characterize it as "*active* concealment of the truth." *See* KEETON ET AL., *supra* note 40, § 106, at 737 (emphasis added).

50. The two techniques are not mutually exclusive. Thus courts often say that a deceit plaintiff must show, inter alia, that the defendant made a misrepresentation and that she intended to deceive the plaintiff. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977). In practice, however, courts rarely insist on separate proof of an intent to deceive. It is usually enough to show that the defendant knew that her statement did not accord with the facts, or that she was recklessly indifferent to its truth.

51. Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1971 (2006) (internal quotation marks omitted).

Buell observes that detailed ex ante definitions of criminal fraud and theft—rules, as distinguished from standards—leave loopholes that bad actors can exploit. The criminal law of fraud "guard[s] against a class of persons who harbor a quasi-professional aim of evading legal constraint to the injury of others" by combining an open-ended definition of the wrong with a very demanding scienter requirement.[52] The federal mail and wire fraud statutes, for example, criminalize "any scheme or artifice to defraud," including schemes to deprive another of "the intangible right to honest services."[53] This broad definition is meant to capture sophisticated bad actors who attempt to evade more narrowly drawn criminal laws. Open-ended standards can fail to put persons on notice of what the law, or the judge who happens to apply it, requires of them. The solution, Buell argues, is to require proof of the defendant's consciousness of wrongdoing, or "badges of guilt."[54] Thus in applying the criminal law of fraud, prosecutors and courts require "evidence that the actor sought to conceal some aspect of the truth about her conduct in order to avoid the adverse normative assessments of others."[55] This de facto consciousness-of-wrongdoing requirement serves two purposes. It indicates that the defendant's behavior was particularly likely to be wrongful or harmful, as the defendant herself assessed it as such. And consciousness of wrongdoing ensures that the defendant was on notice of the wrongfulness of her behavior, allaying familiar concerns about ex post facto criminal lawmaking.

Buell's theory is not about the law of deception as I use the term, but about the crimes of fraud and theft. As a result, his analysis is driven by concerns that differ somewhat from mine. For one thing, Buell's residual category of fraud is meant also to address bad acts whose wrongfulness does not lie primarily in their deceptive effect. An employee who accepts a bribe against the interests of her employer might want to conceal that fact, but the underlying wrong is more

52. *Id.* at 1989; *see also id.* at 1991 ("Open-textured law that grows and innovates in competition with those who seek to evade it appears to be characteristic of any legal order that seeks to control harmful human behavior, at least in any society mature enough to have a large economy."). Buell suggests that this is the only function of the criminal law of fraud. "Novelty might even be *constitutive* of the concept of fraud, if we understand the choice to treat fraud as a category of wrongdoing as a choice to prohibit something residual like 'other forms of indirect taking of property.'" *Id.* at 1996. I believe this overstates things. Criminal fraud employs multiple devices to define the target of regulation. One is consciousness of wrongdoing, or "badges of guilt," as Buell suggests. *Id*. Another is intentional misrepresentation, without regard to any badges of guilt. The criminal law of fraud employs both interpretive and purpose-based methods.

53. 18 U.S.C. §§ 1341, 1346 (2000 & Supp. III 2003), *quoted in* Buell, *supra* note 51, at 1979 (internal quotation marks omitted). The Supreme Court has recently adopted a narrowing definition of "honest services" fraud. *See* Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).

54. Buell, *supra* note 51, at 1996.

55. *Id.*; *see also id.* at 2001 ("[T]he search for badges of guilt continues to drive how many decisionmakers select novel cases for criminal enforcement."). While I like Buell's analysis of how consciousness of wrongdoing can function to define the wrong in criminal fraud, his theory places a great deal of trust in prosecutors and judges applying these open-textured laws. It would be preferable if criminal fraud statutes expressly included "badges of guilt" requirements, which would permit greater judicial oversight of decisions to prosecute and greater appellate oversight of trial court decisions.

akin to stealing than to lying. Furthermore, because Buell is examining the criminal law, there is a special concern about notice and ex post facto lawmaking. These two aspects of Buell's analysis explain his focus on consciousness of wrongdoing. That reflective attitude is general enough to capture non-informational wrongs and at the same time is tailored to assure that the defendant is on notice of the wrongfulness of her behavior.

My category of purpose-based laws of deception is both broader and narrower than criminal fraud as Buell describes it. The category is broader because it includes noncriminal laws, with respect to which the ex post facto concern is not so pressing. The category is narrower because it includes only laws that target deception. These differences explain why the law of fraudulent concealment should require evidence not of the defendant's reflective consciousness of wrongdoing, but only of her wrongful purpose—her intent to conceal material facts. While a mere intent to conceal might not answer worries about notice apposite to the criminal law, it specifically targets the informational wrongs that are the focus of the tort. That said, this subjective inquiry serves functions that are similar to those Buell assigns the subjective inquiry in criminal fraud. That one party meant to conceal material facts from the other, and succeeded in doing so, is sufficient to identify her behavior as wrongful and likely to harm—thus the behavior is the proper target for regulation. There is, therefore, no need for a separate inquiry into the semantic content of her acts (interpretive laws) or a general inquiry into their probable effects (causal-predictive laws). Additionally, the intent of a defendant to conceal a material fact provides sufficient notice for the civil consequences that attach to her actions.

This analysis suggests that while scienter requirements can be found in both interpretive and purpose-based laws (and in some of the causal-predictive laws described below), they serve different functions in these different contexts. Interpretive laws define the object of regulation without reference to the actor's state of mind. The category can therefore include a range of fault standards. Between parties to a contract, for example, a purposive, knowing, or reckless misrepresentation supports a claim for deceit, with the possibility of punitive damages;[56] a material falsehood made negligently permits only a suit for negligent misrepresentation, with damages limited to compensatory measures;[57] and an unintentional, nonnegligent material misrepresentation simply renders the contract voidable by the injured party.[58] Where there is separate and

56. *See* KEETON ET AL., *supra* note 40, §§ 105, 110.

57. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977); KEETON ET AL., *supra* note 40, § 107, at 745–48.

58. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). The same section also provides that a fraudulent nonmaterial misrepresentation renders a resulting contract voidable. Farnsworth reports, however, that "although there is no shortage of cases allowing avoidance where the misrepresentation was both material and fraudulent, or material but not fraudulent, it is difficult to find cases that have done so where the misrepresentation was fraudulent but not material." 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.12, at 481 (3d ed. 2004).

sufficient evidence that the defendant made a material representation on which the plaintiff relied to her detriment, the scienter inquiry functions not to determine whether the defendant committed a deceptive act, but the appropriate legal consequences of that act. These laws assess culpability, and perhaps also materiality and foreseeability, based on the defendant's intention that her falsehood deceive. Proof of scienter might well play these roles in purpose-based laws as well. But it has another more important function: to determine whether there has been a deceptive act in the first place. Because purpose-based laws require no evidence of misrepresentation, it is the scienter inquiry, together with proof of reliance and harm, that determines whether the defendant's act was a deceptive one. Scienter defines the object of regulation.

Fraud by concealment is not the only member of the category of purpose-based laws. Misdirection is another. As distinguished from concealment, which involves the hiding of facts or information, misdirection plays on inferences other persons are likely to draw from facts or information to which they have access—underfunding loan loss reserves because of the inferences investors are likely to draw, or bringing a third party, whom the seller is likely to assume is the buyer's agent, to negotiations. Again we have deception without misrepresentation.

Unlike concealment, to date courts and commentators have not distinguished misdirection as a separate species of legal wrong. This is unfortunate. Allegations of misdirection are commonly brought under the rubric of fraud or deceit without considering that the defendant has not made a false statement as such. As a result, there is less doctrinal clarity about the elements of a misdirection claim. In *Wells Fargo*, for example, the Ninth Circuit suggested that the defendant's reckless disregard of how the loan loss reserve would be interpreted would be enough to support a holding of either securities fraud under § 10(b) of the Securities Exchange Act of 1934 or deceit under California law.[59] This seems too broad a rule with respect to the state law tort claim.[60] Although the *Wells Fargo* court repeated the "reckless or intentional" standard, one wonders whether it would have upheld a holding of tort liability based solely on the defendant's reckless disregard of investors' likely inferences.[61] More satisfying in this regard is *Lages*, where the court found that bringing a third party to talks with the sellers was part of a "scheme to cheat plaintiff out of her commission," suggesting that it was the defendant's purpose to deceive.[62] Like concealment,

59. *See In re* Wells Fargo Sec. Litig., 12 F.3d 922, 926 (9th Cir. 1993), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), *as recognized in* Howard v. Everex Sys., Inc., 228 F.3d 1057, 1063–64 (9th Cir. 2000).

60. Perhaps it is not too broad a rule under federal securities law, which imposes many affirmative duties to disclose and arguably a general duty of care to clarify potentially misleading facts.

61. The plaintiffs also alleged intentional misrepresentations. *See Wells Fargo*, 12 F.3d at 924.

62. *See In re* Lages, 386 B.R. 590, 600 (Bankr. W.D. Pa. 2008) (concluding that the debt was nonetheless dischargeable under § 523(a)(2)(A) of the Bankruptcy Code because the debtors did not obtain services from the plaintiff by means of their fraud).

the law of misdirection should require the plaintiff to show that the defendant intended the deceptive effects of her action.

Other examples of purpose-based laws can be found in judicially created rules that supplement objective definitions of informational wrongs.[63] Although the law of misrepresentation generally excludes sales talk or puffery from its scope, a sales talk defense will not succeed if the plaintiff can show that the defendant intended her words to deceive.[64] Bait-and-switch advertising is another example. Federal regulations define "bait advertising" as an "insincere offer" to sell whose "purpose is to switch consumers from buying the advertised merchandise, in order to sell something else."[65] The purpose-based inquiry captures the advertiser who sells one or two of the advertised goods in order to avoid a charge of misrepresentation, while protecting the relatively innocent advertiser who simply runs out of an item.[66] Yet another example can be found in judicial interpretations of the Lanham Act's prohibition on false advertising. As Part III discusses, courts have held that a plaintiff bringing a section 43(a) claim will be relieved of otherwise applicable evidentiary requirements, including that the advertisement was literally false or had a deceptive effect, if she can show that the defendant intended the advertisement to mislead the public.[67] All of these rules define the legal wrong by way of the purpose with which an act is done.

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63. In addition to the examples described above, one also finds a purpose-based gap filler in the law of perjury. In *United States v. DeZarn*, the Sixth Circuit held that a witness charged with perjury cannot use the literal truth defense where there was evidence that his responsive answers were deliberately misleading. *See* 157 F.3d 1042, 1049 (6th Cir. 1998).

> [A] perjury inquiry which focuses only upon the precision of the question and ignores what the Defendant knew about the subject matter of the question at the time it was asked, misses the very point of perjury: that is, the Defendant's intent to testify falsely and, thereby, mislead his interrogators.

Id. The *DeZarn* court distinguished the case from *Bronston v. United States*, which held that an intent to deceive by way of a nonresponsive answer could not support a perjury conviction. 409 U.S. 352, 359 (1973).

64. *See* Weitzel v. Jukich, 251 P.2d 542, 544 (Idaho 1952) (holding there is an exception to the law that says seller's talk does not amount to misrepresentation which occurs when the parties have unequal ways of knowing the truth); *see also* Hogan v. McCombs Bros., 180 N.W. 770, 772–73 (Iowa 1921) (holding the exception for sales talk in the law of false representations does not apply to material facts which "are made with intent to deceive"); Landis v. Rodgers, 249 P. 398, 400 (Okla. 1926) (holding an expression of opinion made as an inducement to an ignorant party may be the basis for a misrepresentation action).

65. 16 C.F.R. § 238.0 (2010); *see also* Tashof v. FTC, 437 F.2d 707, 709 n.3 (D.C. Cir. 1970) ("'Bait and switch' describes an offer which is made not in order to sell the advertised product at the advertised price, but rather to draw a customer to the store to sell him another similar product which is more profitable to the advertiser.").

66. This analysis suggests an amendment to Ian Ayres and my discussion of bait-and-switch advertisement. *See* AYRES & KLASS, *supra* note 24, at 149–50. There we emphasized the positive function that proof of insincerity might serve in bait-and-switch cases. The analysis above suggests that, where proof of misrepresentation is lacking or the evidence is equivocal, proof of bad purpose should be enough.

67. *See* cases cited *infra* notes 139–42.

C. CAUSAL-PREDICTIVE LAWS: CONSUMER PROTECTION

Yet a third category within the law of deception is what I call "causal-predictive laws." I will use the term "transaction element" to refer to any aspect of a transaction between two or more parties. A transaction element might be the content of a communication, the method or format of communicating, noncommunicative acts or omissions, one or more terms of a deal, the parties' relative experience or sophistication, or any other feature of the transaction. My functional definition of "the law of deception" stipulates that such laws regulate transaction elements because those elements are likely to cause or correct false beliefs. There is a sense, then, in which all of the law of deception is concerned with causation. But some laws inquire more directly into deceptive effects than do others. Interpretive and purpose-based laws identify a transaction element's informational effects by way of an inquiry into its semantic properties or intended effects. The defining feature of causal-predictive laws is that they investigate a transaction element's informational effects more directly. Rather than asking about its meaning and veracity or a party's purpose in introducing it, a causal-predictive law simply asks about a transaction element's likely effects on persons' beliefs or knowledge. Such inquiries employ three sorts of techniques: the application of everyday folk psychology to predict informational effects, the empirical scientific study of those effects, and the application of more sophisticated theories of cognition and information processing.

An example of regulation that uses only the first technique is New York's law that the drafter of a printed consumer contract or residential lease may put the document into evidence only if the print is clear and legible and in 8-point type or larger.[68] The obvious reasoning behind the law is that consumers are less likely to read and understand contracts that are written in small, unclear, or illegible print. The law requires neither a finding that the document was false nor that it was produced with intent to deceive. The only question is the size, clarity, and legibility of the print, a transaction element that has a predictable effect on consumer understanding. Or consider the federally mandated three-day cooling-off period for door-to-door consumer sales. The Federal Trade Commission's announced reasons for the rule included anecdotal accounts of deceptive and high-pressure sales tactics, evidence that similar laws reduced the number of consumer complaints, and the observation that "[t]he 3-day cooling-off period will provide the consumer with an opportunity to discuss his purchase with others, to reflect upon the provisions of the contract, and perhaps to do a little comparative shopping."[69] I will call laws that regulate transaction elements on the basis of our everyday, non-semantic understanding of their

68. *See* N.Y. C.P.L.R. 4544 (MCKINNEY 2007).

69. Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22,942 (Oct. 26, 1972).

informational effects "common sense regulation."[70]

Other causal-predictive laws employ more sophisticated methods to determine a transaction element's informational effects. A recent study by the Federal Trade Commission, for example, concluded that existing mortgage disclosure forms failed to convey key information to consumers, and that a different format would result in significantly better consumer comprehension.[71] The FTC reached that conclusion by giving approximately 800 recent mortgage customers one of two mortgage disclosure forms, asking them a series of questions to test their comprehension and retention, and then determining which form resulted in more correct answers.[72] The study did not inquire into the meaning of the forms, and there was no finding that one or the other was false. Nor did it look to the intent with which the forms were produced. The FTC simply observed that providing the information in the new format resulted in more informed consumers, from which it concluded that regulations requiring lenders to use that format would likely have positive effects in reducing consumer misapprehension or deception.

I use "empirical regulation" to denote causal-predictive laws that take this second approach. Empirical regulation is a common technique in consumer protection law. Researchers and regulators have studied, for example, the effectiveness of nutrition labeling on food,[73] health warnings on cigarettes,[74] and warning labels on alcohol.[75] As will be discussed in greater detail in Part III, empirical regulation also figures prominently into judicial interpretations of the Lanham Act's false advertising provisions, where courts have required consumer surveys, copy tests, and other forms of empirical evidence to support claims of implicit misrepresentation.

Causal-predictive laws can also take into account sophisticated general theories of cognitive or behavioral biases that predict how a transaction element is likely to affect parties' beliefs. Sometimes those predictions merely confirm common sense. Results from behavioral economics, for example, can explain why cooling-off periods lead to better consumer decisions.[76] Other predictions

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70. Thanks to Rebecca Tushnet for prompting me to recognize the separate category of common-sense causal-predictive laws and for these examples.

71. *See* JAMES M. LACKO & JANIS K. PAPPALARDO, FED. TRADE COMM'N, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS ES-5 (2007), http://www.ftc.gov/be/econrpt.shtm.

72. *See id.* at 41–54.

73. *See generally* Lisa A. Sutherland et al., *Guiding Stars: The Effect of a Nutrition Navigation Program on Consumer Purchases at the Supermarket*, 91 AM. J. CLINICAL NUTRITION 1090S (2010).

74. *See generally* David Hammond et al., *Graphic Canadian Cigarette Warning Labels and Adverse Outcomes: Evidence from Canadian Smokers*, 94 AM. J. PUB. HEALTH 1442 (2004); David Hammond et al., *Text and Graphic Warnings on Cigarette Packages: Findings from the International Tobacco Control Four Country Study*, 32 AM. J. PREVENTIVE MED. 202 (2007).

75. *See generally* J. Craig Andrews, *The Effectiveness of Alcohol Warning Labels: A Review and Extension*, 38 AM. BEHAV. SCIENTIST 622 (1995).

76. *See* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1238–47 (2003).

run contrary to our untutored judgments. For example, common cognitive biases make warnings much less effective than we might otherwise think.[77] Building on general theories of cognitive bias and heuristics, Christine Jolls and Cass Sunstein suggest that regulators take advantage of cognitive shortcuts when designing warnings. Because "people tend to respond to concrete, narrative information even when they do not respond, or respond far less, to general statistical information"[78] (the availability heuristic), consumers should be given stories about harmful uses of a product, rather than simple bold-face warnings.[79]

Another application of cognitive theory to regulatory design can be found in Oren Bar-Gill's examination of the informational effects of bundling separate products together, such as a free cell phone with a two-year contract, or a low-cost printer with high-cost cartridges.[80] Bar-Gill concludes that because consumers often over- or underestimate their use of a product or the value they will get from it, such transaction structures tend to cause consumer misperception of both value and price, and that regulations discouraging such bundling would likely improve consumer information. Like the FTC's empirical study of mortgage disclosures, these results have nothing to do with whether sellers are telling lies. In fact, the transaction elements that concern Bar-Gill are not even communications. They can be neither true nor false. Nor do Bar-Gill's conclusions rest on a finding that sellers use bundling with the purpose of deceiving consumers. These elements are amenable to the tools of causal-predictive laws not because of their meaning or purpose, but because established theories of cognition and information processing predict that they will have a deceptive effect. I refer to this third causal-predictive technique as "theory-based regulation."

Empirical and theory-based methods are often applied in tandem. Empirical studies draw their hypotheses from the realm of theory. And the predictions of cognitive theory demand not only empirical verification, but often also empirical specification. Theories by design oversimplify the world. Thus Jolls and Sunstein note that "overshooting is always a possible danger," and argue that experimentation is needed to calibrate any efforts to take advantage of heuristics and cognitive biases when designing regulations.[81] An example of the interplay can be found in Ian Ayres, Sophie Raseman, and Alice Shih's recent study of the effect of informing utility consumers about how their energy usage compares to

77. *See* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1229–41 (1994).

78. Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 210 (2006).

79. *See id.* at 212–13.

80. *See generally* Oren Bar-Gill, Essay, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33 (2006) [hereinafter Bar-Gill, *Bundling*]; *see also* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1402–04 (2004) (examining credit card issuers' exploitation of common consumer cognitive and behavioral biases by offering low annual fees while imposing high interest rates).

81. Jolls & Sunstein, *supra* note 78, at 230.

that of their neighbors.[82] The study draws on Robert Cialdini's theory that normative messages are more effective in changing behavior when they convey widespread adherence to the norm, as people tend to conform their behavior to the perceived behavior of others.[83] In 2008, the Sacramento Municipal Utility District and Puget Sound Energy began providing comparative energy usage information to thousands of customers and measuring their subsequent usage. Ayres, Raseman, and Shih have used that data as empirical evidence of the likely effect of requiring such information on energy bills and of how such information should be presented. These causal-predictive results draw both on Cialdini's broader theory of how certain types of information are likely to affect consumer behavior and on the empirical study of those effects.[84]

As I have said, there is a sense in which interpretive and purpose-based laws are also about a transaction element's likely deceptive effects. But those laws do not define their direct object in terms of those effects. Interpretive laws require an inquiry into meaning and truth; purpose-based laws an inquiry into mental states. Causal-predictive laws investigate a transaction element's informational effects more directly, through the application of folk psychology, scientific induction, cognitive theory, or some combination of the three. An important consequence of this difference, which I discuss in the next Part, is that causal-predictive laws need not limit themselves to communications or acts done with a verifiable purpose. The methods can be applied to any transaction element that has a predictable informational effect. But, I will argue, causal-predictive methods also come with an important limitation: they can be effectively deployed only when the behavior they target is repeated in substantially the same form across multiple transactions.

II. STRENGTHS AND WEAKNESSES

I have identified three types of laws of deception, each defined by how it picks out the object of regulation. Interpretive laws recognize and incorporate everyday norms of meaning and truth telling. Purpose-based laws look to the

82. Ian Ayres, Sophie Raseman & Alice Shih, Evidence from Two Large Field Experiments that Peer Comparison Feedback Can Reduce Residential Energy Usage (July 16, 2009) (unpublished manuscript), http://ssrn.com/abstract=1434950.

83. *See, e.g.*, Robert B. Cialdini, *Crafting Normative Messages To Protect the Environment*, 12 CURRENT DIRECTIONS IN PSYCHOL. SCI. 105 (2003); Robert B. Cialdini, Raymond R. Reno & Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling the Concept of Norms To Reduce Littering in Public Places*, 58 J. PERSONALITY & SOC. PSYCHOL. 1015 (1990).

84. Another example of the mixed use of empirical and theory-based methods can be found in Maureen Morrin and Jacob Jacoby's *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MARKETING 265, 266 (2000). Morrin and Jacoby showed subjects sample potentially infringing trademarks, such as "Dogiva dog biscuits," and then measured subjects' response times and accuracy when shown the original marks. The goal was to elicit empirical evidence for the theory that trademark dilution causes confusion by increasing so-called internal search costs. For a trenchant criticism, see Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 527–46 (2008).

purpose with which an act was done. Causal-predictive laws use folk psychology, the methods of the natural sciences, and cognitive theory to predict a transaction element's informational effects. Each picks out a different set of transaction elements for legal regulation. That is, each describes a different regulatory domain. Those domains overlap. An advertisement that includes a false statement, is intended to deceive the public, and has a measurable deceptive effect might be reached by any or all of the methods. But the domains are not coextensive. I have already mentioned several examples. Purpose-based laws do not reach unintentional misrepresentations. Interpretive laws cannot capture purposive concealment that involves no false statements as such or noncommunicative transaction elements that have predictable informational effects. The domain, or regulatory reach, of each method can therefore be represented in a Venn diagram.

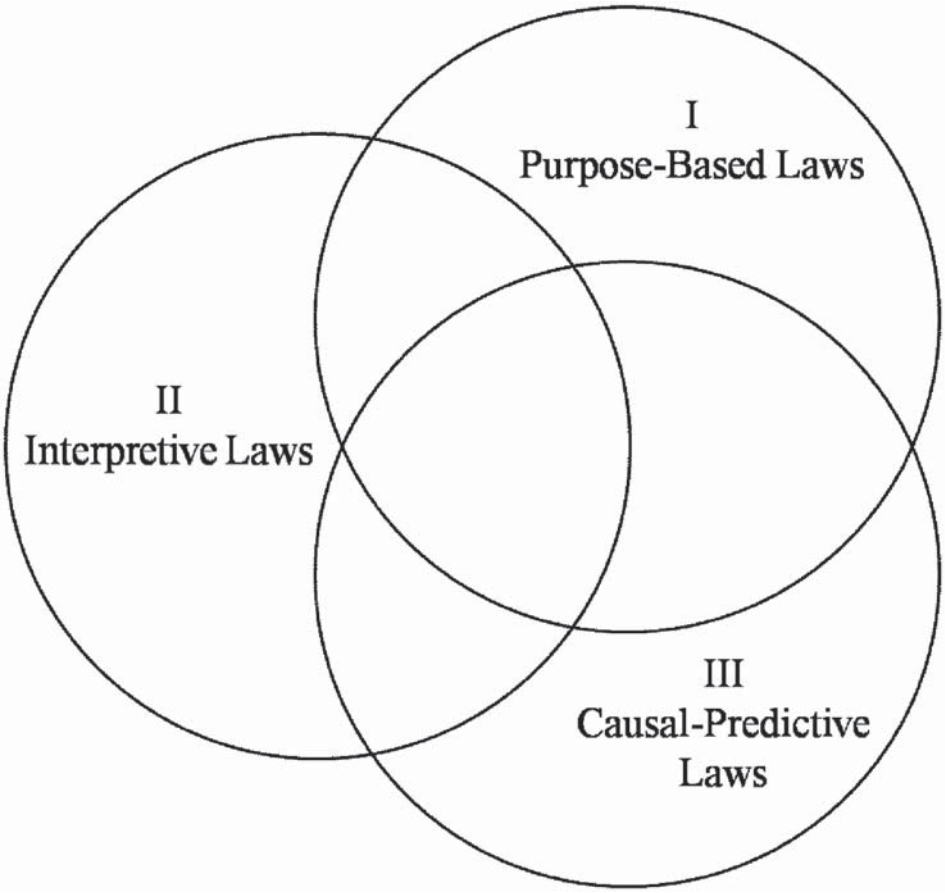

Figure 1

The strength of each regulatory approach depends in part on the extent of its domain—on the relative diameter of its circle.

The first section of this Part describes the regulatory domains of each method. The limits of purpose-based and interpretive laws are perhaps the most obvious. Purpose-based laws work only when an actor's purpose can be proven in court, interpretive laws only when a transaction element is a communication that can be shown to be false. Causal-predictive laws are subject to neither restriction, and can address factors such as relative effectiveness and alternative acts that the binary structures of the first two approaches do not capture. But causal-predictive laws have a limitation of their own: they can be effectively applied only to elements that are repeated in the same form across many transactions. While these conclusions are relatively simple to state, getting the nuances will take some work. The second section deploys those conclusions to draw a few lessons about the proper design and deployment of these different regulatory methods.

A. THE DOMAIN OF REGULATION

The limits of purpose-based laws are most obvious. Many informationally significant transaction elements merit legal attention without regard to the purpose with which they are included in a transaction. Examples include unintentional misrepresentations, innocent failures to disclose, and opaque modes of communicating, such as small print or overly technical language. Even when informationally significant acts are done with bad intent, purpose-based laws can reach them only if those who apply the law—courts, juries, or regulatory agencies—can see that intent. A bad actor's purpose must be verifiable. Rules of evidence, burdens of proof, and the inherent difficulty of proving state of mind all create hurdles here. The domain of purpose-based laws includes only transaction elements done with a verifiable wrongful purpose—a relatively small set.

The domain of interpretive laws also has its limits, though they are both more capacious and more plastic than those of purpose-based laws. Interpretive laws apply by definition only to misrepresentations and so reach only false communications. More specifically, interpretive laws reach only transaction elements that include assertions, express or implied, that are demonstrably false. They do not capture deceptive acts that do not involve falsehoods, such as noncommunicative behavior that has predictable informational effects or true statements that nonetheless deceive.

One advantage of interpretive laws over purpose-based laws is that they can be applied without an inquiry into the defendant's state of mind. To ascertain whether there is a misrepresentation, a legal decision maker must determine a speech act's meaning and its veracity. Both are objective facts. The question is not the subjective, perhaps hidden, intent of the speaker, but the reasonable interpretation of her words and actions and whether that meaning corresponds to

the world. This difference marks a strength of interpretive as compared to purpose-based laws: meaning and truth are easier to verify than purpose.

Interpretive laws are also more plastic than purpose-based ones. Interpretive laws give legal force to extralegal norms. All social-norm-based laws are to some degree constrained by the extralegal norms they incorporate. If, as the Restatement recommends, the law of nondisclosure were to piggyback on the ethics and expectations of businesspeople, it would reach only transaction elements that businesspeople consider normatively significant. By the same token, interpretive laws can reach only transaction elements that our everyday interpretive practices allow us to identify as false. But these extralegal norms are not fixed in stone, and laws can be structured in ways that extend them to new cases, which can in turn change or give new content to them. Fifty years ago, it was perhaps unclear whether in an arms-length sale of residential property the seller had an ethical duty to disclose termite damage. Today, the legal rule in many states is clear: the seller has a duty to disclose such information.[85] That legal change has affected the expectations of sophisticated market participants, perhaps also changing the extralegal norms used to judge fair practices. Similarly, by merely mentioning the terms "as is" and "with all faults," the safe-harbor rules for warranties in the Uniform Commercial Code have affected the everyday meaning of those phrases.[86] Or consider the implied certification doctrine, which courts have developed in applying the False Claims Act. According to this rule, a claim for payment against the federal government implicitly represents compliance with material contract terms, statutes, and regulations.[87] While that rule probably departs from everyday understandings of what a request for payment means, it is perhaps also working a change in the interpretive practices of government contractors. By adopting interpretations that depart from, clarify, or restrict the meaning words otherwise have, the law can change the nonlegal understanding of them.

The decision to depart in the law from everyday rules of interpretation cannot, of course, be based on those rules. Reasons to change some norms must come from the outside, as it were.[88] Legal attempts to depart from or change

85. *See, e.g.*, Pywell v. Haldane, 186 A.2d 623 (D.C. 1962); Piazzini v. Jessup, 314 P.2d 196 (Cal. Ct. App. 1957); Smith v. Renaut, 564 A.2d 188 (Pa. Super. Ct. 1989).

86. U.C.C. § 2-316(3)(a) (2004) (internal quotation marks omitted). The irony is that the provision purports to use the two phases merely as examples of when "language that *in common understanding* calls the buyer's attention to the exclusion of warranties [and] makes plain that there is no implied warranty." *Id.* (emphasis added). By mentioning the two examples, the U.C.C. almost certainly changed, or at least clarified, the common understanding of those terms.

87. *See, e.g.*, Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001); Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 433 (Fed. Cl. 1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

88. Raz observes that whether lawmakers will want to extend a social norm to new instances depends on the reasons why the law recognizes that norm. If it does so because lawmakers attach importance to the social norm as such—what Raz calls "derivative" recognition—lawmakers are unlikely to engage in normative innovation. If it is in order to advance other social interests not directly

everyday interpretations of what people say cannot be based on those interpretations. Instead they will be supported by considerations like common sense judgments of morality, fairness, or efficiency.[89] Or they might be based on more sophisticated arguments from economics, cognitive science, or empirical studies. The plasticity of interpretive regulation lies in the ability to combine it with these other methods of determining the regulatory object.

There is, however, a limit to such normative innovation. An important advantage of social-norm-based laws in general, and of interpretive laws in particular, is they provide a low-cost way to ensure notice of what the law demands. If most people are already adept at applying and complying with the relevant social norms, they already know the scope of the related legal obligations. Because the law of deceit recognizes and incorporates everyday norms of interpretation and truth telling, competent language users generally know what it requires of them. It is enough that they understand the simple maxim: do not tell a lie. This advantage is lost when the law departs too far from a person's everyday understanding of extralegal norms that govern their interactions. This is not much of a worry where the legal innovation involves a clear rule applied in limited situations to parties who are on notice that they are subject to it. This is why we do not worry much about legal rules that clarify or extend the disclosure duties of those who issue securities, of credit-card companies and banks, or even of home sellers, or about fixed legal interpretations of claims for payment on a government contract. But as interpretive and other social-norm-based regulation departs further from the extralegal norms it incorporates, it calls for other means of ensuring that people know what the law requires of them.

Both interpretive and purpose-based laws are subject to yet another limitation, which corresponds to a strength of the causal-predictive approach. Richard Craswell has argued that contract scholars too often think of disclosure as "a binary or an all-or-nothing trait," assuming that "there can be no such thing as greater or lesser *degrees* of disclosure."[90] In fact, Craswell observes, information can be presented more or less effectively, and the design of laws regulating information flow should take account of the effectiveness of the mode of presentation.[91] Craswell takes as his model consumer protection law, where regulators and scholars have studied, for example, whether information should

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related to the value of the recognized social norm—"original" recognition—lawmakers are more likely to extend the norm to new cases and less likely to worry about the feedback effects discussed above. JOSEPH RAZ, PRACTICAL REASON AND NORMS 153–54 (1975); Joseph Raz, *The Institutional Nature of Law*, 38 MOD. L. REV. 489, 502 (1975); Joseph Raz, *Voluntary Obligations and Normative Powers II*, 46 PROC. ARISTOTELIAN SOC'Y 79, 86–87 (1972).

89. Michael Holt and I have argued, for example, that the implied certification rule is supported by considerations of both morality and efficiency. Holt & Klass, *supra* note 24, at 38–47.

90. Craswell, *Taking Information Seriously*, *supra* note 1, at 569.

91. *Id.* at 585 (discussing inter alia Ian Ayres and my work on promissory fraud).

be presented in absolute or relative terms, the effects of formatting and prominence of disclosures, the effects of imagery, and the difference between framing information in terms of benefits and in terms of losses.[92]

Craswell identifies the problem as limited vision of contract scholars. But those limits reflect the common law methods they study. Interpretive and purpose-based laws each pose to adjudicators a binary question: Was there a misrepresentation? Did a person act with a wrongful purpose? Neither approach is suited to evaluate the effectiveness of hypothetical alternative communications. Inquiries into purpose are about a defendant's subjective state, not the effectiveness of her acts. And while the rules of conversational implicature take account of effectiveness ("Avoid obscurity of expression." "Avoid ambiguity."), they provide no tools for measuring the relative effectiveness of different modes of communication. The extralegal norms governing the effectiveness of communications are too uncertain and indefinite to serve as a test for legal liability. Interpretive laws therefore incorporate the simpler, binary norm: do not tell a lie.

All of this, though stated in somewhat different terms, is of a piece with Craswell's analysis. To reach questions of effectiveness, the law must use folk psychology, empirical studies, or cognitive theories that predict or test the effects of different modes of presentation. Craswell therefore proposes that to capture questions of effectiveness, the common law incorporate some of the causal-predictive methods found in consumer protection law.[93] I consider that proposal below. For the moment, I simply observe that neither purpose-based nor interpretive laws are, in themselves, suited to the regulation of effectiveness. Those informational aspects of transactions lie in the domain of causal-predictive regulation.

Another relative strength of causal-predictive laws is that they are limited neither by legal actors' purposes nor by transaction elements' meaning and veracity. Folk psychology, cognitive psychology, and the methods of empirical sciences can be used to investigate acts without inquiry into actors' purposes, and they can be applied to both communicative and noncommunicative transaction elements. I have already mentioned an example: Bar-Gill's theoretical work on the informational effects of bundling products together. While Bar-Gill ventures some hypotheses about why businesses engage in bundling,[94] his analysis of the practice's informational effects does not turn on those suppositions. Nor is bundling a speech act with communicative content, or the object of other extralegal norms. Rather, bundling is amenable to the causal-predictive approach because cognitive theories of information processing predict that the practice is likely to cause specific forms of consumer deception, and because we

92. *Id.* at 581–93.
93. *Id.* at 623–31.
94. *E.g.*, Bar-Gill, *Bundling, supra* note 80.

can imagine empirical studies that might confirm or disprove those effects. Causal-predictive regulation can also identify instances where truthful communications are ineffective or even deceptive. Though our everyday interpretive practices suggest that clear warnings on consumer products should be enough to inform users of their dangers,[95] empirical studies and cognitive theory suggest that such warnings in fact often fail to correct consumer misperception.[96] And while disclaimers can prevent misrepresentation proper, they will not prevent deception if they go unnoticed or are not attended to.[97] Causal-predictive regulation can expand the law's scope beyond falsehoods to address the informative and deceptive effects of communications more generally.

This suggests that the domain of causal-predictive laws is much broader than the domains of purpose-based and interpretive laws. But causal-predictive regulation too has its limits. I will use the term "repeat elements" to denote transaction elements that are replicated in substantially the same form across many transactions. Most mass-consumer contracts, for example, contain many repeat elements: a single seller offers the same product in a similar format and on similar terms to many different buyers.[98] I will use "discrete elements" to refer to transaction elements that appear in relatively few transactions. Highly negotiated transactions are likely to include many discrete elements. "Repeat" and "discrete" are relative terms: a given transaction element can be more or less repeat or discrete. For one thing, a transaction element might be replicated more or less widely. Boilerplate can be common to several contracts between two players, to all contracts written by a single law firm, to many contracts in a segment of a market, or to most contracts in the market as a whole. For another, there are degrees of similarity. Elements of many mass-consumer transactions—such as the words used in an advertisement—are identical across all transactions. At the opposite end of the spectrum is the act of agreeing or promising, a transaction element that is repeat insofar as it appears in every contract, but takes many different forms. Finally, transactions as a whole can be described as more or less repeat, depending on how many elements they share with other transactions.

The distinction between repeat and discrete terms is important because causal-predictive laws are effective only when applied to repeat transaction elements. There are at least three reasons why this is so.

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95. The everyday interpretive judgment is embodied in the so-called heeding presumption in products liability law, which presupposes for purposes of judging causation that a consumer would have attended to a warning had it been given. *See* Richard C. Henke, *The Heeding Presumption in Failure To Warn Cases: Opening a Pandora's Box?*, 30 SETON HALL L. REV. 174, 185–89 (1999).

96. *See* Latin, *supra* note 77; Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665–79 (2011).

97. *See* Craswell, *Taking Information Seriously*, *supra* note 1, at 583–84.

98. Repeat elements can also appear in transactions where neither party is a repeat player. The seller and purchaser of an existing home typically do not engage in transactions of that sort, though their sales contract probably includes elements identical to those in most other sales contracts.

First, the scientific-inductive methods of empirical regulation require repeatability. Field studies can be performed only on transaction elements that can be standardized and replicated across multiple sample transactions. But many informationally significant transaction elements are highly discrete. The parties' relative intelligence, their biases and backgrounds, and the unique history of their relationship might all figure into deception. Such discrete transaction elements are often difficult or impossible to replicate, and therefore escape the methods of empirical regulation.

Consider the familiar facts of *Vokes v. Arthur Murray*.[99] Representatives of the Arthur Murray School of Dancing allegedly used "a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums" over the course of sixteen months to dupe Audrey Vokes, "a widow of 51 years and without family," into purchasing fourteen dance courses, adding up to 2,302 hours of lessons for a total cash outlay of just over thirty-one thousand dollars.[100] The court concluded that Vokes had adequately pled fraud based on a number of factors, including the school's superior knowledge of her dancing abilities, the relationship of trust that the instructor fostered with Vokes, and, implicitly, Vokes's vulnerability.[101] In reaching its decision, the court appealed to social norms of truth telling and disclosure, as well as evidence of the dance company's wrongful purpose.[102] These considerations identify Arthur Murray's alleged behavior, taken as a whole, as a good target for regulation.

The *Vokes* complaint averred many separate acts and practices, some of which might be amenable to empirical study. For example, the school allegedly induced Vokes to purchase more dance lessons by awarding her "Bronze," "Silver," and "Gold" medals.[103] One might test how such prizes are commonly understood and their effects on purchasing decisions. But it is hard to imagine a field study that would replicate and test the constellation of acts and circumstances that allegedly worked together to mislead Audrey Vokes. Not only

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99. 212 So. 2d 906, 907–08 (Fla. Dist. Ct. App. 1968).

100. *Id.* at 907.

101. *See id.* at 908–09.

102. *See id.* Much of the court's analysis is taken up with the common law rules of misrepresentation and fraud. For example: "Even in contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, the law is if he undertakes to do so he must disclose the Whole truth." *Id.* at 909. But the court also discussed Arthur Murray's likely purpose:

> [I]t would be a reasonable inference from the undenied averments of the complaint that the flowery eulogiums heaped upon her by defendants as a prelude to her contracting for 1944 additional hours of instruction in order to attain the rank of the Bronze Standard, thence to the bracket of the Silver Standard, thence to the class of the Gold Bar Standard, and finally to the crowning plateau of a Life Member of the Studio, proceeded as much or more from the urge to "ring the cash register" as from any honest or realistic appraisal of her dancing prowess or a factual representation of her progress.

Id.

103. *See id.* at 909.

would it be difficult to capture all of those elements in a single experiment, but they included facts, such as the dance instructors' superior knowledge and, according to the court's description, Vokes's emotional state, that would be nearly impossible to replicate.

This first limitation of the causal-predictive method applies only to the empirical type. A second limiting factor applies both to empirical and to theory-based regulation. This is cost. Reliable empirical studies are expensive, worth the price only when they can be productively applied to regulate a large number of transactions. And while theory-based lawmaking can be done from an armchair, the proper application of cognitive theories requires expertise, collaboration, and reflection. The work of applying purpose-based or interpretive laws to a given set of facts, in contrast, can be done by a lay jury or common law judge in the course of a single lawsuit, often without even a trial. Unlike purpose-based and interpretive regulation, empirical and theory-based lawmaking make sense only if their costs can be amortized over a large number of transactions.

Lastly, there is the general requirement that subjects of a law be on notice of what it demands of them. I argued above that interpretive laws can work to change everyday interpretive norms, but that too much innovation of this sort undermines one of their important advantages: nonsophisticates' ability to anticipate the law. That concern is all the more salient in the design of causal-predictive laws. Whether a law is meant to guide behavior ex ante or to remedy wrongs ex post, we want people to be able to predict what it expects of them. Those subject to interpretive laws can rely on their familiarity with the norms that govern meaning and veracity. Those subject to purpose-based laws can rely on their everyday understanding of what counts as a wrongful or deceptive purpose. Neither is available to the subjects of causal-predictive laws, as these laws often depart from our pre-theoretical assessment of permissible behavior.

The problem here is that the law first sees a discrete transaction element only at the end of its natural life, after the transaction has broken down. The results of any empirical testing arrive too late to guide the parties, whose exchange is water under the bridge. And cognitive theories of information processing are new and developing, their applications dependent on expert knowledge and judgment. Bar-Gill's analysis of bundling[104] is interesting because it is surprising, at least to those unfamiliar with the theories on which it is based. Although sophisticated commercial parties no doubt use these theories in advertising and elsewhere, one cannot presuppose general familiarity with them or their implications, which are often subtle, nonobvious, or contestable. Even the causal-predictive rules generated by common sense or folk psychology, such as

104. *See* Bar-Gill, *Bundling, supra* note 80.

type–size requirements or cooling-off periods, must be announced in advance if they are to be effective going forward. While the reasons for those rules are widely understood, the rules themselves do not correspond to familiar extralegal norms or widely agreed-upon judgments.

Causal-predictive regulation's restriction to repeat transaction elements marks a comparative strength of both interpretive and purpose-based laws. To effectively regulate discrete, informationally significant transaction elements, a rule must be stated at a high level of abstraction, so as to capture a broad range of behavior in a way that is nonetheless sensitive to informationally relevant facts and circumstances. Both interpretive and purpose-based laws fit that description. Interpretive laws achieve generality by targeting only transaction elements that are objectively meant to share information—communications—and by ignoring all but the most obviously deceptive behavior—falsehoods. They achieve context-sensitivity by recognizing and incorporating everyday rules of interpretation that are highly attuned to the facts of a conversational situation. The familiarity of those rules also serves to put people on notice of what the law expects of them. Purpose-based laws, by picking out a single informationally relevant fact—wrongful intent—capture a broad range of acts, all of which are likely to deceive. Again the rule's simplicity extends its reach.

The limitations of purpose-based and interpretive laws, which include their binary structure and inability to regulate effectiveness, are therefore also the source of their strengths. By focusing on familiar, binary, informationally salient questions—meaning and veracity or deceptive purpose—these laws can effectively reach novel or discrete transaction elements. What those laws lose in regulatory nuance, such as the ability to address the effectiveness of a communication, they gain back in their extended reach. By piggybacking on our everyday interpretive practices and moral judgments to isolate transaction elements that are especially likely to deceive, interpretive and purpose-based laws can reach discrete transaction elements that elude causal-predictive regulation.[105]

I suggested at the beginning of this Part that the domains of interpretive, purpose-based, and causal-predictive laws are overlapping but not coextensive. That suggestion can now be given more content, and we can fill in the Venn diagram:

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105. Charles Fried makes a similar point in his discussion of the line between mere negotiations and the existence of a contract:

> This series of alternations in and out of the promise principle has a disquietingly binary look about it . . . . As it is, however, there are sharp discontinuities, and these are disturbing to the economic or marginalist mentality. That mentality sees discontinuities as a symptom of irrationality. . . . [S]uch discontinuities are unavoidable, and indeed . . . are a sign that we are in the domain of right and wrong, which is a domain of discontinuity.

CHARLES FRIED, CONTRACT AS PROMISE 131–32 (1981).

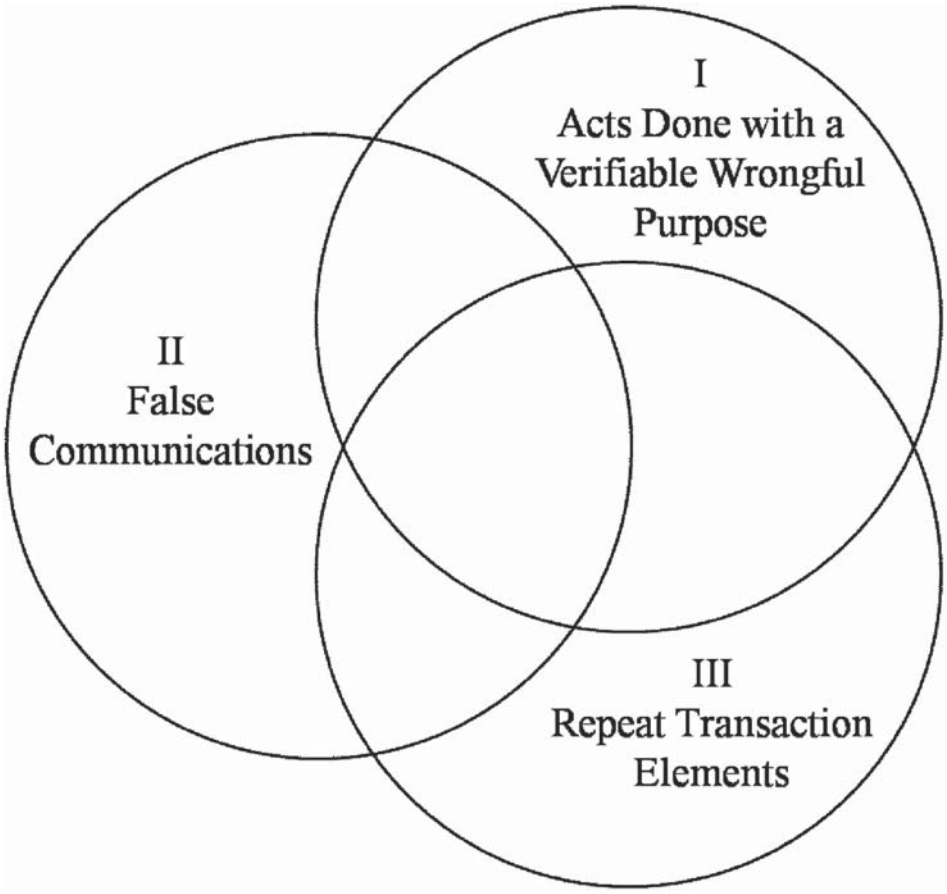

Figure 2

Transaction elements falling into Group I are in the domain of purpose-based laws, those in Group II the domain of interpretive laws, and those in Group III the domain of causal-predictive laws. Transaction elements that fall in only one of these three groups are subject to only one regulatory approach. Transaction elements that appear in the intersections of one or more groups are subject to more than one approach.

B. DESIGN AND DEPLOYMENT

The above discussion has implications for the design and deployment of the regulatory methods I have identified. We can begin with how laws are expressed. The broadly applicable rules of interpretive and purpose-based laws—"Do not tell a lie," "Do not conceal material facts," and the like—work because they pick up very fine-grained extralegal rules. Causal-predictive laws must take

a different approach. A rule like "Do not engage in behavior that is likely to cause false beliefs" or "Do not use transaction elements that have an empirically verifiable deceptive effect" would not tell legal actors what the law expects of them. Instead, causal-predictive laws issue more specific directives like "Mortgage sellers shall disclose such-and-such information in such-and-such format," or "Cell phone providers shall not bundle phones with plans of duration of more than *x* months." Only specific directives that apply to narrowly described repeat transaction elements provide adequate notice of the requirements of causal-predictive regulation.

The last point has broader consequences for the design of causal-predictive laws. Both interpretive and purpose-based laws require adjudicators to decide individual cases based on the very considerations that define the regulatory domain. In resolving allegations of deceit, a court or jury inquires into the meaning and veracity of the statements at issue. To determine whether there was concealment, the legal fact-finder makes a judgment about the purpose with which the defendant acted. Causal-predictive laws are different. They require an intermediate legislative step in which cognitive theories or empirical results are applied to repeat transaction elements to produce more specific directives to guide both those subject to the law and those who enforce it.

This difference, in turn, raises issues of institutional competence. Richard Craswell, who generally emphasizes the advantages of causal-predictive methods, suggests we consider removing "misrepresentation and nondisclosure cases . . . from the common-law courts entirely and [hand them] over to regulatory agencies."[106] The proposal makes good sense with respect to the intermediate legislative step in causal-predictive lawmaking, especially of the empirical and theory-based varieties. Regulatory agencies are better situated than are courts of general jurisdiction to evaluate empirical studies of informational effects, to apply sophisticated theories of cognitive and behavioral biases, and to use the results to effectively regulate repeat transaction elements. The difference in institutional competence suggests, for example, that when false advertising claims turn on such evidence, they might better be decided by the FTC than by courts.[107]

Agency expertise does not extend, however, to interpreting the meaning of speech acts in the context in which they were uttered, or to determining the purpose with which a defendant acted. More to the point, there are often good reasons to leave such commonsense judgments to judges and juries. The application of interpretive laws requires judgments about an actor's compliance with community standards that govern meaning and truth telling. The application of purpose-based laws requires an inquiry into the motives and intentions behind an act or omission. U.S. law regularly leaves such factual determinations to courts and to juries, who are considered to have a special expertise in

106. Craswell, *Taking Information Seriously*, *supra* note 1, at 623.

107. I discuss these aspects of the Lanham Act in Part III.

community standards and the ability to weigh and evaluate the relevant evidence.[108] While it is possible to use surveys, focus groups, or other empirical methods to test how a speech act is likely to be interpreted, such studies are expensive and, where the question is only whether the statement was true or false, it is not obvious that they are more accurate than the findings of a judge or jury.

The differences between these regulatory methods also raise questions about Craswell's recommendation that the common law incorporate some of the causal-predictive methods found in consumer-protection law.[109] Craswell suggests that plaintiffs claiming misrepresentation or nondisclosure should be required to "specify some alternative(s) to whatever the defendant actually said,"[110] that "either party should be allowed to dispute the costs or benefits of those alternatives,"[111] and that "either party should be allowed to introduce empirical evidence as to how similar contracting parties would be likely to respond to the identified alternatives."[112] It is not obvious, however, whether the gains from supplementing interpretive or purpose-based laws with causal-predictive methods would be worth the costs. This is especially so where the alleged wrongful behavior involves discrete transaction elements and the decision maker has limited expertise in cognitive theory or empirical methodology.

A last point on the relative strengths of these regulatory methods sounds in a different register. So far, I have largely avoided discussing the various justifications for laws of deception, the reasons why a society might choose to regulate deceptive behavior. One reason is that deception is wrong. Another is that deception is wasteful. Broadly speaking, interpretive and purpose-based laws are better suited to regulating for the first reason because they incorporate judgments of everyday morality. Causal-predictive regulation, with its focus on effects and its sometimes counterintuitive outcomes, is more in line with the consequentialist reasoning of the second type. This is not to say that interpretive or purpose-based regulation cannot be justified on consequentialist grounds, or

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108. The above arguments suggest that the Seventh Circuit might have gotten things backwards in *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992). Kraft argued that the FTC should have considered extrinsic evidence that alleged implied misrepresentations in its advertisements for processed cheese caused consumer misperception. *Id.* at 318. The court rejected the argument with the following reasoning:

> Kraft's reliance on Lanham Act decisions is misplaced. For one, not all courts applying the Lanham Act rely on extrinsic evidence when confronted with implied claims, but more importantly, when they do, it is because they are ill equipped—unlike the Commission—to detect deceptive advertising. And the Commission's expertise in deceptive advertising cases, Kraft's protestations notwithstanding, undoubtedly exceeds that of courts as a general matter.

Id. at 320 (citations omitted).

109. *See* Craswell, *Taking Information Seriously*, *supra* note 1, at 624–30.

110. *Id.* at 624.

111. *Id.* at 625.

112. *Id.* at 626.

causal-predictive regulation on deontological ones. But the different methods do lend themselves to different reasons for regulation.

III. APPLICATION: SECTION 43(A) OF THE LANHAM ACT

The previous Part argued that the domains of interpretive, promise-based, and causal-predictive laws are overlapping but not coextensive, as represented in the Venn diagram in Figure 2. Interpretive laws capture only false communications, purpose-based laws only acts done with a verifiable wrongful purpose, and causal-predictive laws only repeat transaction elements. Which regulatory method or methods should be applied where the domains overlap? Consider an intentionally false communication that is repeated across many transactions. Should it be subject to interpretive regulation, purpose-based regulation, causal-predictive regulation, or to some combination of the three?

Judicial interpretations of the Lanham Act's false advertising provisions illustrate how lawmakers have mixed and matched regulatory methods in the intersection. The goal of the previous Parts was to map the law of deception as a whole. Because that map describes a broad area it does not include many local landmarks. This Part sketches in the details of a single region: judicial interpretations of the Lanham Act. The first section provides an overview of this area of law. The second uses the analytic tools developed in Part II to explain and evaluate its topography.

A. JUDICIAL INTERPRETATION OF THE LANHAM ACT'S FALSE ADVERTISING PROVISIONS

Section 43(a)(1) of the Lanham Act prohibits the use of any "false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities."[113] A party who is injured by such false advertising—a competitor or a consumer—can seek an injunction or damages.[114] Courts are in broad agreement on the elements of a section 43(a) false advertising claim. As listed by the First Circuit, they are:

> (1) a false or misleading description of fact or representation of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceives or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false or misleading statement, either by

113. 15 U.S.C. § 1125(a)(1) (2006).

114. *See* FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982); FTC v. Sw. Sunsites, Inc., 665 F.2d 711, 718 (5th Cir. 1982).

> direct diversion of sales from itself to defendant or by a lessening of goodwill associated with its products.[115]

Section 43(a) does not have a scienter requirement but holds advertisers strictly liable for their false advertising. "It is well-settled that no proof of intent or willfulness is required to establish a violation of Lanham Act § 43(a) for false advertising."[116]

While the elements of a section 43(a) claim include the advertisement's tendency to deceive, courts have held that literally false advertisements are presumptively deceptive.[117] Consequently, a plaintiff who can point to a literal falsehood need not introduce additional evidence of tendency to deceive, unless it is needed to rebut the defendant's evidence of no deceptive effect. In *W.L. Gore & Associates v. Totes, Inc.*, for example, where the defendants had advertised their golf jacket as made of the "best waterproof fabric you can find," the district court held that it was enough for the plaintiff to show that the jacket was not in fact waterproof.[118] If "the claim is literally false, the court need not consider the actual effect on the buying public."[119]

When an advertisement is literally true but alleged to include an implicit falsehood, courts generally require extrinsic evidence to establish its nonliteral meaning and its tendency to deceive.[120] As the Second Circuit has explained, in such cases it "is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive."[121] The most common types of evidence of deceptive meaning and effect are consumer surveys and copy tests, which show one or more ads to a representative group of consumers, though courts have also accepted the direct testimony of consumers

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115. Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000) (emphasis removed).

116. Vector Prods., Inc. v. Hartford Fire Ins. Co., 397 F.3d 1316, 1319 (11th Cir. 2005); *cf.* Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 313–15 (1st Cir. 2002); PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 272 (2d Cir. 1987).

117. *See* Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 693 (6th Cir. 2000) ("Because proof of 'actual confusion' can be difficult to obtain, most of the circuits have ruled that when a statement is literally false, a plaintiff need not demonstrate actual customer deception in order to obtain relief under the Lanham Act." (citation omitted)). For a discussion of the emergence of and judicial rationales for this rule, see Richard J. Leighton, *Literal Falsity by Necessary Implication: Presuming Deception Without Evidence in Lanham Act False Advertising Cases*, 97 TRADEMARK REP. 1286, 1289–91 (2007) [hereinafter Leighton, *Literal Falsity by Necessary Implication*]. Courts have also held that a literal falsehood creates a presumption that the falsehood is material. *See* Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts*, 94 TRADEMARK REP. 585, 596–99 (2004).

118. 788 F. Supp. 800, 804–05 (D. Del. 1992) (internal quotation marks omitted).

119. *Id.* at 805.

120. *See, e.g.*, Scotts Co. v. United Indus. Corp., 315 F.3d 264, 273 (4th Cir. 2002) (quoting Johnson & Johnson * Merck Consumer Pharm. Co. v. SmithKline Beecham Co., 960 F.2d 294, 297 (2d Cir. 1992)); Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 178 F.3d 1035, 1043 (8th Cir. 1999); Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc., 19 F.3d 125, 129–30 (3d Cir. 1994).

121. *Johnson & Johnson*, 960 F.2d at 297.

and evidence of consumer complaints.[122] In *United Industries Corp. v. Clorox Co.*, for example, the Eighth Circuit considered a claim that "Kills Roaches in 24 Hours," even if expressly true, falsely implied that the product would kill all of the roaches in a home and that the competition would not do so.[123] In affirming the denial of a preliminary injunction, the court observed that the proper construction "is highly dependent upon context and inference," and that the plaintiff's interpretation was "unsupported at this point by expert testimony, surveys, or consumer reaction evidence of any kind."[124]

The evidentiary rules for allegations of literal falsehoods and those for allegations of implicit falsehoods are each subject to exceptions. First, not every literal falsehood can support a section 43(a) claim. A literally false statement is not false advertising if it is sales talk or puffery.[125] In *Pizza Hut v. Papa John's International*, for example, the Fifth Circuit held that although the description, "Better Ingredients. Better Pizza," could be misleading in a comparative ad, standing alone it was "a general statement of opinion regarding the superiority of its product over all others . . . epitomiz[ing] the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer would reasonably rely."[126] A defendant who raises a sales talk defense is not required to introduce evidence of how consumers interpret the advertisement or whether they rely on it.[127] Instead, it is the court that makes the determination on the basis of its own sense of the reasonable interpretation of the statement and whether it would be reasonable to rely on it.[128]

This marks an important difference between the puffery defense and the rule for implicit misrepresentations. When a plaintiff argues that a literally true statement had an implicit false meaning, the court generally requires extrinsic evidence, such as copy tests or consumer surveys, of that meaning and its effect on consumers.[129] When a defendant argues that a literally false advertisement should be interpreted nonliterally, as opinion, exaggeration, exhortation, or impetration, the court decides the matter itself, on the basis of no evidence other than the judge's familiarity with the English language.[130]

But there are also exceptions to the extrinsic-evidence requirement for claims of implicit misrepresentation. The first is the so-called necessary-implication rule. In 1982, a district court considered an advertisement by Robot-Coupe with

122. *See* CHARLES MCKENNEY & GEORGE F. LONG III, 1 FEDERAL UNFAIR COMPETITION: LANHAM ACT 43(A) § 6:5 (2011).

123. *See* 140 F.3d 1175, 1178, 1182–83 (8th Cir. 1998).

124. *Id.* at 1183.

125. *See* Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390–91 (8th Cir. 2004); Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 496 (5th Cir. 2000); Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995).

126. *Pizza Hut*, 227 F.3d at 498.

127. *See id.*

128. *See id.*

129. *See* MCKENNEY & LONG, *supra* note 122.

130. *Cf. Pizza Hut*, 227 F.3d at 498.

the headline,

> Robot-Coupe: 21
> Cuisinart: 0,[131]

followed by the sub-headline: "when all 21 of the three-star restaurants in France's Michelin guide choose the same professional model food processor, somebody knows the score—shouldn't you?"[132] The opinion stated:

> The basic point is that the ad states, by necessary implication, that Robot-Coupe and Cuisinarts both build professional model food processors, and that French restaurateurs, presented with two existing alternatives, chose the Robot-Coupe model over the Cuisinarts model by the score of 21 to 0. I appreciate that the ad does not make that statement in *haec verba*. . . . [But the words in the advertisement], thus arranged, are the practical, grammatical, syntactical equivalent . . .[133]

The opinion concluded that, because Cuisinarts did not in fact market a professional-model food processor, the advertisement was equivalent to a literal falsehood[134] and could therefore be enjoined "without regard to consumer reaction."[135] Since then, six circuits have recognized the doctrine of "necessary implication,"[136] which provides that an advertisement's necessary implications are to be treated the same as its literal claims.[137] "If the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required."[138]

Several courts have also held that where there is no express misrepresentation, proof of a defendant's deceptive intent and investment of significant resources in a false advertising campaign can obviate the need for extrinsic evidence of a deceptive effect. In *U-Haul International, Inc. v. Jartran, Inc.*, the district court found that Jartran's advertisements regularly compared Jartran's temporary promotional prices to U-Haul's standard prices plus temporary volume-

131. Cuisinarts, Inc. v. Robot-Coupe Int'l Corp., No. 81 Civ 731-CSH, 1982 WL 121559, at *1 (S.D.N.Y. June 9, 1982) (capitalization altered).

132. *Id.* at *2 (capitalization altered).

133. *Id.* at *1–*2.

134. *See id.* at *2.

135. *Id.* at *1 (quoting Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 277 (2d Cir. 1981)) (internal quotation marks omitted).

136. *See* Leighton, *Literal Falsity by Necessary Implication*, *supra* note 117, at 1294–1306.

137. *See, e.g.*, Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 148 (2d Cir. 2007) ("[A]n advertisement can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message."); Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 34–35 (1st Cir. 2000) ("Although factfinders usually base literal falsity determinations upon the explicit claims made by an advertisement, they may also consider any claims the advertisement conveys by 'necessary implication.'").

138. *Time Warner*, 497 F.3d at 158.

related fees and that "Jartran arrived at the advertised price for its equipment by selecting a promotional rate that would have consumer impact."[139] The court then held that the "[p]ublication of *deliberately false* comparative claims gives rise to a presumption of actual deception and reliance."[140] Jartran appealed, arguing among other things that the district court should have required U-Haul to provide extrinsic evidence of consumer deception and reliance. The Ninth Circuit rejected this argument:

> The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.[141]

Other courts have permitted similar inferences of actual consumer deception from the defendant's expenditures of sums for the purpose of influencing consumers.[142]

A final potential exception to the Lanham Act rule for alleged implicit misrepresentations has not been embraced by courts but is suggested by FTC rulings under the unfair or deceptive advertising provisions in the Federal Trade Commission Act.[143] The FTC has determined that "[a]bsent an express or implied reference to a certain level of support, and absent other evidence

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139. 601 F. Supp. 1140, 1147 (D. Ariz. 1984), *aff'd in part, modified in part, rev'd in part*, 793 F.2d 1034 (9th Cir. 1986).

140. *Id.* at 1149 (emphasis added).

141. U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986).

142. *See, e.g.*, Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 316 (1st Cir. 2002) ("It is well established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived."); Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 694–95 (6th Cir. 2000) (adopting the rule in *Porous Media Corp. v. Pall Corp*., 110 F.3d 1329, 1336 (8th Cir. 1997)); Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481, 493 (2d Cir. 1998) ("[I]n order for a Lanham Act plaintiff to receive an award of *damages* the plaintiff must prove either actual consumer confusion or deception resulting from the violation, . . . or that the defendant's actions were intentionally deceptive thus giving rise to a rebuttable presumption of consumer confusion." (quoting *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1537 (2d Cir. 1992) (internal quotation marks omitted)); *Porous Media*, 110 F.3d at 1336 ("A predicate finding of intentional deception, as a major part of the defendant's marketing efforts, *contained in comparative advertising,* encompasses sufficient harm to justify a rebuttable presumption of causation and injury in fact."); Kraft, Inc., 114 F.T.C. 40, 1991 WL 11008502, at *31–32 (1991) (holding that Kraft designing the ads with intent to capitalize on consumer calcium deficiency concerns was evidence of the materiality of its calcium content claims), *enforced*, 970 F.2d 311 (7th Cir. 1992); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 42 (D.C. Cir. 1985) (holding that "the vast expenditure of advertising dollars on tar ratings strongly supports public reliance because advertising expenditures presumptively have the effect intended").

143. *See* 15 U.S.C. § 45 (2006); *see also* FTC Policy Statement Regarding Advertising Substantiation, *in* Thompson Med. Co., 104 F.T.C. 648, 1984 WL 565377, at app. (1984). What counts as a reasonable basis depends on factors such as "the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable." *Id.*

indicating what consumer expectations would be, the Commission assumes that consumers expect a 'reasonable basis' for claims."[144] The upshot is a legal presumption, or default interpretation, that a factual statement in an advertisement implicitly represents that the advertiser has a reasonable amount of evidence for the claim.[145] The rule is important in cases in which it is difficult to substantiate whether a claim is true or false. Where it applies, the proponent of a false advertising claim need not prove that the advertisement was literally false, so long as she can show that the advertiser did not have a reasonable basis for making it. What is crucial for my purposes is that reasonable-basis claims require no extrinsic evidence of the implied representation. The FTC has simply decided to read a representation of reasonable basis into advertised factual claims.

Although the reasonable-basis default is firmly established for actions under the FTC Act's deceptive advertising provisions,[146] courts have not applied it to false advertising claims under the Lanham Act.[147] But there are reasons to think that the default representation of a reasonable basis should apply here too.[148] The Third Circuit has adopted a more modest version of the rule: "[A] court may find that a completely unsubstantiated advertising claim by the defendant is *per se* false without additional evidence from the plaintiff to that effect."[149] And the reasons for adopting the default reasonable-basis representation that I identify in the next section apply *pari passu* to Lanham Act claims. Regardless

144. FTC Policy Statement Regarding Advertising Substantiation, *supra* note 143.

145. Or as Richard Craswell has put it: "The FTC has ruled that most claims about a product's attributes also imply a subsidiary claim: that the manufacturer had a reasonable evidentiary basis for believing the primary claim to be true." Craswell, *Control Ads*, *supra* note 1, at 781.

146. *See, e.g.*, Daniel Chapter One, No. 9329, 2010 FTC LEXIS 23, at *9 (Mar. 22, 2010) ("Longstanding case law has consistently held that advertising claims can be found deceptive . . . if they are shown . . . to lack a reasonable basis substantiating the claims . . . .").

147. The Third Circuit has specifically declined to apply the FTC standard to Lanham Act cases. *See, e.g.*, Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc., 19 F.3d 125, 130 (3d Cir. 1994) ("Drawing a distinction between the FTC plaintiff and the Lanham Act plaintiff, this court held in *Sandoz* that the FTC plaintiff could rely on its own determination of deceptiveness, but the Lanham Act plaintiff 'bears the burden of proving actual deception by a preponderance of the evidence.'" (quoting Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228–29 (3d Cir. 1990))); *Sandoz*, 902 F.2d at 229 ("We hold that it is not sufficient for a Lanham Act plaintiff to show only that the defendant's advertising claims of its own drug's effectiveness are inadequately substantiated under FDA guidelines."). The Second Circuit has similarly held that showing lack of substantiation is insufficient in Lanham Act cases. *See* Procter & Gamble Co. v. Chesebrough-Pond's Inc., 747 F.2d 114, 119 (2d Cir. 1984); *see also* Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc., 133 Cal. Rptr. 2d 207, 216–18 (Cal. Ct. App. 2003) (articulating the distinction between Lanham Act and FTC standards).

148. Perhaps the best doctrinal argument against judicial application of the rule is the Seventh Circuit's holding that claims of implicit misrepresentation under the FTC Act do not need to be supported by extrinsic evidence, given the Commission's greater expertise in false advertising. *See* Kraft, Inc. v. FTC, 970 F.2d 311, 320 (7th Cir. 1992). I argued above that, given the FTC's greater expertise in evaluating empirical studies and the judiciary's expertise in interpretation, this statement gets things backward. *See supra* notes 107–08 and accompanying text.

149. Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 590 (3d Cir. 2002).

of whether courts ultimately take this path, the possibility will provide a nice illustration of some of the themes I have discussed above.

B. MEANING, PURPOSE, AND CAUSE IN THE LANHAM ACT

The distinction between interpretive, purpose-based, and causal-predictive laws helps make sense of collection of judicially crafted rules for false advertising claims under the Lanham Act. This is not to say that those rules are perfectly designed or cut at the joints. I will argue, for example, that courts might make greater use of consumer surveys and other evidence before permitting a sales talk defense. More generally, I have argued above that courts have less competence than regulatory agencies in creating and evaluating empirical studies. Here I agree with Craswell's suggestion: If we want to use consumer surveys, copy tests, and other empirical methods, not to mention the testimony of experts in advertising and cognitive theory, we would do better to assign enforcement to the FTC or another administrative agency.[150] And it is worth asking more generally whether the costs of those empirical methods, given their inaccuracy and manipulability, are worth the benefits.[151] Nor are the factors I identify the only explanations of these rules. Thus the sales talk defense might be a judicial attempt to cabin the reach of section 43(a), based on individual judges' doubts about the policy behind the Lanham Act.[152] And the necessary implication rule might well represent a backlash against the use of consumer surveys and other extrinsic evidence of meaning, prompted by judicial experience with the manipulability of such evidence.[153]

All that being said, there is an internal logic to judicial application of section 43(a). No matter what policies or principles have pushed individual judges to develop them, the Lanham Act rules for literal and implicit falsehoods, sales talk, necessary implication, and intent to deceive reflect a functioning mix of interpretive, purpose-based and causal-predictive laws, and they nicely illustrate how these approaches can be combined in light of their relative strengths and weaknesses.

Most advertisements are both communicative acts and repeat transaction elements. An advertisement is typically intended, among other things, to communicate a message, and it is repeated in substantially the same form across multiple transactions. This is why advertisements can be the object of both interpretive and causal-predictive laws. More specifically, as judicial application of the Lanham Act demonstrates, they are amenable to both interpretive and empirical regulatory methods. Where there is proof of deceptive purpose, an

150. *See* Craswell, *Taking Information Seriously*, *supra* note 1, at 623.

151. Rebecca Tushnet has documented the misuse of cognitive theory and psychological studies in trademark dilution law. *See generally* Tushnet, *supra* note 84.

152. See, for example, *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886 (7th Cir. 2000), where Judge Easterbrook questions the policy of prohibiting "factual propositions that are susceptible to misunderstanding."

153. *See* Leighton, *Literal Falsity by Necessary Implication*, *supra* note 117, at 1286–87.

advertisement might also fall within the domain of purpose-based laws. In terms of my Venn diagram, most advertisements reside within the intersection of Groups II and III, and some fall within the intersection of all three domains.

The evidentiary rules for allegations of literal falsehoods and for allegations of implicit falsehoods embody different regulatory approaches. When a plaintiff alleges literal falsehood, courts apply the interpretive method. Here the only question is the literal meaning of the advertisement and whether it was false. The plaintiff is not required to produce extrinsic evidence of the advertisement's meaning or probable effect on its target audience. The general rule for claims of implied misrepresentation, in distinction, instructs courts to apply the causal-predictive method. A plaintiff who alleges an implicit falsehood must introduce evidence, such as consumer surveys or copy tests, of the advertisement's meaning and effect. The factual question is not, in the first instance, one of interpretation, but of causation: what is the advertisement's probable effect on consumers?

The difference is explained by the difficulty in applying the rules of conversational implicature to mass advertising. To identify an advertisement's literal meaning, one need only look at the dictionary definitions of its words. There is no need to inquire into its reasonable interpretation in light of the surrounding circumstances. To identify an advertisement's implicit meaning, one must know how to apply the rules of conversational implicature in this nonconversational context. There are several problems here. First, an advertisement does not appear in a reciprocal series of communications between the advertiser and target audience. Grice's cooperative principle requires that a speaker make her "conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."[154] Advertisements do not appear at a "stage" in an "exchange" where there is an "accepted purpose or direction."[155] There is no conversation that might establish the parties' interests and reasonable expectations of one another. Second, there are no other generally accepted interpretive norms to replace those of conversational implicature. Everyone knows that advertisements aim both to share information and to influence behavior. There is little popular consensus on the appropriate mix between these goals, on where advertisements fall on the spectrum between reliable representations and sales talk. Third, advertisements involve a single message to diverse recipients. Because there is no shared understanding of how advertisements should be interpreted, the same advertisement is likely to elicit different reactions in different consumers, depending on their different backgrounds and expectations. While we can all agree how a consumer should interpret the literal meaning of an advertisement, there is neither a factual nor normative baseline for how consumers do or should interpret an advertisement's implicit meanings.

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154. Grice, *supra* note 29, at 26.
155. *Id.*

All of these factors recommend against applying the interpretive approach to allegations of implicitly false advertising. Rather than relying on the background understanding of a court or a jury, the law might do better by gathering evidence of an advertisement's actual effects—by employing empirical causal-predictive methods. Whether it does better depends in large part on the accuracy and expense of those methods when applied to advertisements by courts. These are empirical questions whose answers are beyond the scope of this Article. The rule for alleged implicit falsehoods, however, suggests that courts believe they can accurately and cost-effectively evaluate empirical studies to identify an advertisement's deceptive effect.

It is possible to apply empirical causal-predictive methods to claims of implicitly false advertising because advertisements are repeat transaction elements. So too are advertisements that contain literal falsehoods. Why then demand extrinsic evidence only for claims of implicit misrepresentation? Why not require extrinsic evidence of deceptive effect also from plaintiffs who allege explicit falsehoods?

There are two answers. The first goes back to cost. Empirical studies are expensive. Courts and juries are competent at identifying literally false advertisements, and literally false advertisements—so long as the audience does not take them to be mere sales talk—are likely to have a deceptive effect. The interpretive method therefore provides a cheap and effective way to identify advertising that is likely to deceive. Requiring additional extrinsic evidence of deceptive effect would be redundant and wasteful.

The second reason turns on the purpose of the Lanham Act's false advertising provisions. There is little doubt that these provisions are designed to protect competitors and consumers from the effects of false advertising on purchasing decisions.[156] But this might not be the law's only purpose, at least in the eyes of

156. Although section 45 of the Lanham Act lists the Act's purpose as protection against unfair competition, courts have held that the Act is also intended to protect consumers. *See, e.g.*, Lacoste Alligator, S.A. v. Bluestein's Men's Wear, Inc., 569 F. Supp. 491, 498 (D.S.C. 1983) ("The underlying purpose of § 1125 is to prevent unfair competition . . . and to protect consumers against deceptive designations of origins of goods." (citing Invicta Plastics (USA) Ltd. v. Mego Corp., 523 F. Supp. 619 (S.D.N.Y. 1981))); *Invicta Plastics*, 523 F. Supp. at 623 ("The underlying purpose . . . is the protection of the public, and other competitors . . . ."); Ames Publ'g Co. v. Walker-Davis Publ'ns, Inc., 372 F. Supp. 1, 13–14 (E.D. Pa. 1974) ("While unarticulated in the Act itself, an underlying purpose of Section 43(a) appears to be protection of the consuming public from false representations and descriptions in connection with the advertising of goods and services."). Some early decisions interpreted section 43(a) as applying only to misrepresentations of the same general character as trademark infringement. *See, e.g.*, Samson Crane Co. v. Union Nat'l Sales, Inc., 87 F. Supp. 218, 221–22 (D. Mass. 1949), *aff'd*, 180 F.2d 896 (1st Cir. 1950). More recently, courts have held that the purpose of section 43 is to protect against "a wide variety of misrepresentations of products and services." *See* CBS Inc. v. Springboard Int'l Records, 429 F. Supp. 563, 566 (S.D.N.Y. 1976); *see also* Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 625 (S.D.N.Y. 1985) (quoting *CBS Inc.*, 429 F. Supp. at 566, for the same rule). For other cases applying this rule, see, for example, *20th Century Wear, Inc. v. Sanmark-Stardust Inc.*, 747 F.2d 81, 91 (2d Cir. 1984) (holding that "section 43(a) has been broadly construed to provide protection against deceptive marketing, packaging, and advertising of goods and services in commerce"), *WSM, Inc. v. Hilton, Inc.*, 724 F.2d 1320, 1331 (8th Cir. 1984) (holding that "[t]he purpose of

courts. False advertising is wrong not only because it causes false beliefs in consumers, and thereby suboptimal purchasing decisions, but also because advertisers, like other speakers, have a general obligation to speak truthfully. The law might care about false advertising not only because of its effects on consumers, but also because such speech acts violate familiar norms of truth telling, regardless of their effect. Attaching legal consequences to such violations is a way for society to support and give effect to those norms. If this is right, then there is a second reason not to require extrinsic evidence of consumer deception in cases of literal falsehood: society's interest in truthful advertising extends beyond advertising's effects on consumers. The Lanham Act's false advertising provisions also function to enforce and support the widely accepted prohibition against lying, which is based on more than the effects of such speech.

A similar explanation applies to the rule for literally true advertisements intended to deceive. The plaintiff who can prove that an advertiser intended its literally true advertisement to deceive the public is not required to introduce extrinsic evidence of deceptive effect. This is a purpose-based rule: proof of wrongful purpose is used to identify the legal wrong. Like the rule for literal falsehoods, the deceptive-intent rule can be justified on both consequentialist and nonconsequentialist grounds. An advertiser's deceptive purpose is strong evidence of deceptive effect, sufficient to excuse a plaintiff from the extra expense of producing extrinsic evidence of it.[157] And regardless of its effect, purposively setting out to deceive the public is the sort of wrongful act that warrants both an expression of disapprobation and punishment.

What of the other exceptions to the basic evidentiary rules? The above discussion suggests a potential problem with the sales talk rule, which permits a judge to decide without recourse to extrinsic evidence that an advertised claim is mere puffery. Generally speaking, identifying a claim as sales talk is an exercise in interpretation, requiring application of the rules of conversational implicature. Whether a statement is best interpreted as an assertion of fact or as an exhortation to buy depends on the circumstances of its production, just as other implicit meanings do. If the individual judge's linguistic sense is an unreliable instrument for detecting deceptive implicit falsehoods in advertisements, the same should be true of her ability to determine without recourse to extrinsic evidence whether a literal falsehood is likely to deceive the public.

And yet there is a strong intuition that some advertised statements are

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section 43(a) is to create a new federal remedy for . . . unfair competition that results from false designation of origin or other false representation"), *Invicta Plastics*, 523 F. Supp. at 623 (holding that the purpose of the Lanham Act sections is "the protection of the public, and other competitors, from any misleading advertising or packaging which results in unfair competition"), and *Metric & Multistandard Components Corp. v. Metric's, Inc.*, 635 F.2d 710, 713 (8th Cir. 1980) (holding that section 43(a) "was designed to create a new federal remedy for the particular kind of unfair competition that results from false designation of origin or other false representation").

157. *See* U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986).

obvious puffery. When a pizza chain, without mentioning any of its competitors, advertises "Better Ingredients. Better Pizza.," we know it is expressing enthusiasm for its product, rather than making a factual claim.[158] The statement exemplifies "the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer would reasonably rely."[159] I think there is something to this intuition. While advertisements do not appear in conversations, they are not context-free. Most importantly, members of the target audience generally know they are watching an advertisement. The audience knows that the speech is an exercise in persuasion and an attempt at influence, and it understands generic claims of superiority accordingly. And if that is right, a judge's linguistic sense might in some cases be all we need to determine that an advertised claim is mere puff.

This suggests that the rule for sales talk is akin to the necessary-implication rule, which holds that some implicit meanings are so certain that, when untrue, they are the practical equivalent of a literal falsehood, suspending the requirement of extrinsic evidence of deceptive effect. The necessary-implication rule finds some support in linguistic theory. First, as just noted, while advertisements do not occur in conversations, they are not context free. Recall Robot-Coupe's ad—"Robot-Coupe: 21[.] Cuisinart: 0"[160]—referring to the number of three-star restaurants using Robot-Coupe food processors. In the context of a consumer's purchasing decision—which is exactly what the advertisement purported to address—the fact that no three-star restaurants used a Cuisinart model was relevant only if Cuisinart made a professional model.[161] In that context, the statement read literally would be a non sequitur, violating the maxim, "Be relevant."[162] While advertisements do not occur in conversations, they are contextually rich enough to support some conversational implication.

Second, and more generally, not all implicit meanings are the product of *conversational* implicature. In addition to conversational implicature, there is also, in Grice's nomenclature, *conventional* implicature, which turns on the meaning of sentences, and *generalized conversational* implicature, which is grounded in customary ways of speaking.[163] For example, "she is a judge; therefore she is honorable," conventionally implies that all judges are honorable. The implicature depends only on the meaning of the words and applies no matter what the context. Alternatively, the statement, "some judges are tall," implies that not all judges are tall because this is how we customarily use the

158. *See* Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 498 (5th Cir. 2000).

159. *Id.*

160. Cuisinarts, Inc., v. Robot-Coupe Int'l Corp., No. 81 CIV 731-CSH, 1982 WL 121559, at *1–2 (S.D.N.Y. June 9, 1982).

161. *Id.* at *2.

162. *See* Grice, *supra* note 29, at 27.

163. *See* WAYNE A. DAVIS, IMPLICATURE: INTENTION, CONVENTION, AND PRINCIPLE IN THE FAILURE OF GRICEAN THEORY 8–9, 157 (1998); *see also* Kent Bach, *The Top 10 Misconceptions About Implicature*, *in* DRAWING THE BOUNDARIES OF MEANING: NEO-GRICEAN STUDIES IN PRAGMATICS AND SEMANTICS IN HONOR OF LAURENCE R. HORN 21, 23, 29 (Betty J. Birner & Gregory Ward eds., 2006).

word "some." Again the implicature does not depend on context, but here is a result of general practices rather than the meaning of the words. If courts are applying the doctrine of necessary implication only in cases of conventional or generalized conversational implicature, they are perhaps right to treat them similarly to literal falsehoods. When interpretation alone suffices to identify a statement as false, there is no need to employ more costly empirical causal-predictive techniques.

The above paragraphs only scratch the surface of a deep set of questions involving the possible use of linguistic theory to describe, explain, and perhaps reform judicial application of the Lanham Act, not to mention other interpretive laws. Perhaps advertiser sales talk can be identified by a sort of generalized conversational implicature, in which case judges are qualified to rule on sales talk defenses without extrinsic evidence. Alternatively, maybe determining whether an advertisement constitutes sales talk depends so much on context that extrinsic evidence should always be required. With respect to the necessary-implication rule, one would want to examine its application in light of the types of implicature that speech-act theorists have recognized. Are courts in these cases identifying context-independent meanings that rest on conventional or generalized conversational implicature? Or is this simply a backlash, as some have suggested, against the use of copy tests and consumer surveys, which courts have experienced to be unreliable in practice?[164]

This Article does not attempt to answer these questions. I raise them because they demonstrate the value of the analytic distinction between the interpretive and causal-predictive laws. These are in essence questions about the limits of the interpretive approach, or where to draw the boundaries between the interpretive and causal-predictive methods within this region of the law of deception. Recognizing that judicial application of the Lanham Act's false advertising provisions is in fact an amalgam of different regulatory approaches provides the materials for an informed evaluation of the law's design.

The last exception to the evidentiary rules for alleged implicit falsehoods is somewhat speculative, as will be my discussion of it. The FTC has concluded that to advertise a factual claim is to implicitly represent that one has a reasonable basis for making it—that the claim has a reasonable amount of evidentiary support.[165] I have suggested that courts might adopt this rule in Lanham Act cases. The reasonable-basis rule establishes a legal default. I argued in Part I that, as compared to the law of contracts, the law of deception includes remarkably few legal interpretive rules. The reasonable-basis rule is

164. *See* Leighton, *Literal Falsity by Necessary Implication*, *supra* note 117, at 1286–87.

165. Letter from Fed. Trade Comm'n to Congressman John D. Dingell, Chairman, U.S. House of Representatives Comm. on Energy & Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Assocs., Inc. 103 F.T.C. 110 app. at 174, 175 n.5 (1984). The FTC has also held that advertisements implicitly represent that a product is fit for its intended use. *Id.* at 177. Like the reasonable-basis rule, the implied representation of fitness arguably follows not so much from an interpretation of what advertisements do say as from a policy decision about what they should say.

interesting because it is a member of that small class.

Why has the FTC adopted this default? The Commission's statements about the rule are not very enlightening.[166] I would suggest two possible explanations. First, the reasonable-basis default might be a legal codification of the rules of conversational implicature, specifically Grice's second maxim of quality: "Do not say that for which you lack adequate evidence."[167] Perhaps advertisements imply a reasonable basis so commonly that it would be a waste of resources to engage in a full-blown empirical inquiry in every case. It is cheaper and just as accurate to adopt the majority implication as the legal default, shifting the burden to the defendant-advertiser to demonstrate (with extrinsic evidence) that its factual statement did not imply a reasonable basis. Second, and not incompatibly, the reasonable-basis default might represent the FTC's judgment that regardless of how the public usually understands advertisements, the world would be a better place if advertisers made factual statements only when they had a reasonable basis for doing so.[168] On this theory, the reasonable-basis default is desirable not, or not only, because it is the majoritarian default or tracks extralegal interpretive norms, but because it gives advertisers a new reason not to make unsubstantiated claims and therefore gives the public a new reason to trust advertisements.

Under either explanation, the reasonable-basis default nicely exemplifies the plasticity of interpretive laws. By embedding this legal default within the broader interpretive law of false advertising, the rule can be expected to affect the public's understanding of advertisements in nonlegal contexts. Such mechanisms allow the law of false advertising not only to recognize and incorporate our everyday interpretive practices, but to extend and thereby effect a positive change in them.

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166. *See, e.g.*, Nat'l Dynamics Corp., 82 F.T.C. 488, 549–50, 553 (1973) (justifying the reasonable-basis rule as a measure of deception); Firestone Tire & Rubber Co., 81 F.T.C. 398, 463 (1972) (same); Pfizer, Inc., 81 F.T.C. 23, 62–64 (1972) (justifying the reasonable-basis rule as a standard for evaluating unfairness); *see also* 2 FED. TRADE COMM'N § 22:7 (2009); MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 9:16 (2009).

167. Grice, *supra* note 29, at 27.

168. Thus an early FTC articulation of the rule took a decidedly moralistic tone:

> While we are not deciding the instant case on such a ground, we are inclined to think that an advertiser is under a duty, *before* he makes any representation which, if false, could cause injury to the health or personal safety of the user of the advertised product, to make reasonable inquiry into the truth or falsity of the representation. He should have in his possession such information as would satisfy a reasonable and prudent businessman, acting in good faith, that such representation was true. To make a representation of this sort, without such minimum substantiation, is to demonstrate a reckless disregard for human health and safety, and is clearly an unfair and deceptive practice.

Heinz w. Kirchner Trading as Universe Co., 63 F.T.C. 1282, 1294 (1963). The Commission has also suggested that it is more efficient to put the burden of substantiation on the manufacturer than on the consumer. *Pfizer*, 81 F.T.C. at 62.

CONCLUSION

The distinction between meaning, purpose, and cause illuminates both the structure and the underlying logic of the law of deception. It also leaves parts of that law in the shadows. There is room for more research in many different directions.

First, there is much more to say about each of the regulatory strategies I have identified. With respect to interpretive laws, for example, there is the question of how legal rules can, for better or worse, feed back into and affect our everyday interpretive practices. Especially interesting here is the occasional use of interpretive defaults in the law of fraud or deceit, such as the FTC's reasonable-basis rule for deceptive advertising. Much has been written about the use of interpretive defaults in contract law; virtually nothing has been written about their use in interpretive laws such as the law of fraud. Another important question here concerns the reliability of causal-predictive methods. Rebecca Tushnet, for example, has described the misuse of armchair theorizing and laboratory experiments in the justification of trademark dilution.[169] And Lauren Willis has documented the limited practical value of common sense attempts at financial-literacy education.[170] The costs of causal-predictive regulation also include manipulation and error, risks that deserve serious attention.

Second, the interpretive, purpose-based, and causal-predictive approaches do not exhaust the law's methods for determining the object of laws of deception. One could inquire further into the strengths and weaknesses of other regulatory approaches, including that of neoclassical economics.

Third, this Article has addressed only one side of the design question: fixing the law's direct object, the behavior that the law should target. There is also the question of *how* to regulate that behavior. In addressing that topic, I have argued, for example, that scienter requirements serve different functions in purpose-based laws and in interpretive or causal-predictive laws, that the problem of notice requires a separate legislative step in causal-predictive lawmaking, and that the different forms of laws require different institutional capacities in their application. But I have left many larger questions unanswered. When, for example, are criminal sanctions or punitive damages appropriate? When are only compensatory remedies? Who should be allowed to bring enforcement actions: prosecutors, regulators, or private parties? Why and when are heightened pleading standards desirable? What is the right mix between federal and state law in this area? There is much more to say on the different regulatory techniques one finds in the law of deception, as well as their possible relationship to the method of defining the regulatory object.

Finally, this Article has made only a start about thinking about the different

169. Tushnet, *supra* note 84.

170. Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 197–98 (2008); Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415, 419–20 (2009).

functions of and justifications for laws of deception. In the end, the design of a law must be guided by the reasons for having it, by the purposes it serves and the principles that justify it. Of particular relevance to the thesis of this Article are the possible connections to how a law defines its regulatory object. Because both interpretive and purpose-based laws recognize and incorporate our extralegal norms of truth telling and fair dealing, they can serve to affirm and support those norms. But this is not to say that this is their sole or even primary raison d'être. It might be that the only proper purpose of the Lanham Act's false advertising provisions, for example, is consumer protection, and that it recognizes and incorporates our everyday judgments about wrongful behavior only for the sake of improving consumer purchasing decisions. Or perhaps those provisions serve multiple functions or are justified on more than one principle. That said, it would seem that both interpretive and purpose-based laws are at least better suited to the legal enforcement of extralegal norms of fairness and morality. Causal-predictive laws, in contrast, are by design consequentialist in their orientation.

The previous paragraphs raise more questions than they answer. But I hope they indicate a few directions that a systematic theory of the law of deception might take. This Article's description of the different roles of meaning, purpose, and cause in that law is a start.