

MANIPULATING, FAST AND SLOW: THE LAW OF NON-VERBAL MARKET MANIPULATIONS[†]

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Consumers make purchasing decisions in various markets every day. Contrary to common belief, such decision-making is often not the result of deliberate analysis of information or of rational thinking. Rather, it is frequently based on feelings, sensations and intuition. Purchasing decisions are not made in a vacuum and are regularly influenced by sellers' manipulation and selling tactics.

It is well documented that people receive a substantial part of the information they possess via non-verbal communication. One of the most alarming aspects of this reality is that consumers are mostly unaware of non-verbal cues and the ways they can influence them. Therefore, consumers can hardly correct their mistakes and protect themselves against such influence. This stands in sharp contrast to the increasing efforts invested by marketers in employing non-verbal marketing methods.

Despite the enormous impact of non-verbal communication on consumers' purchasing decisions, current law neglects to address the encoding and decoding of wordless cues exchanged between consumers and businesses. Instead the law mainly focuses on defending the public against misleading verbal information. This opens a challenging gap between the law's intention to protect consumers from deceptive practices and its ability to do so effectively; this contributes to a false consciousness in consumers of proper protection. It provides consumers with an artificial sense of effective legal protection while leaving them exposed to far more sophisticated manipulations of which they are mostly unaware.

[†] Alluding to DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

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Non-verbal manipulations are a robust phenomenon, extensively employed by sellers who are well versed in marketing research. Yet legal scholars, judges and legislatures lack a systematic understanding of how non-verbal cues influence consumers, let alone how the law should respond. This Article, while focusing on the psychology of non-verbal manipulations, aims to narrow this gap descriptively and normatively.

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INTRODUCTION

Consumers make purchasing decisions in various markets every day. Many of these decisions are mundane. Examples are which coffee to get in the morning, where to buy a new shirt, or what kind of body lotion to use. Other decisions are less routine, such as choosing among vacations, cars and houses, or purchasing furniture and jewelry.

Contrary to common belief, decision-making is often not the result of deliberate analysis of information and data and of rational thinking, but of feelings, sensations and intuition. Purchasing decisions are not made in a vacuum. The basic premise of the science of marketing is that consumers' purchasing decisions are highly influenced by sellers' manipulation and selling tactics. Nonetheless, the focus of the law is only on inaccurate or misleading information. Slightly restated, the law largely ignores numerous non-verbal selling manipulations that attempt to influence decision-making in subtle and unconscious ways.

Consider the following examples which represent different kinds of marketing practices: an attractive (female) seller flirts with a potential (male) buyer, creating greater willingness to shop. A bookshop owner utilizes a chocolate scent that draws prospective consumers to spend more time in the store while increasing their tendency to purchase books. An outfitter uses distorting mirrors and pale painted walls that slim customers' figures and cajole them into a purchase. A supermarket strategically designs the sales floor so that children make eye contact with cereal characters, thus instilling feelings of trust and connection. A fast food restaurant plays rhythmic and fast music to prod clients to consume more food in a given time and quickly vacate tables.

This Article seeks to answer the following questions: Should the law tackle and regulate such selling tactics? If so, what is the appropriate regulatory approach? This challenge is especially important since policymakers have a somewhat vague understanding of what constitutes "unfair practice" which results in "market manipulation," which is aggravated with respect to non-verbal practices. On the prescriptive level, the challenge increases in light of the common suspicion in the United States of paternalistic state intervention.¹

¹ A good example may be New York City's initiative to ban sales of supersize soft drinks, the debate it ignited and the backlash of public protest. For a detailed discussion of this rule and its regulatory aspects, see David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687 (2014) (discussing the relation between public health and paternalism from various perspectives); see also Laura Hoffman, *Cigarettes vs. Soda?: The Argument for Similar Public Health Regulation of Smoking and Obesity*, 46 CONN. L. REV. 1889 (2014); Zita Lazzarini & David Gregorio, *Personal Health in the Public Domain: Reconciling Individual Rights with Collective Responsibilities*, 46 CONN. L. REV. 1839 (2014); Wendy Mariner, *Paternalism, Public Health, and Behavioral Economics: A Problematic Combination*,

True, consumer law aspires to tackle unfair manipulation and provide adequate protection to consumers.² Legal regulation issued by state and federal legislators aims to reduce sellers' ability to take advantage of consumers' vulnerability. However, legislators traditionally tailor legal rules on the assumption that consumers make decisions—rationally or irrationally—on the basis of available and relevant information. Legislatures and judges further presume that verbal information is most important in such decisions and therefore should be scrutinized. This concentration on information given to consumers and on verbal communication between them and vendors arises from some inaccurate assumptions on how consumers make decisions. As we explain throughout this Article, this overlooks the need to protect consumers from non-verbal manipulations.

As we demonstrate in this Article, the importance of this omission by policymakers can hardly be overstated. It is well documented that people receive a substantial part of the information they possess unconsciously via non-verbal communication.³ This kind of communication is especially powerful since its recipients employ different cognitive mechanisms from those used for processing verbal information. Most importantly, non-verbal communications are usually much harder to reflect upon.⁴ Decision-making based on these involves feelings, emotions and intuition—rather than information and deliberative reasoning. One of the most alarming aspects of this reality is that consumers are mostly unaware of non-verbal cues and the ways it can influence them. Furthermore, consumers cannot escape non-verbal communication. Since one cannot correct one's mistakes without being

46 CONN. L. REV. 1817 (2014); Wendy E. Parmet, *Beyond Paternalism: Rethinking the Limits of Public Health Law*, 46 CONN. L. REV. 1771 (2014); Katherine Pratt, *The Limits of Anti-Obesity Public Health Paternalism: Another View*, 46 CONN. L. REV. 1903 (2014); Yofi Tirosh, *Three Comments on Paternalism in Public Health*, 46 CONN. L. REV. 1795 (2014); Lindsay F. Wiley, *Sugary Drinks, Happy Meals, Social Norms, and the Law: The Normative Impact of Product Configuration Bans*, 46 CONN. L. REV. 1877 (2014). The rule was rejected by New York's state courts and received a considerable amount of public attention. See, e.g., Michael M. Grynbaum, *New York's Ban on Big Sodas Is Rejected by Final Court*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/2014/06/27/nyregion/city-loses-final-appeal-on-limiting-sales-of-large-sodas.html>.

² See *infra* Section I.A.

³ See *infra* Section I.C.

⁴ R. J. R. Blair, *Facial Expressions, Their Communicatory Functions and Neuro-Cognitive Substrates*, 358 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y B: BIOLOGICAL SCI. 561, 561 (2003). For a broader theoretical discussion of the differences between the "functional properties of nonverbal and verbal representational systems and their empirical implications for memory, language, and cognition generally," see Allan Paivio, *Dual Coding Theory: Retrospect and Current Status*, 45 CANADIAN J. PSYCHOL. 255 (1991). For a discussion of the interaction with economics, see Colin Camerer, George Loewenstein & Drazen Prelec, *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LITERATURE 9 (2005).

aware of them, consumers are unable to learn effectively from their experience and avoid repeating these purchasing mistakes.

The law neglects to address the encoding and decoding of wordless cues exchanged between consumers and businesses. This creates a challenging gap between the law's intention to protect consumers and its ability to do so effectively. Furthermore, the current legal approach contributes to consumers' unfounded faith in proper protection. It provides consumers with an artificial sense of effective protection while leaving them exposed to sophisticated market manipulations.

The law's disregard and mistreatment of these non-verbal exchanges demonstrates that marketing scholars and market forces are ahead of legal scholars—let alone judges—in how influence works at the point of purchase. More generally, this neglect may serve as a powerful illustration of important ways in which the law is slow to respond to recent advancements in behavioral and marketing sciences. We believe that this is an important lesson that policymakers should keep in mind, and we incorporate it into our analysis and policy recommendations below.

Indeed, it has recently been argued that the concept of market manipulation, as understood and treated by legislatures and judges, is descriptively and theoretically incomplete.⁵ However, even this important and pioneering literature does not tackle systematically the kind of manipulations we address. Thus this Article enriches the literature by updating and broadening the framework for the realities of a marketplace that is manipulated by non-verbal cues.

Non-verbal manipulations are a pervasive phenomenon, employed by sellers who mostly are well acquainted with marketing research.⁶ Legal scholars, judges and legislatures, however, lack a systematic understanding of the dominance of non-verbal cues in influencing consumers, let alone how the law should respond. This Article aims to narrow this gap significantly.

In sum, non-verbal manipulations deeply influence consumer decision-making in a subtle, sophisticated way. Such manipulations are most often not under the control of the thinking of the decision-maker, who (to begin with) is unaware of the manipulation. Accordingly, this Article seeks to draw the line between sellers' legitimate marketing processes on the one hand and illegitimate influences that should be regulated on the other. In essence, we argue that the definition of misleading or deceptive practices should be revisited and revised. The orthodox view of unfair practices presumes that as long as the

⁵ See, e.g., Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497 (2015); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014).

⁶ We return to this important fact *infra* Section I.D.

information communicated is accurate, the nature of its impact on people's consumption is secondary and often should be considered "fair play." However, we will argue that many kinds of non-verbal communications undermine consumers' overall utility and may be misleading and deceptive. This may be true even if the information provided is accurate.

The Article is organized as follows: Part I summarizes the current consumer law landscape. It defines the term "Non-Verbal Market Manipulation" for the purpose of this Article, then briefly surveys recent case law and initiatives by the Federal Trade Commission (FTC) and state legislatures. This review shows that present consumer law leaves manipulative non-verbal communication unregulated. Part II presents common non-verbal manipulations and discusses their effectiveness. We focus on the manipulative use of vision, color, scent, music and celebrities by sellers. Part III provides policy recommendations. It first examines whether non-verbal manipulations should be inspected (normatively) and whether and how existing consumer law can regulate them (positively). This discussion exemplifies that the notions of deceptive and misleading practices should be reconsidered so to allow consumer law to address non-verbal communications. It further provides a general framework delineating several key considerations that should shape this policy. Part IV tackles some limitations, reservations and arguments against our thesis. It concerns issues such as fear of regulatory slippery slope; paternalism and consumers' heterogeneity; concern of over-regulation that will undermine consumers' overall utility; and more. A brief conclusion follows.

I. BACKGROUND: MARKET MANIPULATIONS AND CURRENT CONSUMER PROTECTION LANDSCAPE IN A NUTSHELL

This Part briefly answers the question of how the current law addresses manipulative selling tactics. For an informed response to this question, Section A concisely portrays the current consumer law landscape. Here we show that the law mainly focuses on verbal data and information, while virtually ignoring non-verbal messages and communications.

To understand the term "Non-Verbal Communications," Section B explains what dual reasoning is. Thereafter Section C sketches a rough map of consumer-seller forms of communication, while proposing a taxonomy that points to the ones this Article addresses. Section D concludes this Part by defining the term "manipulative" for the purpose of this Article.

A. Market Manipulations and Current Consumer Law

The relationship between sellers and consumers is typically characterized by unequal bargaining power. Sellers, as repeat players, have various advantages over consumers, who are usually “one shotters.”⁷ For instance, sellers are more familiar with the product’s characteristics. They draft the contracts that govern the transaction. They have smoother access to marketing, legal and financial experts. They have accumulated more experience in litigating cases in court. They also enjoy greater ability to cooperate among themselves and unite strategically, thus influencing policymakers and public opinion in various ways.⁸

Since its early days and for some fifty years thereafter, consumer protection law has rested on this understanding while seeking to protect the weaker party. In the early days, commentators and courts simply used the unequal bargaining power terminology to rationalize the protection afforded to consumers. Notions such as “consumers’ autonomy,” “consumers’ sovereignty,”⁹ and “fairness” were—and still are—often associated with this outlook.

Later on, the law-and-economics approach challenged this traditional jargon and looked instead for market failures. These, according to law-and-economics proponents, can hurt consumers and undermine overall market utility. The main market failure, in the context of consumer law, is asymmetric information.¹⁰ According to this logic, if a market failure does not exist, the law should not intervene.¹¹

More recently, insights drawn from behavioral economics have called the economic perspective into question. Behavioral insights

⁷ See, e.g., Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y. REV. 95 (1974). In some markets, however, consumers may gain experience and knowledge. We discuss this point *infra* Section IV.C.

⁸ For a general explanation, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991).

⁹ See, e.g., Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997). For a general explanation on consumers’ autonomy, see Anne Cunningham, *Autonomous Consumption: Buying into the Ideology of Capitalism*, 48 J. BUS. ETHICS 229, 230 (2003). For a general explanation on consumers’ fairness, see Lisa E. Bolton, Luk Warlop & Joseph W. Alba, *Consumer Perceptions of Price (Un)Fairness*, 29 J. CONSUMER RES. 474 (2003).

¹⁰ For early writings discussing informational market failures in consumer markets see, for example, Arthur Allen Leff, *The Pontiac Prospectus*, 2 CONSUMER J. 25 (1974); Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977).

¹¹ Of course, a market failure does not necessitate, in and of itself, any kind of legal intervention. According to the law-and-economics approach, such an intervention must still be justified by a cost-benefit analysis. See Joseph E. Stiglitz, *Markets, Market Failures, and Development*, 79 AM. ECON. REV. 197, 202 (1989).

demonstrate that consumers depart from the classic paradigm of rationality. Consumers suffer from various cognitive limitations and biases and make ill choices under many circumstances. Thus, the behavioral approach to law expands (beyond asymmetric information) the circumstances under which legal intervention might be legitimate and seeks to protect consumers from their cognitive pitfalls.¹²

In this Section we survey how the law in books responds to market manipulations. While the discussion below captures only a small part of the broad picture of consumer law, it still demonstrates two complementary assertions: first, current consumer law tends to focus on misleading verbal communications. In other words, the law attends to verbal sales tactics that lead to consumers' deliberative reaction; second, current consumer law does not regulate non-verbal manipulations that influence consumers in an underhanded way.

Market manipulations as discussed in this Article take place in the pre-contractual stage in the consumer–seller relationship. It is here—before the transaction is settled—that the seller employs selling tactics to lure consumers into a deal. Consumer law traditionally regulates this early stage by focusing on disclosures. Disclosing accurate and relevant information is perceived as an effective tool that allows consumers to reach informed decisions.

Disclosures are of two kinds: voluntary and compulsory. As for regulating sellers' voluntary disclosures, the law generally bans fraudulent misrepresentation. Under many circumstances it also prohibits silence fraud and omissions.¹³ Accordingly, the FTC¹⁴ invests substantial resources in preventing and fighting misrepresentations and misleading information disclosures.¹⁵

An interesting contemporary case of fraudulent misrepresentation that demonstrates the focus on verbal communications is the lawsuit

¹² See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1407 (2004); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

¹³ For a detailed discussion see, for example, JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 1–122 (3d ed. 2007).

¹⁴ The FTC, established in 1914, is a dominant agency in the field of consumer protection. The FTC states in its online site that its mission is “[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.” See *About the FTC*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc> (last visited Sept. 9, 2016).

¹⁵ For the statutory basis for the FTC's action, see 15 U.S.C. § 45(a)(1) (2012) (“[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); *id.* §§ 52, 55 (defining false advertisement as misleading in a material respect and stating that where such advertisement is likely to induce purchase is should be considered as an unfair or deceptive practice).

against Red Bull, the energy drink producer. Red Bull was sued in a class action for its misleading and false advertising statement: “Red Bull gives you wings.”¹⁶ The plaintiffs argued that such a slogan led consumers to overestimate the positive traits and overall quality of the energy drink. The lawsuit ended with a settlement that required Red Bull to pay millions of dollars in compensation to American consumers.¹⁷

The case of *Pelman v. McDonald’s* further illustrates the attention that verbal disclosures receive within the realm of consumer law.¹⁸ In this famous lawsuit, which enjoyed much media coverage, plaintiffs claimed that McDonald’s violated consumer protection law. This claim was based, among other things, on allegedly false representation. These representations supposedly caused consumers to over-estimate how healthy and nutritionally beneficial McDonald’s food is.

As these (and other) examples make evident, consumer law concentrates on verbal communications. This concentration is intensified by the FTC’s Advertising Substantiation Doctrine.¹⁹ According to this doctrine, advertisers and ad agencies should have a reasonable basis for their selling statements before they are disseminated.²⁰

A recent example of fraudulent misrepresentation that the FTC confronted by using this doctrine concerned L’Oréal Paris Youth Code skincare products. The company’s campaign asserted the “new era of skincare: gene science,” and that consumers could “crack the code to younger acting skin.”²¹ According to the FTC’s complaint, L’Oréal made false and unsubstantiated claims that its products “provided anti-aging benefits by targeting users’ genes.”²²

¹⁶ Ana Komljenovic & Brana Komljenovic, *A Study of Marketing Techniques and Consumer Protection in the Regulatory Framework of the European Union*, 6 INT’L J. SOC. SCI. & HUMAN. 710, 712–13 (2016) (discussing the Red Bull consumer class action).

¹⁷ The court approved the settlement in May 2015. Stipulation of Settlement, Careathers v. Red Bull N. Am., Inc., No. 1:13 CV-0369 (KPF) (S.D.N.Y. July 31, 2014). For more details on the settlement, see ENERGY DRINK SETTLEMENT, <http://www.energydrinksettlement.com> (last visited Aug. 23, 2016). For media coverage, see, for example, Mike Gardner, *Is Metaphor in Advertising Dead? What the Red Bull Payout Means for Brands and Their Slogans*, THE DRUM (Oct. 13, 2014, 1:25 PM), <http://www.thedrum.com/opinion/2014/10/13/metaphor-advertising-dead-what-red-bull-payout-means-brands-and-their-slogans>.

¹⁸ *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508 (2d Cir. 2005).

¹⁹ See Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999 (F.T.C. Aug. 2, 1984); see also *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984).

²⁰ Although the Doctrine applies to implied statements as well, such implied statements should be based on reasonable interpretation of the literal messages. See Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30,999.

²¹ See Press Release, Fed. Trade Comm’n, L’Oréal Settles FTC Charges Alleging Deceptive Advertising for Anti-Aging Cosmetics (June 30, 2014), <https://www.ftc.gov/news-events/press-releases/2014/06/loreal-settles-ftc-charges-alleging-deceptive-advertising-anti>.

²² See *id.*

As for compulsory disclosures, consumer law often requires sellers to reveal information to consumers across a wide array of transactions. Perhaps one of the most prominent and controversial examples of compulsory disclosures is the Truth in Lending Act.²³ Another example is in the context of food, drug, and cosmetic labeling.²⁴ There are many other examples, of course, on both the federal and state levels.²⁵

The rationale behind these requirements is that informed consumers can reach better decisions. Intelligent purchasing decisions, in turn, advance market efficiency and minimize the need for regulatory intervention. However, the efficacy of mandated disclosures is highly debated and questioned for various valid reasons.²⁶

The law protects consumers from unacceptable manipulations—deceptive or otherwise unfair—in additional ways. One conspicuous example is door-to-door sales. It has been noted that in many such sales consumers fall prey to aggressive sales tactics and undue pressure.²⁷ Furthermore, consumers encounter these home solicitations in an inconvenient environment, which is not commercial in nature. Therefore, federal²⁸ and state²⁹ legislation mandates cooling-off periods, which allow consumers to rescind the contract. For arguably similar reasons, cooling-off periods have been enacted with respect to time-sharing sales, used car sales and some other transactions.³⁰ We shall return to this point below.

In addition, the law protects consumers who may suffer injury or encounter infringement of their rights in several other circumstances. Important examples are referral schemes, telemarketing, and email

²³ Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2012).

²⁴ See 21 C.F.R. §§ 101, 201, 701 (2016); 27 C.F.R. §§ 4–5, 7 (2016); *Ingredients, Packaging & Labeling*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/IngredientsPackagingLabeling/default.htm> (last visited on Oct. 21, 2016).

²⁵ See, e.g., Consumer Leasing Act of 1976, 15 U.S.C. § 1667 (2012); 15 U.S.C. §§ 1601–1667e. On the state level see, for instance, MASS. GEN. LAWS ch. 94 § 181 (2016) (requiring grocers to post prices per standardized measures).

²⁶ For a powerful recent example, see OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

²⁷ See, e.g., *State v. Direct Sellers Ass'n*, 108 Ariz. 165, 167 (1972) (upholding a statute regulating door-to-door salesmen since “a disproportionate number of door-to-door sales involve misleading or high pressure sales tactics”).

²⁸ See 16 C.F.R. § 429.1 (2016).

²⁹ According to one study, every state—and the District of Columbia—has enacted a cooling-off statute. See DEE PRIDGEN & RICHARD M. ALDERMAN, *CONSUMER CREDIT AND THE LAW*, app. 14A (2015).

³⁰ See 15 U.S.C. § 1635 (2012) (provision mandating a three-day right to rescind home equity loans); N.Y. GEN. BUS. LAW § 198-b (McKinney 2012) (used car sales). A mandated cooling-off period has also been granted in the context of home equity loans. See Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709 (codified as amended at 15 U.S.C. § 1601 (2012)) (amending provisions of the Truth in Lending Act).

spam.³¹ In all these instances, consumer law seeks to minimize sellers' ability to use illegitimate selling tactics that exploit its superior power over consumers. Nevertheless, none of these initiatives tackles non-verbal market manipulations.

An apparent explanation for the disparity in the legal treatment of verbal as against non-verbal communication is that language is considered by many to be the most fundamental, efficient, and convenient means of communication. By and large, the accuracy of words is relatively much easier to verify, prove, and measure. The law normally regulates and responds to concepts such as truth and falsehood, dishonesty and inaccuracy, from various other doctrines. Hence, by focusing only on the accuracy of the words, the law demarcates quite clear borders around its intervention. The law thus minimizes allegedly slippery slopes that might result from scrutinizing non-verbal cues.³²

In that regard, we argue that policy makers and legislatures are fighting the easy wars rather than the important ones. Focusing on verbal manipulations has a serious shortcoming as it leaves many substantial effects on decision-making unnoticed. In terms of influencing consumers, non-verbal manipulations can be far more effective. Much of the information we possess comes from non-verbal communications and signals. We next explain that, in light of the psychological and marketing literature, the law should be hesitant in asking merely "How did the manipulation occur?" instead of "To what extent was the consumer manipulated?"

B. *Deliberative and Non-Deliberative Modes of Reasoning*

At this point it is important to explain briefly the concept of dual reasoning, which is a key notion that sheds important light on our analysis. A large body of literature demonstrates that individuals depart from rational decision-making models in systematic and predictive ways. Our starting point here is similar to the one chosen, among others, by Hanson and Kyser: we believe that the law should take into account how people deviate from rational thinking, but also "the possibility that other actors will take advantage of [psychological

³¹ See, e.g., DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW 105–124 (Vicki Been et al. eds., 5th ed. 2009).

³² However, we find it important to clarify that the current approach might be generated by prudential concerns, such as limited resources and evidentiary availability, rather than a result of a deeper and coherent theory.

phenomena] to influence individual preferences for their own gain.”³³ We further agree that “[m]anufacturers will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits.”³⁴

Within this broad concept, one paradigm that has gained popular recognition through Daniel Kahneman’s book, *Thinking, Fast and Slow*,³⁵ is the concept of two systems of (or dual) reasoning. To be more specific, Kahneman differentiates an automatic, intuitive, and mostly unconscious process—dubbed System 1—from a controlled and deliberative process—labeled System 2.³⁶ While System 2 represents planning, calculating, thinking, and self-control, System 1 represents automatic and sometimes hasty behavior focused on present needs and desires.³⁷ Recognition of the role of automaticity in decision-making has played an important part in the emergence of behavioral economics.³⁸ This concept now lies at the heart of much research in behavioral law and economics.³⁹

³³ Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1426 (1999).

³⁴ Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 743 (1999).

³⁵ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

³⁶ *Id.* at 13. Kahneman notes that “[t]he distinction between fast and slow thinking has been explored by many psychologists over the last twenty-five years.” *Id.* For an important review, see Jonathan St. B. T. Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCHOL. 255 (2008).

³⁷ There is an enormous body of literature discussing the dual reasoning model and documenting the variations in controllability, malleability, and awareness. See, e.g., Peter Carruthers, *An Architecture for Dual Reasoning*, in *IN TWO MINDS: DUAL PROCESSES AND BEYOND* 109 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009); Jonathan St. B. T. Evans, *How Many Dual-Process Theories Do We Need?*, in *IN TWO MINDS: DUAL PROCESSES AND BEYOND* 33 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009); Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: An Historical Perspective*, in *IN TWO MINDS: DUAL PROCESSES AND BEYOND* 1 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009); Richard Samuels, *The Magical Number Two, Plus or Minus: Dual-Process Theory as a Theory of Cognitive Kinds*, in *IN TWO MINDS: DUAL PROCESSES AND BEYOND* 129 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009); Jonathan St. B. T. Evans, *Dual Processes, Evolution and Rationality*, 10 THINKING & REASONING 405 (2004) (reviewing KEITH E. STANOVICH, *THE ROBOT’S REBELLION: FINDING MEANING IN THE AGE OF DARWIN* (2004)).

³⁸ See, e.g., Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCHOL. REV. 650 (1996). However, the paradigm of intuitive versus deliberate judgments has also been criticized by scholars. See Arie W. Kruglanski & Gerd Gigerenzer, *Theoretical Note, Intuitive and Deliberate Judgments Are Based on Common Principles*, 118 PSYCHOL. REV. 97 (2011).

³⁹ Plentiful studies have been published in this tradition with many collective works. For a recent collection, see *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* (Eyal Zamir & Doron Teichman eds., 2014). For an attempt to extend the relevancy of dual reasoning to additional contexts, see Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 213 (Eyal Zamir & Doron Teichman eds., 2014).

Interestingly, a large portion of research on behavioral law and economics is related to biases attributed to non-deliberative choice. This research is mainly concerned with the effects of framing, perception of risk, and probabilities.⁴⁰ However, the behavioral law-and-economics approach has, to date, hardly tackled the notion of non-verbal market manipulations. As we demonstrate below, by and large, non-verbal manipulation targets System 1 while bypassing System 2. We now turn to define and describe this concept in the context of marketing and consumer decision-making in more detail.

C. *A Taxonomy of Consumer–Seller Communication*

Non-verbal communication is usually understood as the process of communicating through wordless messages—namely behaviors and elements of speech apart from the words themselves. Non-verbal communication may include speed, intonation, and volume of voice; gestures and facial expressions; body posture, stance, and proximity to the listener; and eye movements and contact. Dress, clothing, hairstyle and general appearance are also part of non-verbal communication.

Non-verbal communications are extremely important. Research suggests⁴¹ that in a face-to-face interaction only seven percent of the general effect is produced by the spoken word, while thirty-eight percent is produced by elements of voice and fifty-five percent by facial expressions.⁴² A further fifty percent stems from body language, movements, eye contact, etc.

These very powerful non-verbal communications exert an immediate effect because of the speed at which the receiver perceives the message.⁴³ It takes much less time to see a symbol or picture than to receive and understand spoken words and their implications. Hence, we normally respond much faster to colors and pictures than to any language. Moreover, non-verbal techniques can present a large amount of data in compact form.

Human behavior and human reasoning are complex and challenging, so, not surprisingly, market manipulations have many

⁴⁰ See Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980 (2009).

⁴¹ For a similar argument in the context of romantic dating, see ANDREW TREES, *DECODING LOVE: WHY IT TAKES TWELVE FROGS TO FIND A PRINCE AND OTHER REVELATIONS FROM THE SCIENCE OF ATTRACTION* 16 (2009).

⁴² Albert Mehrabian, *Communication Without Words*, in *COMMUNICATION THEORY* 193, 193–94 (C. David Mortensen ed., 2d ed. 2008).

⁴³ See, e.g., Narendra Sonu Tayade, *Decoding Non-Verbal Communication*, *CONFLUENCE*, Feb. 26, 2011, at 96, 97 (2011).

flavors and do not come in a single standard shape.⁴⁴ To exemplify this seemingly vague assertion, the matrix below presents sellers' market manipulations in two dimensions. The first dimension distinguishes verbal from non-verbal selling tactics. It focuses on the *seller's behavior*. The second dimension distinguishes deliberative from non-deliberative decision-making. Contrary to the first, the second analyzes how *consumers* interact and respond to the seller's tactic—deliberatively or non-deliberatively.

Table 1: Selling Tactics and Consumers' Response

	Deliberative	Non-Deliberative
Verbal	1. Seller declares that a 4.8 lbs. package weighs 5 lbs.	2. Seller announces a “cash discount” rather than a “credit surcharge.”
Non-Verbal	3. Seller uses bold/large font or a special frame for specific parts of the contract.	4. Seller makes use of sweet scent in a bookstore.

Before proceeding, we note that Table 1 is used for methodological purposes only. Unlike the seemingly clear lines it draws, not everything fits neatly into the deliberative and non-deliberative dichotomy. Sometimes the consumer may be aware of part of the manipulation or of its impact on her decisions. However, this taxonomy—though not sufficiently sensitive to all possible cases and situations—helps us explain and illustrate our focus.

In the first rubric, where the seller declares the weight of a package, he communicates verbal, explicit information to prospective consumers. Consumers who read this statement process the information deliberatively. As we detail in the next Part, the law regulates these situations, focusing mainly on this rubric. It requires the seller to provide accurate information while banning misleading or deceptive information.

In the second rubric, the seller communicates information in a way that may take advantage of consumers' cognitive biases. For instance, since people are more sensitive to losses than to gains, a “credit surcharge” will have a more chilling effect on consumers than a “cash discount.” Without changing the actual terms of the transaction, the seller can frame the paying options in a way that influences consumers' behavioral decisions. Sellers may want to encourage their customers to

⁴⁴ Cf. Cass R. Sunstein, *Fifty Shades of Manipulation*, 1 J. MARKETING BEHAV. 213, 215–16 (2015).

use credit cards.⁴⁵ To facilitate this, sellers are likely to prefer the “cash discount” statement.

Sellers can take advantage of a wide variety of cognitive biases. For instance, a seller may say “many people like you” This statement subtly pressures a consumer by employing the bandwagon effect, which indicates what the descriptive norm is. Indeed, a large body of literature discusses, among other matters, the ways sellers exploit information overload, the sunk cost effect, over-optimism, the endowment effect and cognitive dissonance.⁴⁶

In the third rubric the seller uses non-verbal means to spark a deliberate reaction. For instance, by using a large font or a frame in a contract, a seller can enhance consumers’ awareness. By using such non-verbal visual means, the seller can channel consumers’ attention without changing the wording of the contract itself. Scholars have recently addressed such techniques—mainly as means to improve consumer protection and fight information asymmetry.⁴⁷ Consumer law addresses this rubric as well, requiring sellers to present or at times emphasize information in particular ways.⁴⁸

The fourth rubric shows the most interesting tactic and it is the crux of our analysis. By using non-verbal methods such as scent, seductive body language, colors, or music, the seller influences

⁴⁵ It might be in the seller’s interest that consumers use a credit card rather than cash. This is because credit card causes less pain to consumers and is likely to heighten their propensity to spend. See, e.g., Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 125 (2006); Richard A. Feinberg, *Credit Cards as Spending Facilitating Stimuli: A Conditioning Interpretation*, 13 J. CONSUMER RES. 348 (1986); Dilip Soman, *The Effect of Payment Transparency on Consumption: Quasi-Experiments from the Field*, 14 MARKETING LETTERS 173 (2003).

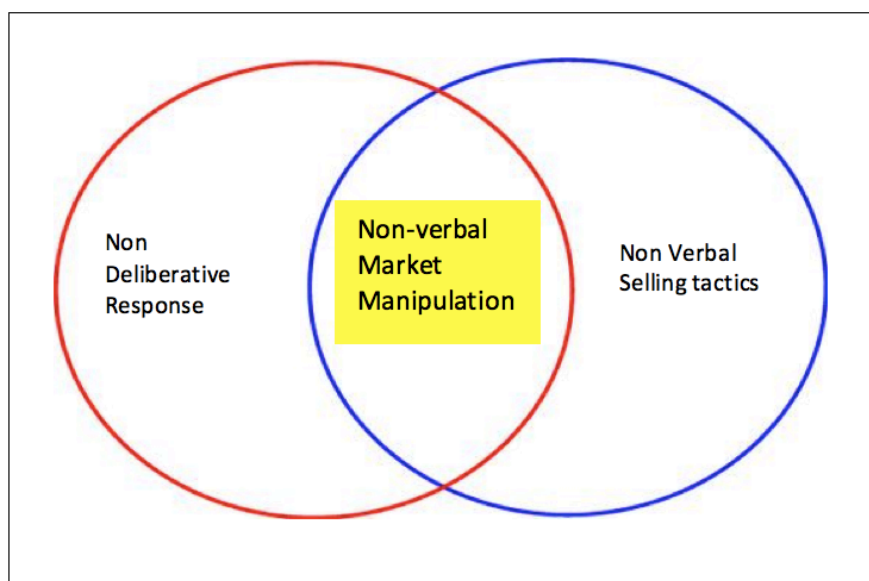
⁴⁶ See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 794 (2008); Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1120 (2009); Bar-Gill, *supra* note 12; Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 18 (2008); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J.L. & TECH. 49, 95 (2009); Oren Bar-Gill & Franco Ferrari, *Informing Consumers About Themselves*, 3 ERASMUS L. REV. 93, 113–14 (2010); Becher, *supra* note 12; Shmuel I. Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 L. & CONTEMP. PROBS., Spring 2011, at 63; Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 448 (2002); Korobkin, *supra* note 12. Indeed, in recent years scholars have come to recognize the problem and policymakers have begun to take it into account.

⁴⁷ See, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Shmuel I. Becher, *A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 761 (2009); Omri Ben-Shahar, *The Myth of “The Opportunity to Read” in Contract Law*, 5 EUR. REV. CONTRACT L. 1 (2009).

⁴⁸ One common example is the disclosure format for credit transactions mandated under the Truth in Lending Act. For a detailed discussion, see SPANOGLIE ET AL., *supra* note 13, at 134–49.

consumers' behavior. The diagram below further illustrates what may constitute a non-verbal market manipulation. Under relevant circumstances delineated in the next Part, these techniques can constitute a “non-verbal market manipulation.”

Diagram 1: Non-Verbal Market Manipulations



D. *Defining Non-Verbal Market Manipulations (NVMMs)*

Consumer–seller communication assumes many forms. There are also many kinds of manipulations. However, for consumer–seller communications to become manipulative they need to be of certain types or meet certain prerequisites. As Sunstein notes, merely attempting to alter one’s behavior does not constitute per se a manipulative act.⁴⁹ By the same token, providing information in order to convince someone is not a manipulation.⁵⁰ To be manipulative, *something more* is required.

In this Section we start to explain what this additional “thing” may be. However, this is a thorny task since current legal literature does not address—certainly not thoroughly and consistently—what ought to be considered manipulative. So before proceeding we find it important to clarify that our attempt below to delineate what should be regarded as

⁴⁹ Sunstein, *supra* note 44, at 215.

⁵⁰ *Id.* at 215–16.

manipulative is preliminary. Given the significant omission in current legal scholarship of consumer protection, we hope that as the literature advances, the definition will become clearer and more accurate. Against the difficulty of defining when a non-verbal selling practice crosses the threshold and becomes manipulative, we list a model with seven parameters that need to be satisfied.

First, to constitute a manipulative selling tactic, sellers (as a class) are presumably aware of consumers' psychological vulnerabilities. For instance, sellers are presumably aware that a sweet scent can cause consumers to spend more time in a bookshop and perceive the store in a more positive way. They also know that consumers can hardly protect themselves against this influence.

Second, NVMM can materialize only when sellers are able to exploit consumers' susceptibilities. Taking the sweet scent example, sellers know how to produce (or where to purchase) artificial sweet scent, where to locate that aroma on their premises, how strong it should be or how often used, and the like.

The third condition for NVMM is that businesses have a profit-incentive to take advantage of consumers' weaknesses. That is, the seller will enjoy a potential gain by using the relevant selling tactic. For instance, the seller may believe that the expected marginal revenues from using sweet scent in a bookstore will exceed the costs of its use.

Fourthly, NVMM emerges where, and only where, vendors are prepared to ignore consumers' interests if necessary. That is, sellers are willing to employ the selling tactic even if it undermines consumers' utility or welfare. True, some manipulations do not hurt consumers.⁵¹ But where sellers focus on their own interest while disregarding consumers' true preferences, their practice becomes problematic. We return to this point below where we propose a legal approach to NVMMs.

Fifthly, NVMM exists only if sellers deliberately employ effective tactics—that are not a natural by-product of the market activity itself—which mesh with consumers' vulnerabilities. In the above example, utilizing chocolate scent artificially in a bookstore is considered deliberate, while its presence in a bakery is not.

The sixth condition is that sellers employ a deceptive tactic unrelated to the product and its features. An NVMM comes into existence only if vendors influence consumers' perception of—or behavior and attitude to—a product, not its merit. This influence works when no information (accurate or not) about the product itself (its

⁵¹ See *id.* at 223. For instance, framing options in a way that increases the likelihood that consumers will opt for healthy products may be manipulative. Yet it probably does not require protecting consumers from it.

benefits, usage, etc.) is given. In the above example, the chocolate scent does not teach the consumer anything about the items sold at the bookstore. There is no relation or connection between the surrounding scent and the items sold.

The seventh and last prerequisite for an NVMM is the “unawareness” feature. That is, consumers are unaware of sellers’ NVMM: the customer at the bookstore may notice and perhaps appreciate the sweet scent, but he does not know how this scent influences his purchasing behavior.

Of course, this is not an all-or-nothing system. In many instances consumers are partially aware of a NVMM. They may learn about NVMMs through their own or their peers’ experience, press and media, blogging, etc. However, where consumers know little about how strong the effect is, and especially when they tend to substantially underestimate it, courts and policy makers should stay vigilant. The ultimate test would probe whether the seller has used a selling tactic mostly directed at System 1, subverting the consumer’s ability to use System 2 properly.

II. NON-VERBAL MANIPULATION IN ACTION

On Saturday afternoon, an Abercrombie & Fitch store in the SoHo neighborhood of New York City was darkly lit, like a nightclub. Music was pumping and the smell of cologne lingered in every nook and cranny.⁵²

This Part presents common non-verbal market selling tactics and manipulations that are largely unregulated. It also shows the ways these manipulations influence consumers’ decision-making. The instances are (1) colors and visuals, (2) music, (3) scent, (4) celebrities and cereal characters, (5) advertising happiness. As we explain throughout this Part, these examples mostly aim to influence consumers’ non-deliberative decision-making.

Non-verbal communications and manipulations can take place in different contexts. One context is the environmental conditions where communication takes place. Elements such as color, music, and scent are prime examples of this context. Another possible context is the communicators’ physical characteristics: a company may hire only good-looking, young, slim in-store representatives. A third context is communicators’ behavior in face-to-face interactions: a store

⁵² Jana Kasperkevic, *Abercrombie & Fitch Employees Embrace Death of Sexualised Dress Code*, *GUARDIAN* (Apr. 26, 2015, 6:30 PM), <http://www.theguardian.com/business/2015/apr/26/abercrombie-fitch-ditches-sexualised-marketing-policy>.

representative may flirt with a potential buyer. An additional context may be playing on emotional attachments.

We address examples of these contexts throughout the Article. However, this Part does not aspire to cover all non-verbal manipulative tactics that can be found in the marketplace—an apparently impossible task. Rather, it seeks to provide the reader with a solid understanding of how such manipulations engage the senses and influence consumers unconsciously. It further illustrates that retailers can easily manipulate shoppers with subtle and relatively inexpensive applications. We will examine additional non-verbal manipulations in the next Part where we discuss the regulatory framework for addressing NVMM manipulations.

A. *Visuals and Colors*

We start our analysis with manipulations applying visuals and colors.⁵³ Colors have so-called “personalities” that can extend to products.⁵⁴ Since colors convey meanings, they can influence consumers’ decision-making and behaviors.⁵⁵ Marketers can thus use colors to influence customers’ preferences in various ways.⁵⁶ Psychological research of colors teaches us that different colors can be used, among other things, to increase or decrease appetite, enhance mood, calm customers down, and even reduce perception of waiting time. Moreover, purchasing intent can also be greatly affected by colors.⁵⁷

A store’s atmosphere can influence consumers’ emotions, as well as level of comfort, mood, and time spent shopping—all of which may impact purchase decisions. Experimental research generally suggests that cool-colored store environments seem preferable to warm-colored ones.⁵⁸ Warm colors (e.g., red) increase arousal, whereas cool colors (e.g., blue) tend to induce feelings of relaxation and perceptions of

⁵³ Interestingly, the great majority of the information we possess comes from sight. For an interesting account from a different perspective, see, for example, Anthony Synnott, *The Eye and I: A Sociology of Sight*, 5 INT’L J. POL. CULTURE & SOC’Y 617 (1992).

⁵⁴ Lauren I. Labrecque & George R. Milne, *Exciting Red and Competent Blue: The Importance of Color in Marketing*, 40 J. ACAD. MARKETING SCI. 711 (2012).

⁵⁵ Lauren I. Labrecque, Vanessa M. Patrick & George R. Milne, *The Marketers’ Prismatic Palette: A Review of Color Research and Future Directions*, 30 PSYCHOL. & MARKETING 187 (2013).

⁵⁶ Satyendra Singh, *Impact of Color on Marketing*, 44 MGMT. DECISION 783 (2006).

⁵⁷ Labrecque & Milne, *supra* note 54, at 721.

⁵⁸ Barry J. Babin, David M. Hardesty & Tracy A. Suter, *Color and Shopping Intentions: The Intervening Effect of Price Fairness and Perceived Affect*, 56 J. BUS. RES. 541 (2003); Joseph A. Bellizzi, Ayn E. Crowley & Ronald W. Hasty, *The Effects of Color in Store Design*, 59 J. RETAILING 21 (1983); Ayn E. Crowley, *The Two-Dimensional Impact of Color on Shopping*, 4 MARKETING LETTERS 59 (1993).

pleasantness.⁵⁹ Colors that induce relaxation increase purchases, reduce purchase postponements, and create a stronger inclination to browse. So marketers sometimes use warm colors on store windows and entrances to attract customers physically into the store, and then utilize cool colors in displays.⁶⁰

Colors also impact consumers' price perception. Remarkably, the literature suggests that this effect is moderated by gender.⁶¹ Male consumers perceived greater savings when prices were presented in red rather than in black. However, if the purchase is likely to be made by women, retailers can realize substantial benefits by listing prices in black. Hence, retailers may realize cost savings by using color strategically on this front as well.

Interestingly, colors in shopping contexts affect consumers' decision-making whether online or offline.⁶² Accordingly, red backgrounds in auctions and negotiations induce aggression through arousal, and (contrary to blue) induces higher bids. In other words, when consumers compete with each other, exposure to the color red increases their willingness to pay. However, in situations where a product is readily available, the consumers' willingness to pay may be enhanced by exposure to blue (rather than red) background.

The combination of logo design and color also influences likability and familiarity.⁶³ Ads with higher value (brighter) colors induce greater feelings of relaxation. By the same token, ads with higher saturation (intensity) prompt feelings of excitement, which favorably influence attitudes to the ads. For this reason, red activates an avoidance motivation, which increases attention, memory, and favorable evaluations of prevention-focused ads. At the same time, blue leads to favorable evaluations of ads that highlight positive product benefits. Therefore, red is a more appropriate color choice for situations that require attention to detail. Conversely, blue is more effective in situations that benefit from increased creativity.

Another study examined the interactive effects of colors and products on perceptions of brand logo appropriateness.⁶⁴ This study

⁵⁹ Bellizzi, Crowley & Hasty, *supra* note 58; Joseph A. Bellizzi & Robert E. Hite, *Environmental Color, Consumer Feelings, and Purchase Likelihood*, 9 PSYCHOL. & MARKETING 347 (1992); Velitchka D. Kaltcheva & Barton A. Weitz, *When Should a Retailer Create an Exciting Store Environment?*, J. MARKETING, Jan. 2006, at 107.

⁶⁰ Bellizzi, Crowley & Hasty, *supra* note 58.

⁶¹ Nancy M. Puccinelli et al., *Are Men Seduced by Red? The Effect of Red Versus Black Prices on Price Perceptions*, 89 J. RETAILING 115 (2013).

⁶² Rajesh Bagchi & Amar Cheema, *The Effect of Red Background Color on Willingness-to-Pay: The Moderating Role of Selling Mechanism*, 39 J. CONSUMER RES. 947 (2013).

⁶³ Labrecque, Patrick & Milne, *supra* note 55.

⁶⁴ Paul A. Bottomley & John R. Doyle, *The Interactive Effects of Colors and Products on Perceptions of Brand Logo Appropriateness*, 6 MARKETING THEORY 63 (2006).

also points out that colors influence how consumers view different products. That is, colors and products have connotative meanings that are shared by most people, while different colors produce a systematic pattern of results. To illustrate, brands promoting a functional image were better received in blue. Likewise, brands promoting a sensory social image were better received in red.

B. *Music*

Music engages the sense of hearing and it is now well established that specific in-store music can be used strategically. Broadly speaking, it can improve a store's environment⁶⁵ and cause shoppers to visit certain stores. It may also play a significant role in the consumers' purchase decision-making process. Experiments show that the right type of music can put consumers in a mood that heightens their probability of purchasing.⁶⁶ For instance, classical music will generally lead customers to spend more money than pop music.

Businesses can play music with a slower tempo to encourage their customers to stay longer and spend more. For instance, when slower music is playing, people in sit-down restaurants usually remain longer—and order more food, drinks, or dessert. But fast-food places usually play music with a quicker tempo, which can make people eat faster and leave faster, making room for others. Another interesting study⁶⁷ examined music in flower shops and found that the sum spent on flowers was much higher when love songs and romantic music was played, as opposed to other music or none.

Type of effective music depends not only on the kind of store but also on its prospective clientele. A study on clothing store shoppers comparing the effects of background and foreground music⁶⁸ confirmed that shoppers indeed respond psychologically and behaviorally to music. It suggested that the most effective way was to play different kinds of music in different areas of the store. That way the music appealed to customers of different ages.

⁶⁵ See, e.g., Michael Morrison et al., *In-Store Music and Aroma Influences on Shopper Behavior and Satisfaction*, 64 J. BUS. RES. 558 (2011).

⁶⁶ Mindy Pham, *The Effects of Background Music on Consumer Behavior* (2014) (unpublished paper) (on file with University of California, Santa Barbara).

⁶⁷ Nicolas Guéguen & Céline Jacob, *Music Congruency and Consumer Behaviour: An Experimental Field Study*, INT'L BULL. BUS. ADMIN., Dec. 2010, at 56.

⁶⁸ Richard Yalch & Eric Spangenberg, *Effects of Store Music on Shopping Behavior*, J. CONSUMER MARKETING, Spring 1990, at 55.

C. Scent

The marketing literature suggests that strategically manipulating the store environment by using scents is “an inexpensive yet effective way to positively influence consumer behavior.”⁶⁹ A pleasant scent can induce participants to spend more time in the shop and to evaluate it more positively. Perhaps most importantly, pleasant scents cause a stronger purchase intention and greater readiness to re-visit the store.

Following this logic, the presence of a pleasant store scent can result in a more positive evaluation of brands.⁷⁰ Likewise, a pleasant scent in places where people are waiting for service can help decrease the perceived waiting time.⁷¹ Another study tested the effect of ambient scents on shopping mall environments.⁷² Again, it showed that ambient scent influenced shoppers’ perceptions of the environment and of product quality.

The “temperature” of scents also affects what, and how much, customers buy. When customers in a room smelled a “warm” scent such as cinnamon they felt that it was more crowded than did customers who smelled a “cool” scent in a room. The people in the warm-smelling room felt less powerful as a result of the perceived crowding. Under these conditions customers revealed a stronger tendency to compensate for this seeming loss of power. Curiously, they did so by buying items which presumably helped raise their personal status; and significantly more items were bought overall.

Another study illustrates the difference between scent as an intentional manipulation and scent as a positive by-product of a legitimate market activity.⁷³ For many years, retailers have improved their sales by the aroma of freshly ground coffee, freshly baked bread, etc. However, this was usually a by-product of activities conducted in the shop. The study notes that some supermarkets have taken this a step farther by deliberately blowing bakery scent into the air to attract shoppers. Likewise, as noted earlier, a chocolate scent in a book store

⁶⁹ Lieve Doucé & Wim Janssens, *The Presence of a Pleasant Ambient Scent in a Fashion Store: The Moderating Role of Shopping Motivation and Affect Intensity*, 45 ENV'T & BEHAV. 215, 215 (2013). The Authors point out that different types of odors can make people perceive environments and products in a particular way. *See id.* at 231.

⁷⁰ Maureen Morrin & S. Ratneshwar, *The Impact of Ambient Scent on Evaluation, Attention, and Memory for Familiar and Unfamiliar Brands*, 49 J. BUS. RES. 157 (2000).

⁷¹ John McDonnell, *Sensorial Marketing for Those Who Can Wait Non Longer* (June 3, 2002) (conference paper) (on file with Queensland University of Technology).

⁷² Jean-Charles Chebat & Richard Michon, *Impact of Ambient Odors on Mall Shoppers’ Emotions, Cognition, and Spending: A Test of Competitive Causal Theories*, 56 J. BUS. RES. 529 (2003).

⁷³ McDonnell, *supra* note 71.

may cause customers to explore the store and spend more time and money.⁷⁴

The concept of atmospherics (including scent), which influences consumer behavior, seems generally accepted in the marketing literature.⁷⁵ Thus, not surprisingly, in recent years new technology has taken a fresh approach, introducing scents into the retail environment to promote consumer interest. Among these are the fragrance of coconut oil in a travel agency, of leather in a new car showroom, and more.⁷⁶

A study asked an intriguing question as to what happens when sellers appeal simultaneously to the olfactory and hearing senses by combining scent and music.⁷⁷ Unsurprisingly, with this combination shoppers evaluated the perceived environment more positively. They experienced enhanced satisfaction, and exhibited higher levels of purchasing approach and impulse-buying behaviors. For example, retail stores aimed at teenagers are likely to benefit from combining high arousal scents with funky music, thereby inducing unplanned purchases. By the same token, to maximize pleasure associated with department store shopping, vendors can scent the store with low arousal aromas while playing classical background music.

D. Celebrities

So far we have presented NVMMs that deal with vision and color, music, and scent. These three types of potential manipulations are all part of in-store atmospherics. However, NVMMs go far beyond and have additional shades. One is the use of celebrities.

Celebrities featuring in advertisements is widespread in an industry that turns over incredibly large sums of money.⁷⁸ Advertisers invest in the use of celebrities to attract interest in and trigger consumer demand for their products. A study on athletes' endorsements found a positive

⁷⁴ Lieve Doucé et al., *Smelling the Books: The Effect of Chocolate Scent on Purchase-Related Behavior in a Bookstore*, 36 J. ENVTL. PSYCHOL. 65 (2013).

⁷⁵ L. W. Turley & Ronald E. Milliman, *Atmospheric Effects on Shopping Behavior: A Review of the Experimental Evidence*, 49 J. BUS. RES. 193 (2000).

⁷⁶ McDonnell, *supra* note 71, at 2.

⁷⁷ Anna S. Mattila & Jochen Wirtz, *Congruency of Scent and Music as a Driver of In-Store Evaluations and Behavior*, 77 J. RETAILING 273 (2001).

⁷⁸ One source claims that as of 2010, "[a]n estimated \$50 billion is invested globally on corporate sponsorships and endorsements. While a majority of that is spent on sports marketing, 'celebrity' plays a dynamic role." Dean Crutchfield, *Celebrity Endorsements Still Push Product*, ADVERT. AGE (Sept. 22, 2010), <http://adage.com/article/cmo-strategy/marketing-celebrity-endorsements-push-product/146023>.

payoff from a firm's decision to sign an endorser.⁷⁹ Endorsements were associated with sales rising above those of competing brands. Furthermore, sales and stock returns rose markedly with each major achievement by the athlete.

Another study examined differences between advertisements with celebrities and corresponding advertisements with non-celebrities.⁸⁰ Again, celebrity endorsements proved effective if used in the right context. This was especially true in arousing instant interest in products.

As noted, using celebrities is not identical to the other NVMMs we have discussed thus far. In the case of celebrities, consumers are well aware that the product is being endorsed by a celebrity. Social psychology, more particularly research on social influence, explains why celebrities are a powerful advertising tool,⁸¹ and the fact that firms use celebrities as a marketing tactic is common knowledge. However, celebrities also influence consumers' perception in nuanced and subliminal ways which are beyond their awareness.

Therefore, it is of little surprise that the FTC has exercised some vigilance with respect to endorsements. An instance is its quite aggressive targeting of deceptive advertising of weight-loss products.⁸² Among other means, this relies constantly on celebrity endorsements and infomercials.⁸³ However, even in these cases the FTC focused on verbal messages, citing the doctrine of Advertising Substantiation.⁸⁴ That is, it does not address endorsement by a celebrity per se.

Lastly, a recent study argues that eye contact with cereal spokes-characters increases feelings of trust and connection to the brand.⁸⁵ Eye contact with products as an advertising tool was shown to increase positive feelings toward the product and to encourage consumers to purchase it. According to this study, the average angle of eye contact of cereal box spokes-characters for children is 9.6 degrees downward, while with cereals for adults it is .43 degrees upward. This finding further explains how placing cereals for kids on the bottom two shelves—and cereals for adults on top two shelves—can be a

⁷⁹ Anita Elberse & Jeroen Verleun, *The Economic Value of Celebrity Endorsements*, 52 J. ADVERT. RES. 149 (2012).

⁸⁰ Mohan K. Menon, Louis E. Boone & Hudson P. Rogers, *Celebrity Advertising: An Assessment of Its Relative Effectiveness* (2001) (unpublished manuscript) (on file with DePaul University).

⁸¹ For a literature review, see B. Zafer Erdogan, *Celebrity Endorsement: A Literature Review*, 15 J. MARKETING MGMT. 291 (1999).

⁸² See FED. TRADE COMM'N, *WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS* (2002), <http://www.dietscam.org/reports/ftc/2002.pdf>.

⁸³ See SPANOGLE ET AL., *supra* note 13, at 58.

⁸⁴ See *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004).

⁸⁵ Aviva Musicus, Aner Tal & Brian Wansink, *Eyes in the Aisles: Why Is Cap'n Crunch Looking Down at My Child?*, 47 ENV'T & BEHAV. 715 (2015).

sophisticated tool to enhance selling. Apparently, this is another kind of NVMMs that vendors can utilize to maximize their profits.

E. Advertising Happiness

The discussion about celebrities brings us to our next illustration of NVMMs: advertising happiness.⁸⁶ Advertising is one of the most prominent venues for consumer–seller communication, wherein companies invest many billions of dollars yearly to promote their products and services.⁸⁷

On the face of it, this makes perfect economic sense. Advertisements communicate important information and can reach countless consumers. They convey to consumers facts about the various products in the market, from which consumers can form their preferences and make sensible purchasing decisions. According to this reasoning, advertisements are an effective way to dispense information and enhance market efficiency.

Commercials can be viewed as voluntary disclosures, which as noted above are regulated by consumer law. It aspires to prevent misleading presentations that can distort rational behavior and undermine market efficiency. Therefore, the law penalizes misleading and fraudulent commercials.

Furthermore, it might be argued that in some contexts consumers know they are likely to be manipulated. Arguably, consumers expect to be manipulated by commercials and may even implicitly consent to it. It might even be argued that some consumers enjoy and appreciate the humor, bonhomie, and other good feelings that manipulative commercials stimulate.

On top of this, one should also keep in mind that advertisements are protected, at least to some degree, by the constitutional doctrine of free speech. Therefore, regulating commercial speech might encounter more criticism than regulating other commercial practices. A detailed discussion of this issue has been suggested by others⁸⁸ and is not within the scope of this Article.

⁸⁶ The term “happiness” as used in this Section encompasses wellbeing, wellness, life satisfaction and the main factors that are associated with it (such as success, status, social connections, etc.).

⁸⁷ Total ad spending in the United States is estimated at \$180 billion per year. See, e.g., *Total US Ad Spending to See Largest Increase Since 2004*, EMARKETER (July 2, 2014), <http://www.emarketer.com/Article/Total-US-Ad-Spending-See-Largest-Increase-Since-2004/1010982>.

⁸⁸ See, e.g., Berman, *supra* note 5. Berman opines that marketing practices that do not provide information to consumers “are entitled to limited, if any, protection under the First

Our argument here is that current law focuses on the verbal messages that commercials emit. For instance, by requiring advertisers to substantiate the claims they voice and write in ads and commercials,⁸⁹ the law ignores possible non-verbal manipulations—largely because the problem is not misleading information per se. Rather, it is the overall subtle yet misrepresentative impression that the commercial creates and discharges.

Advertisers thereby can easily have consumers believe that the advertised product or service will contribute substantially to their wellbeing and happiness. This can be done, for instance, by associating the advertised product with the main causes of human happiness: among them are autonomy and control, meaning, elevated moments of joy, connection to nature, and, most prominently, social ties.⁹⁰

Many commercials associate products with realizing one's dreams and achieving happiness and wellbeing. They highlight and sell a gratifying and enjoyable future experience or reality. In essence, they portray a reality or a state (happiness and wellbeing) that people are wired to pursue. Some companies explicitly associate their products with happiness, while others do so in a more implicit way.⁹¹

Such commercials enjoy a high degree of popularity and empathy. People like to imagine a better and more pleasing future.⁹² This tactic becomes even more potent once we consider the focusing illusion.⁹³

Amendment, particularly when the products or activities being promoted are harmful to public health." *Id.* at 497.

⁸⁹ See *supra* Section I.A (discussing the doctrine of Advertising Substantiation).

⁹⁰ A huge amount of literature explores the main causes of human happiness. For a few important examples, see TIM KASSER, *THE HIGH PRICE OF MATERIALISM* 24–25 (2002); RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 55–76 (2005) (discussing how genes affect happiness); MARTIN E. P. SELIGMAN, *FLOURISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING* (2012); Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 *SCIENCE* 1776–77 (2004) (listing the contribution of various daily activities to one's happiness); Carol D. Ryff & Corey Lee M. Keyes, *The Structure of Psychological Well-Being Revisited*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 719 (1995) (building a conceptual framework for future research on wellbeing and happiness).

⁹¹ Examples of explicit association may include “happy meals” by McDonald’s and the “happiness truck” by Coca Cola. See, e.g., Coca-Cola, *Coca-Cola Happiness Truck*, YOUTUBE (Feb. 18, 2011), <https://www.youtube.com/watch?v=hVap-ZxSDeE>; Joseph Zentil, *Coca-Cola “Open Happiness”*, YOUTUBE (Feb. 25, 2010), <https://www.youtube.com/watch?v=xRVkl iATzUU>.

⁹² Interestingly, imagining a pleasing future is sometimes far more enjoyable than experiencing the pleasing future itself. See DANIEL GILBERT, *STUMBLING ON HAPPINESS* 18–19 (2006). For a sarcastic saying along these lines by Jerry Seinfeld, see Kate O’Hare, *Jerry Seinfeld Slams Ad World While Receiving Advertising Award*, BREITBART (Oct. 3, 2014), <http://www.breitbart.com/big-hollywood/2014/10/03/jerry-seinfeld-slams-ad-world-while-receiving-advertising-award>.

⁹³ See, e.g., David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 *PSYCHOL. SCI.* 340 (1998).

According to this illusion, people tend to focus on a narrow aspect of an experience or situation; they neglect to consider the broader picture.

By focusing our attention on one particular aspect of life we tend to overestimate its general impact. Thus, people incline to believe that one positive occurrence—be it a lottery win, promotion at work, weight loss, moving to a comfortable climate, finding love—will substantially and permanently change their lives.

To conclude, brands associated with positive effect are easier to remember, and consumers respond positively to positive emotions.⁹⁴ However, by presenting the product that way, the commercial ceases to serve for information distribution. Instead, it becomes a tool for non-verbal manipulation that appeals to consumers' weaknesses and desires.⁹⁵ As we explain in the next Part, this may carry a hefty price for society.⁹⁶

* * *

Sellers' numerous effective selling tactics is one reality that makes NVMMs prevalent and effective. However, we deem it important to explain another reality that may contribute to the pervasiveness of NVMMs. In competitive markets the efficacy of these manipulations cannot pass unnoticed by sellers. That is, sellers are well aware that by eschewing such manipulations they will lose their market share to competitors. Market pressure must inevitably incentivize vendors to employ NVMMs. Hence sellers will compete over successful manipulations rather than over the product's quality. At the end of the day, market pressure will force sellers to use manipulations effectively, while racing to the bottom with respect to others' important products' aspects.⁹⁷ This will cause initially benign sellers to consider NVMMs as well.

This then is a collective action problem: where all sellers use NVMMs their ability to gain by using such manipulations weakens. This results in resources that do not yield their full potential advantage. In other words, the general pool of sellers would be better off by opting out of NVMMs. Yet sellers cannot coordinate among themselves to achieve this equilibrium. Since each seller as an individual can gain much from

⁹⁴ See, e.g., Carl D. Marci, *Minding the Gap: The Evolving Relationships Between Affective Neuroscience and Advertising Research*, 27 INT'L. J. ADVERT., 473, 474 (2008). This is especially true for everyday products that attracted low consumer attention. See, e.g., Robert Heath, *Emotional Engagement: How Television Builds Big Brands at Low Attention*, 49 J. ADVERT. RES. 62 (2009).

⁹⁵ Cf. Berman, *supra* note 5.

⁹⁶ See also KASSER, *supra* note 90. For a short film that captures the essence of this book, see Center for a New American Dream, *The High Price of Materialism*, YOUTUBE (Dec. 4, 2011), <https://www.youtube.com/watch?v=oGab38pKscw>.

⁹⁷ Cf. Korobkin, *supra* note 12, at 1206.

being the only one who employs NVMMs, all sellers are forced to invest in them to hold onto their market share and not be left behind.

III. POLICY RECOMMENDATIONS: DEVELOPING A MORE HOLISTIC REGULATORY APPROACH

Courts have noted that ordinary consumers are frequently and easily influenced by unfair selling tactics and distracted by irrelevant factors. Therefore, courts have acknowledged that ordinary consumers are not to be expected at all times to make informed and rational decisions. For instance, some courts have stated:

The general public has been defined as “that vast multitude which includes the ignorant, and the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.” The average purchaser has been variously characterized as not “straight thinking,” subject to “impressions,” uneducated, and grossly misinformed . . .⁹⁸

Interestingly, it has also been noted more generally that non-verbal communications can have a substantial effect on legal actors:

Trial lawyers have long realized that trial judges can give guidance to a jury by their facial expressions, gestures, or other nonverbal conduct. For instance, it seems clear that a judge might communicate to jurors, either by nodding her head or by stating “yes,” the same approval or belief in the testimony of a witness or an argument of counsel. . . . [I]n other cases, nonverbal conduct has been held to amount to an error which deprived the defendant of the constitutional right to a fair trial.⁹⁹

However, commentators and courts have not addressed non-verbal market manipulations, let alone systematically and comprehensively. We now seek to put together the various pieces of the puzzle. In the next Parts we draft a legal framework that will facilitate the examination of NVMMs. Let’s move forward.

⁹⁸ *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (citing 1 *CALLMAN, UNFAIR COMPETITION AND TRADEMARKS* § 19.2(a)(1) (1950)).

⁹⁹ David E. Rigney, Annotation, *Gestures, Facial Expressions, or Other Nonverbal Communication of Trial Judge in Criminal Case as Ground for Relief*, 45 A.L.R. 5th 531 (originally published in 1997).

A. *Foundation of the Proposed Approach*

First we note that scrutiny of NVMMs may accord well with many of the elements that shape current consumer law. We have defined NVMMs as acts that knowingly exploit consumers' weaknesses and unconscious biases.¹⁰⁰ We have also explained the potential magnitude of the problem, noting that NVMMs may be extremely powerful.¹⁰¹ It has also been observed that such information reaches the brain very quickly, normally long before we begin to analyze the verbal cues communicated.

Consumer law seeks to protect the vulnerable party from exploitation by the other party.¹⁰² Exploitation of the weaker party is precisely what may happen with NVMMs. Theoretically, therefore, consumer law should address NVMMs to prevent or minimize sellers' ability to take advantage of consumers both unfairly and inefficiently.¹⁰³

More specifically, consumer law recognizes that the pre-contractual influence should be reviewed as a whole, taking into account all relevant circumstances (rather than focusing solely on a specific aspect or a narrow communicated message). The FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising may serve as an anecdotal example.¹⁰⁴ Among other concerns, these guides limit a seller's discretion in using expert endorsements.¹⁰⁵ In this sense, examining NVMMs simply adds a layer to the current approach and analysis. It is another facet of the pre-contractual relationship that consumer law ought to address.

On the doctrinal level, the language of section 5 of the FTC Act bans "unfair or deceptive" practices.¹⁰⁶ NVMMs, as defined above, are

¹⁰⁰ *Supra* Section I.D.

¹⁰¹ *Supra* Section I.C.

¹⁰² A recent initiative that further exemplifies this notion is the Consumer Financial Protection Bureau (CFPB). The CFPB seeks to ensure fair, transparent, and competitive financial products and services by monitoring unfair, deceptive, and abusive practices. 12 U.S.C. § 5511 (2012). Sunstein views the initiatives of the CFPB as initial efforts to address the risks of manipulation. Sunstein, *supra* note 44, at 238–39.

¹⁰³ This general approach should be balanced, of course, with other considerations, which we detail below. For instance, one may wonder why it should be the law's mission to move consumers in the direction of cold-blooded decisions. Below we explain how important it is to study the actual effect of the relevant NVMMs, while distinguishing different markets, consumers, and circumstances. We also address the assertion that perhaps (at least) some people prefer having fun while shopping, rather than engaging in robotic and optimal purchasing behavior. *See infra* Section IV.B.

¹⁰⁴ *See* 16 C.F.R. § 255 (2016).

¹⁰⁵ *See id.* § 255.3.

¹⁰⁶ 15 U.S.C. § 45 (2012).

indeed potentially deceptive and unfair.¹⁰⁷ To deal with these manipulations effectively we suggest employing a continuum of regulatory reactions. Using such a continuum will enable policymakers to address the different kinds of NVMMs more flexibly. Therefore, rather than offering a closed list of regulatory interventions, the continuum focuses on a few interesting and prominent means.

The continuum reflects the existence of many different types of NVMMs. They vary in their manipulative degree, the harm they might inflict, their level of unfairness, the public targeted, etc. As will be clarified shortly, the continuum is based on tools, doctrines and approaches that current consumer law already offers.

At one end of the continuum is an ex ante regulatory prohibition. In this state, NVMMs—generally or of a particular kind—are forbidden. The main problem with this approach is its allegedly harsh intervention. It would be hard to justify a categorical rule which is not sensitive to the various degrees of selling tactics and does not consider a seller's rights and interests. Additionally, some may argue that such an approach reflects an unwarranted paternalism. Though we do not support a decisive ban, we discuss paternalism in the context of NVMMs in more detail below.¹⁰⁸

At the other end of the continuum a NVMM is left unregulated, at least ex ante. Aggrieved consumers hurt by NVMMs would bring their claims before courts ex post. The main difficulty with this approach is that placing the burden on consumers is rather problematic, for various good reasons. First, consumers are often unaware of the exploitative manipulation. As noted, NVMMs are subtle and mostly unconscious. Second, even if consumers are aware of the manipulation, they are unlikely to associate it with an infringement of their rights.¹⁰⁹ Third, consumers are likely to avoid litigation, fearing its economic and emotional costs.¹¹⁰ This is especially true with regard to everyday transactions where relatively small amounts of money are involved.¹¹¹

¹⁰⁷ However, to be defined as an unfair practice, the selling tactics should satisfy three criteria. See SPANOGLE ET AL., *supra* note 13, at 67. Among other matters, the injury to consumers must be substantial. It should thus be used only in appropriate circumstances. The guidelines detailed in the next two Sections might help in this respect as well.

¹⁰⁸ See *infra* Section IV.C.

¹⁰⁹ Cf. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC'Y REV. 631 (1981) (modeling the obstacles individuals experience in forming their grievances into legally formulated claims).

¹¹⁰ See, e.g., Becher, *supra* note 47, at 773–74.

¹¹¹ This is a common scenario, relevant to many consumer goods and disputes. For example, a Washington court invalidated a standardized forum selection term employed by America Online which read that all litigation should take place in Virginia. In its decision, the court noted, *inter alia*, that damages suffered by individual consumers are not likely to exceed \$250,

Fourth, consumers will probably find it hard to prove the manipulation.¹¹² In sum, we do not support this anti-regulatory approach either.

Between these two extremes, several other alternatives exist. One is to ban a NVMM unless it has been pre-approved. This pre-approval may be given by an administrative agency, a designated committee, or a judicial tribunal vested with the necessary authority. The law has been entertaining the idea of pre-approval mechanisms—one conspicuous example being FDA approval.¹¹³

Another such option would be to allow pre-approval but not mandate it. Obviously, if such a regime is chosen sellers should be provided with sufficient profit-incentive to use it. Among other things, the incentives may include legal immunity from consumers' lawsuits, a seal of approval that will enhance a seller's reputation, positive publicity by government bodies, the media, NGOs and the like.¹¹⁴ If voluntary approval fails to go far enough after a trial period, it might indicate a need for a more intrusive measure. In such a case it might be worthwhile to consider making pre-approval mandatory.

An additional alternative, less intrusive, is to allow NVMMs yet provide consumers with extended cooling-off periods. This will require identifying first the markets and type of transactions that involve NVMMs.¹¹⁵ According to this alternative, consumers will be granted the right to cancel the transaction at the identified markets. Withdrawal will entail no costs as long as it is within a defined timeframe.

Providing consumers with cooling-off periods is a well-established regulatory tool. The assumption here is that, during this period, consumers will learn about the true nature of the product; they might also better assess the risks involved in the deal at hand. After doing so (during the cooling-off period) consumers can rescind unbeneficial transactions.

thus imposing unreasonable expenses on Washington residents who seek to launch litigation. *Dix v. ICT Grp., Inc.*, 106 P.3d 841, 844–45 (Wash. Ct. App. 2005).

¹¹² One way to diminish this problem is by shifting the burden of proof. Once a plaintiff establishes a prima facie NVMM, the defendant will have to prove that his selling tactic is not manipulative. The burden shifting framework has been suggested in various other contexts. *See, e.g.,* Becher, *supra* note 47; David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1439–47 (2006). We believe, however, this is still an insufficient redress.

¹¹³ For details, see U.S. FOOD AND DRUG ADMIN., FOOD AND DRUG ADMINISTRATION COMPLIANCE PROGRAM GUIDANCE MANUAL (2010), <http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/Manufacturing/QuestionsandAnswers/CurrentGoodManufacturingPracticescGMPforDrugs/ucm071871.pdf>.

¹¹⁴ *Cf.* Becher, *supra* note 47, at 789–90.

¹¹⁵ If identifying the relevant markets and transaction seems too daunting or inefficient, consumers may be granted a general, across-the-board cooling-off period.

However, a cooling-off period is not a panacea. One of the most troubling aspects of this approach is the endowment effect and the transaction costs incurred by rescinding a contract. Once a consumer owns the product he tends to overestimate its value. In addition, the hassle and effort involved in withdrawing from the transaction seem to deter the average consumer from using this right.¹¹⁶

Yet another relaxed approach would be to require disclosures. That is, sellers who opt to use NVMMs will have to notify potential consumers of the manipulative tactics employed. Of course, such disclosures might assume many hues. They may vary in context, size, language, color, noticeability and much more. Consumers might even be required to sign some kind of consent form.

However, mandating disclosures is far from a simple and neat solution. First, the fact that NVMMs are ubiquitous, unconscious, quick and powerful may render disclosures inefficient. Second, as we have already mentioned, there is a huge debate as to the effectiveness of disclosures more generally. Critics argue, among other things, that disclosures are not noticed by consumers, are not read by them, are not tailored to the way people process information, are not in line with how people make decisions, and are too numerous to read and assimilate.¹¹⁷ We therefore greatly doubt that disclosures per se will do much good. Unfortunately, they might even backfire and create some kind of indifference or even ridiculing of the subject.

There is yet another option for encouraging self-regulation or recommended guidelines. Under it, sellers in various industries will generate their own guidelines, with or without the umbrella of the FTC. These guidelines might be drafted with the assistance of professionals and regulatory, government, or pro-consumer agencies that represent the public's interest. The FTC has done this, for instance, with respect to voluntary guidelines for disclosures in the dieting industry.¹¹⁸

As per the optimistic scenario, such guidelines will incorporate fair and balanced rules (which might even be approved by a body like the FTC). Under these circumstances, sellers who follow these guidelines might be accorded a more favorable starting point in court disputes. They might harness their compliance to enhance their positive reputation as well. However, we should also consider the less optimistic scenario, because such a lenient approach might not yield the expected

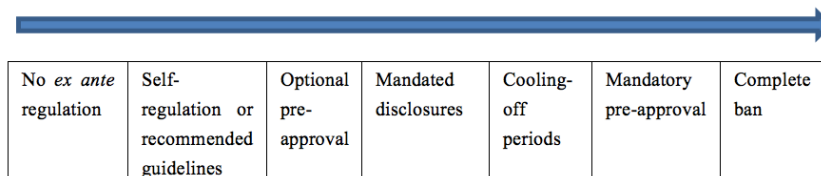
¹¹⁶ For a detailed discussion see Becher & Zarsky, *supra* note 46, at 80–81.

¹¹⁷ For a comprehensive discussion, see, for example, BEN-SHAHAR & SCHNEIDER, *supra* note 26.

¹¹⁸ See HANDBOOK OF OBESITY TREATMENT 395 (Thomas A. Wadden & Albert J. Stunkard eds., 2002).

results. In such a case, we might need to move to a more intrusive regulatory option.

Diagram 2: Regulatory Continuum



As we conclude this Section, it seems inappropriate, at least at this early stage, to provide a one-size-fits-all approach to NVMMs. Rather, we maintain that the approach to NVMMs should be based on a set of considerations that examine the specific circumstances surrounding the NVMMs. To illustrate in a nutshell, targeting kids is not similar to targeting adults; transactions that risk public health and safety are unlike time-sharing transactions; and consumers' ability to avoid manipulations, or even learn from and correct their mistakes, differs from one context to the next. And as the next Section illustrates, this is merely the tip of the iceberg.

B. *Main Criteria for Regulating NVMMs: From Theory to Practice*

In this Part, we suggest key features in our proposed regulatory approach to non-verbal market manipulations. We base our proposal on the insights portrayed and discussed thus far. Before formulating it further, a caveat is due: the legal attitude to NVMMs should be dynamic. The four key insights we delineate below do not exhaust the aspects that should be part of the legal treatment of NVMMs. The latter should stay alert to technological changes, new data, empirical findings, and other economic, market and jurisprudential developments.

1. Considering the Efficacy of Non-Legal Alternatives

One set of key considerations that should be examined is the possibility to use other mechanisms than legal intervention. The first and most obvious is consumers' self-correction or avoidance. If consumers can learn from their own mistakes, or if they can avoid them from the start in a cost-effective manner, the law should be more reluctant to intervene. This is for both fairness reasons as well as

economic ones: once consumers are aware of the NVMMs, they might pressure sellers to reach a more efficient and balanced equilibrium.¹¹⁹

At the current stage, however, many NVMMs are not a salient component from the typical consumer's perspective. Recall that an unconscious influence on consumers is one of the prerequisites for constituting NVMMs. Hence, consumers are largely unaware of the non-verbal manipulations sellers utilize.

However, consumers' ability to learn about manipulations can change with time and developments. As the examples of forum selection clauses and the right to cancel fixed term consumer contracts show, saliency is not a stagnant concept. Sellers, the media, social networks, governmental entities, NGOs, watchdogs and of course the law—all can divert the public's attention and turn a non-salient aspect into a salient one.¹²⁰ This may result in sufficient market pressure to minimize sellers' incentive to use (at least some) NVMMs.

Furthermore, people may consent to manipulations, and manipulations may become transparent.¹²¹ Thus, a significant question arises: would a simple in-store warning sign suffice for making the manipulation legitimate? Can a vendor immune itself from legal intervention by posting a notice stating: "In this bookstore we use a sweet chocolate scent as a manipulative selling tactic"? On the face of it we think the answer is negative. A simple disclaimer of this type hides more than it reveals. The average consumer is still unable to understand the manipulation even if he becomes aware of the disclaimer, let alone evade it successfully (once in the store). Therefore, true consent to be manipulated should not be inferred from consumers' perspectives.

This brings us to another important consideration, which is whether the consumer can reasonably defend himself against the misleading influence. We have already noted that NVMMs reach the brain quickly and effectively. For a consumer who visits a store it would be next to impossible to avoid the music, the scent, the visuals, or the look and body language of the in-store representatives. Apparently, this is part of what makes NVMMs so powerful.

Still, one might argue that consumers can beat NVMMs by shopping at different stores, where such manipulations do not take place. As for a misleading advertisement, consumers can switch to a

¹¹⁹ The idea that in competitive markets even a relatively small group of informed consumers may deter sellers and promote efficient equilibrium has been discussed in the literature for decades. See, e.g., Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983).

¹²⁰ See, e.g., Shmuel I. Becher & Tal Z. Zarsky, *Online Consumer Contracts: No One Reads, but Does Anyone Care?*, 12 JERUSALEM REV. LEGAL STUD. 105 (2015).

¹²¹ See Sunstein, *supra* note 44, at 230–32.

different TV channel or radio station. Further, we all know that ads are likely to evoke emotions and desires rather than reflective thinking. Naïve consumers, unaware that in this context manipulation is so pervasive, are not entitled to be protected.¹²²

For several reasons we do not find this argument persuasive. First, since consumers are unaware of the manipulation, they have no incentive to look for places where it does not occur or to beware of misleading advertisements. Second, consumers lack the necessary knowledge about NVMMs: they might underestimate (or overestimate) the ways NVMMs influence them, and hence under- (or over-) protect themselves from them. Placing the burden on consumers will consequently result in ineffective precaution-taking. Third, we find it unfair and inefficient to charge consumers with checking whether a store employs NVMMs or whether an advertisement will manipulate them. In most cases it would be hard for consumers to know about such things before experiencing them (or before being exposed to others' experience). On the contrary, sellers are the least costs avoiders since they are the ones who utilize and profit from NVMMs. Fourth, NVMMs are ubiquitous: we doubt that consumers can easily find stores (or encounter advertisements) that do not use them.¹²³

Consumers' capability to handle NVMMs is closely related to the question of whether it would be possible to educate the general public efficiently and cost-effectively. Educating consumers is not a simple task and it requires significant resources. As long as governments do not invest enough in educating consumers, legal intervention is more warranted. In this vein, the degree of legal intervention should also be influenced by the public discourse. The more the mass media, user-generated online content (such as blogs and tweets) and social networks deal with NVMMs, the less necessary it might be to employ intrusive legal means.¹²⁴ Somewhat paradoxically, this Article (and its like), which calls for legal intervention in the context of NVMMs, may enhance the attention given to the subject, resulting in a lesser need for legal intervention.

¹²² Cf. *id.* at 227 (noting that although "it would be extravagant to say that in such cases, people have consented to manipulation in all imaginable forms. . . it is important that people are aware of the distinctive nature of the relevant enterprises" (citation omitted)).

¹²³ See discussion *infra* Section II.E.

¹²⁴ Cf. Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008).

2. The Misleading Manipulation and Its Potential Upshot

The first set of considerations focused on the possibility to use meta-legal means that may minimize the problems associated with NVMMs. We now move to the second set of considerations: the nature of the misleading manipulation and its potential effects on consumers. Here, we invite policymakers to study what the prospective damage of the relevant NVMMs is.

Most prominently, and as we demonstrate in the next Part, we suggest paying heed to the context in which NVMMs are used. In this respect one may distinguish sensitive markets that might endanger public health and security from mundane markets that do not pose a similar risk for consumers. We also propose to examine whether the manipulation used has a long-term or only a short-term effect on consumers' wellbeing. Long-term contracts, expensive transactions and markets that substantially affect consumers' welfare demand a stricter approach.

Likewise, targeting disadvantaged or more vulnerable groups of consumers—such as minors, the elderly, the sick, or migrants—should result in greater willingness for legal intervention. Such groups are not only more susceptible to potential injuries, but they also have less ability to escape or learn about the manipulation, both *ex ante* and *ex post*. In such cases, therefore, legal means would probably be essential. Special vigilance over vulnerable groups of consumers has been the law's attitude in other contexts,¹²⁵ and NVMMs are no different in this respect.

3. Seller's Behavior, Ethics, and Intention

The third set of considerations that may shape the legal response to NVMMs is the degree to which the seller's behavior is repugnant. Above, we noted that one of the NVMM's features is the disconnection of the manipulative tactic from the product itself. In this regard, the intention of the manipulation is an important factor to bear in mind: where marketing practices are intentional and deliberate, they should be viewed more suspiciously than when they are incidental.

To illustrate, sweet scent in a bakery is a natural by-product of the bakery's day-to-day practice; an artificial chocolate scent in a bookstore

¹²⁵ For instance, there is special legislation (and a body of consumer law) that deals with rent-to-own and leasing transactions, which may attract poorer consumers. For a detailed discussion see, for example, WHALEY, *supra* note 31, at 654–60.

is not. Both may influence consumers—perhaps even in similar ways—but the former is legitimate while the latter is not.

A possible measure of a seller's intentions is the efforts and resources he invests in implementing the manipulative tactic. Another is the distance of the manipulation from the normal and regular conduct of business. For instance, choosing music that appeals to a target restaurant clientele is legitimate, even if it incidentally causes diners to spend more. But intentionally choosing the kind of music that will manipulate patrons to spend more money, or conversely to hasten their turnover, *per se* (that is, with no connection to the type of music they prefer) is not. Needless to say, this uncertainty raises thorny practical issues, to which we shall turn in a moment.

Another test that can help policymakers draw the line between illegitimate manipulative selling tactics and selling tactics that do not justify regulatory responses is people's reaction to it once it is revealed. As Sunstein notes, "[o]ften the distinguishing mark of manipulation is a justified sense of *ex post* betrayal."¹²⁶ Empirical findings, public discourse, and media coverage might all indicate when illegitimate manipulation has occurred.

Yet an additional test to determine the degree of sellers' malevolence is whether the harm to consumers joins another, different harm. A shop employs only slim and good looking assistants: that strategy not only influences consumers unconsciously. It may also have a discriminatory effect on people of color, the overweight, the elderly, the religious—or simply those who do not square with the accepted norms of beauty.¹²⁷ Therefore, if sellers' maneuvers are legally or ethically questionable from another angle it may serve as an indication of impropriety from a consumer law perspective as well.

Advertising happiness can provide another example. As explained, one negative thing about advertising happiness is that it manipulates consumers. Yet another drawback is that advertising happiness might foster a shallow public discourse and a more materialistic society. This in turn may further a reality in which individualistic norms and aspirations erode civic engagement and collective values, such as solidarity, empathy, etc.¹²⁸ The existence of another negative side effect to the manipulative tactics strengthens the need for legal means.

¹²⁶ Sunstein, *supra* note 44, at 217.

¹²⁷ For a recent similar case, see *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (finding the defendant's dress code policy illegal in light of religious discriminatory hiring practices).

¹²⁸ See KASSER, *supra* note 90.

4. A Cost-Benefit Analysis and the FTC's Potential Role

On the practical level, it is also necessary to consider how expensive it would be to create a legal norm for NVMMs and to enforce it. This is especially tricky in our concept. Figuring out which NVMMs are at play and where, the extent of consumers' awareness, the degree of influence or power of the NVMM and the harm it causes, might be very costly. While there is no doubt that NVMMs cause harm to consumers, it is still necessary to weigh this harm against the costs that regulation incurs. Such costs include the formation of the legal rules as well as their enforcement, including prosecution and litigation.

Therefore, a preliminary issue to be considered is whether one of the existing institutions in the consumer arena is suited to the role of detecting and regulating NVMMs. A cogent response at this early stage is difficult to provide. Still, the FTC is one option worth keeping in mind.¹²⁹

Established a century ago, the FTC is a well-known independent agency, with the primary objective of protecting consumers. To this end, the FTC works "[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity."¹³⁰ As part of its vision, the FTC also acknowledges that market efficiency is enhanced when consumers can make informed choices based on accurate information.

The FTC is charged, *inter alia*, with enforcing federal consumer protection laws, which are aimed at preventing behavior that might harm consumers. Also important in our context is the FTC's economic research and analysis to support its law enforcement efforts. The FTC's numerous initiatives and responsibilities include the renowned "National Do Not Call Registry," drawing broad guidelines to govern the sale of used vehicles, enforcing antitrust law, combating manipulative marketing practices, etc.

Harnessing the power of an existing agency such as the FTC may prove beneficial in various ways. Some prominent ones are applying its accumulated expertise and knowledge, taking advantage of the

¹²⁹ Another option worth examining, which we do not address in detail here, is the CFPB. The CFPB aspires to "help[] consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives." *See About Us*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/about-us> (last visited Sept. 9, 2016). We focus on the FTC since the FTC's scope of responsibility seems to better fit the challenge that NVMMs pose.

¹³⁰ *See* FED. TRADE COMMISSION, *supra* note 14.

reputation which it enjoys, and placing NVMM policing in a more general context of consumer protection and marketplace efficacy.

There are additional factors that support harnessing the FTC. As Sovern notes, regulators are unlikely to adopt different solutions for the same problem,¹³¹ so an ineffective means of protection might falsely signal that there is no need to adopt effective ones. Since laws that require consumers to perform certain tasks are likely to fail, such regulation will render the consumer protection illusory. Noting that lawmakers might choose an ineffective means or opt to place an unreasonable burden on consumers, we agree with this analysis. Accordingly, we prefer to rely on the FTC rather than requiring consumers to take action against NVMMs.

C. *An Evidence-Based Approach to Identifying Manipulative Marketing Practices*

Thus far we have outlined many factors related to what we believe is a broader and more holistic account of consumer protection law, which will protect consumers from manipulative influence, not just from inaccurate information. We have shown how the law mostly ignores non-verbal marketing techniques while focusing on verbal ones. In light of the theories presented, it seems most necessary to expand the legal protection given to consumers. However, the holistic approach and the sensitivity to numerous factors and contexts might seem indecisive. Policymakers may be puzzled or even paralyzed.

To formulate a sensible legal approach, we suggest that regulators should continuously monitor non-verbal marketing techniques and test them experimentally in a lab. The lab study should focus in particular on a few measures. First, we suggest measuring the level of manipulation. Here, one group of participants will face a given product where sellers employ a specific marketing technique, while a control group would face the option of purchasing the same product yet without the specific manipulation at play. This will inform policy makers as to the actual effect of the manipulation employed.¹³²

This examination seems especially important since the influence of NVMMs cannot be considered in isolation. In real-world settings,

¹³¹ Jeff Sovern, *Can Cost-Benefit Analysis Help Consumer Protection Laws? Or at Least Benefit Analysis?*, 4 U.C. IRVINE L. REV. 1241 (2014).

¹³² In certain conditions, we believe states might be able to use the marketing studies conducted by the firms themselves. Such an approach might mimic the approval procedure of the FDA for new medical treatment, where some of the studies are being conducted by the pharmaceutical companies who are seeking approval for their drugs.

consumers encounter not only NVMMs but other manipulations as well. These may include sales, discounts, other verbal communications, and more. Therefore, it is necessary to examine whether being exposed to various real-world features and influences may lessen the actual effect of NVMMs.

The second measure in our proposed experimental setting is related to the level of awareness of individuals to the influence of a given marketing practice.¹³³ The third measure should focus on the gap between short-term and long-term evaluation of a good which people have decided to buy following the marketing practice. This type of data will indicate where marketing tactics may contribute to the misalignment of consumers' short- and long-term preferences.

These measures, which we suggest to be taken empirically by means of controlled experiments, should be supplemented by scanning existing research on selling practices that target people's automatic system¹³⁴ and people's level of awareness of what influences them.¹³⁵ Overall, this combination will allow policy makers to form a hierarchy of marketing practices based on their deceptive potential. The end point would be to compare, and perhaps grade, the various techniques based on their potential misleading impact and people's awareness. The FTC (before the fact) and courts (in cases of litigation) will reveal a great tendency to scrutinize those tactics with high impact, low awareness, and high intertemporal gap in people's evaluation of the good.

Moreover, we propose that a systematic examination of the various marketing practices should also account for different demographic factors and markets. This detailed analysis will make the predictability of the suggested taxonomy of marketing practices more accurate. This way, consumer protection law can better determine *ex ante* the manipulative and deceptive power of various selling techniques while accounting for various important factors. It will also allow for focusing on markets that may exploit disadvantaged consumers.

Of course, what we detail here is merely a tentative suggestion—not a panacea. The cautious reader might have noted that we did not give weights to the three suggested measures. For example, there might be instances where one has substantial (though less than perfect) awareness of the NVMM, but is still highly affected because the

¹³³ See Sunstein, *supra* note 44.

¹³⁴ See, e.g., Luiz Pessoa, *To What Extent Are Emotional Visual Stimuli Processed Without Attention and Awareness?*, 15 *CURRENT OPINION NEUROBIOLOGY* 188 (2005).

¹³⁵ For a few leading examples (out of many), see Lynn R. Kahle & Pamela M. Homer, *Physical Attractiveness of the Celebrity Endorser: A Social Adaptation Perspective*, 11 *J. CONSUMER RES.* 954 (1985); Carl F. Mela, Sunil Gupta & Donald R. Lehmann, *The Long-Term Impact of Promotion and Advertising on Consumer Brand Choice*, 34 *J. MARKETING RES.* 248 (1997).

particular NVMM at hand is very powerful. That is, often awareness does not help, especially where consumers exercise bounded will-power and bounded rationality. Further studies are required to determine whether to treat this suggested framework as a flexible common law standard or to weigh the three measures more precisely and perhaps obtain some kind of algorithm or formula.

To conclude, such data sets will equip regulators with the information necessary to build a much more nuanced and informed policy. Currently, in the absence of systematic empirical data, policymakers and judges are tempted to rely on intuition as to what deceives people. They are further likely to employ vague standards such as the reasonable or ordinary consumer. This may lead erratically to over- or under-protection.¹³⁶ Instead, our proposed framework allows policymakers to craft regulatory intervention based on empirical findings.¹³⁷ This will free regulators from the present dogmatic focus on inaccuracies in verbal messages, which by all accounts are much less influential and damaging to consumers' welfare and autonomy.

IV. RESERVATIONS AND COUNTER-ARGUMENTS

Regulating NVMMs is by no means an easy task, theoretically and practically. The legal framework we propose in this Article is only a point of departure. Developing and implementing it will without doubt raise serious challenges.

In this Part, we address three fundamental critiques that may help to clarify further our proposition. First, we tackle concern about a legislative slippery slope, and second, the fear that regulating NVMMs may backlash and undermine consumers' ability to enjoy the pleasure of shopping. Thirdly, we discuss the fear of state paternalism. By attending to these general concerns, we will also provide a rough overview and summary of some of the most important issues that this Article has confronted.

¹³⁶ This might at least partly be due to the false consensus bias. This suggests that people are likely to assume that their own beliefs and preferences are common and that the majority of others share them. See Lee Ross, David Greene & Pamela House, *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977).

¹³⁷ Clearly a further discussion as to the exact level of impact and lack of awareness that mandates regulation will be required.

A. *Legislative Slippery Slope*

The first possible concern with regulating NVMMs comes in the form of a slippery slope argument, meaning that regulators will quickly move beyond NVMMs. They will gradually regulate and scrutinize all marketing techniques, prohibiting them one by one. The end result of banning all selling tactics will be markets where everything is sold in plain and colorless boxes, in dark rooms without music or aroma.

Unsurprisingly, this is not the first time that such an argument has been made. For example, recently there have been a few initiatives, in various countries, requiring that cigarettes be sold in uniform, plain packs.¹³⁸ Such moves seem somewhat effective in reducing smoking rates.¹³⁹ In response, the tobacco industry argued that requiring plain wrappers on cigarettes is just the first move on a dangerous slippery slope: next, they say, will be alcohol, soda drinks and fast food.¹⁴⁰

We do not grant this critique much merit. The slippery slope assertion vis-à-vis our proposal is a logical fallacy, as it fails to address our proposition by misrepresenting it. First, we do not contend that all selling tactics should be regulated. Rather, we focus on those that underhandedly influence consumers, as well as overall efficiency, negatively. Second, we propose a variety of regulatory means that should be tailored to the issue at hand. We acknowledge that there are many shades of selling tactics and suggest adjusting the regulation accordingly. We further recommend considering a variety of means, some of which are not intrusive in nature.

That said, plain packaging might sometimes be the right response to market manipulation. In some markets, such as the tobacco industry, there is strong public interest in reducing usage for apparent good reasons. Generally, plain and standardized packing allows consumers to shop much more rationally while reducing the influence of irrelevant factors. It presumably helps them to focus and channel their attention to important aspects of the transaction or the product.

¹³⁸ Such initiatives have been introduced and advanced to different degrees in Australia, England, New Zealand and Ireland. See *Tobacco Plain Packaging Act 2011* (Cth) (Austl.); Standardised Packaging of Tobacco Products Regulations 2015, SI 2015/829 (UK); Public Health (Standardised Packaging of Tobacco) Act 2015 (Act No. 4/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/4/enacted/en/pdf>; Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill 2014 (186-2) (N.Z.).

¹³⁹ See *Tobacco Control Key Facts and Figures*, AUSTRALIAN GOV'T DEP'T OF HEALTH (June 29, 2016), <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>.

¹⁴⁰ See Marion Nestle, *If Tobacco Gets Plain Packets Will Junk Food Be Next?*, NEW SCIENTIST (Mar. 11, 2015), <https://www.newscientist.com/article/mg22530120.200-if-tobacco-gets-plain-packets-will-junk-food-be-next/>.

Moreover, the slippery slope argument assumes that lawmakers will fairly easily and quickly adopt effective means against selling tactics. This assumption underappreciates two important realities. First, legislatures are influenced by interest groups, lobbying, and short-term political considerations. In this context, sellers can unite and pressure policymakers not to adopt legal rules against their interests. In light of the insights derived from public choice theory¹⁴¹ it comes as no surprise that sellers often forcefully represent their interests and hinder pro-consumer initiatives. At the same time, consumers' interests are underrepresented and frequently their voice is not clearly and persuasively heard.¹⁴² In our opinion, this would almost certainly be the case in respect of regulation of NVMMs.¹⁴³

Second, sellers are repeat players. They have a strong economic incentive to maximize their profits. Under these circumstances, legal rules are sometimes inefficient or unsuccessful. Put simply, sellers recurrently find the way to bypass the legal rules and undermine their effectiveness when significant regulation is at stake.¹⁴⁴ For that reason, predicting a dark future for the marketing industry in light of our proposal seems very premature.

B. *Undermining Consumers' Excitement and Enjoyment*

The next objection to our proposed agenda comes from a totally different, pro-consumer perspective: fear that regulating NVMMs will backlash and prove a pyrrhic victory. According to this argument, people enjoy the product, and the process of shopping, because of (at least some of) these non-verbal cues. Music, scent, visuals, flattering mirrors and implied future happiness all make the shopping experience much more pleasant and enjoyable. According to this assertion, the

¹⁴¹ As explained elsewhere,

[P]ublic choice theory predicts that the public sector will devote too many resources to statutes that concentrate special benefits on specific interest groups, while distributing their costs to the general public. On the other hand, the theory also suggests that legislatures will supply too few statutes that are public regarding (those that distribute benefits broadly).

Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 760 (2008).

¹⁴² See *id.* at 761–63 and accompanying notes.

¹⁴³ One may still contend that firms themselves will pressure the legislatures to ban NVMMs used by their competitors. However, since firms tend to cooperate (and sometimes even collude) this scenario seems unlikely. But if this indeed ends up being the case, we see no good reason to oppose it. Slightly restated, eliminating NVMMs due to firms' pressure is a positive outcome from our perspective.

¹⁴⁴ Cf. Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155 (2013).

consumer may buy more or differently due to NVMMs—but he enjoys it. Indeed, the pleasure we experience from a product derives not only from what our senses tell us, but also from our memory, imagination and expectations. In this respect, research shows that synthetic enjoyment is just as good as authentic.¹⁴⁵

We find this critique much more interesting and challenging than the foregoing one. First and foremost, it enriches the cost-benefit analysis. In other words, the phenomenon of “retail therapy” adds another component that regulators should weigh up. Consumers’ enjoyment is definitely a point to bear in mind, particularly in the context of pro-consumer lawmaking. However, consumers’ enjoyment is merely one factor and it should be balanced against others.

Psychology teaches us that people have three different temporal selves: past-self, present- or current-self, and future-self. For the sake of the current discussion it is important to distinguish them. Below we focus on the distinction between the present-self and the future-self.

Occasionally the preferences of the short-term present-self are not aligned with the preferences of the long-term self. Quite often we make decisions that satisfy the present-self, but have negative consequences for the future-self¹⁴⁶: we might pay a disproportionately high price in the future for the happiness and satisfaction we experience at present. An accurate cost-benefit analysis must account for this reality.

The idea that people’s short- and long-term preferences are not aligned is not self-explanatory, and a few examples may clarify. One is in the domain of health. Many people consume unhealthy food and drink, suffer from alcohol abuse, smoke, and refrain from physical activity. Yet many of them report they are dissatisfied with these habits.

The literature suggests that this is because people have bounded (limited) will-power.¹⁴⁷ We tend to allow the present-self to dictate our behavior at the expense of the future-self—even if the overall consequences do not match our long-term aspirations and preferences.¹⁴⁸ Therefore, when people are asked to choose a dessert for immediate consumption they incline to prefer unhealthy, sweet dishes. But when they are asked to choose a dessert to be consumed in the

¹⁴⁵ See GILBERT, *supra* note 92.

¹⁴⁶ See Daniel Goldstein, *The Battle Between Your Present and Future Self*, TED (Nov. 2011), https://www.ted.com/talks/daniel_goldstein_the_battle_between_your_present_and_future_self?language=en.

¹⁴⁷ For a short and introductory discussion of bounded will-power in the legal context, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

¹⁴⁸ See GILBERT, *supra* note 92, at 118 (explaining that people value the present moment and require compensation for delaying satisfaction).

future they tend to make better decisions and choose healthier products such as fruit.¹⁴⁹

The same might be true with many financial and shopping decisions. Many people spend in the present but report a long-term aspiration to save more. Nevertheless, the temptation to spend and buy now appeals to the present self.¹⁵⁰ As Daniel Gilbert puts it, “the parts of the brain that are primarily responsible for generating feelings of pleasurable excitement become active when people imagine receiving a reward . . . in the near future but not when they imagine receiving the same reward in the far future.”¹⁵¹ When this temptation is aggravated by NVMs it becomes even harder to resist.

This is especially true with regard to products (clothing items, cars, electronics) as opposed to experiences (vacations and trips, social interaction, artistic performances, shows). Happiness studies reveal that the happiness that results from experiences is much more substantial and sustainable than the happiness derived from material goods. While we adapt to new products and thereafter raise our aspirations and expectations, the same processes—which diminish our satisfaction—do not occur with respect to experiences.¹⁵²

A close terminology employs the notions of first-order and second-order preferences.¹⁵³ This terminology highlights the difference between short-term current preferences and long-term preferences. The value one assigns to a product (for example, a new luxury car or an expensive dress) at the time purchased is not always aligned with long-term life goals (for example, education, saving, or health care) that people pursue and value.¹⁵⁴

¹⁴⁹ See Meryl P. Gardner et al., *Better Moods for Better Eating?: How Mood Influences Food Choice*, 24 J. CONSUMER PSYCHOL. 320 (2014).

¹⁵⁰ Behavioral economists have suggested innovative ways to bypass this pitfall and improve decision-making. See Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164 (2004).

¹⁵¹ GILBERT, *supra* note 92, at 107.

¹⁵² For a broader discussion, see Leaf Van Boven & Thomas Gilovich, *To Do or to Have? That Is the Question*, 85 J. PERSONALITY & SOC. PSYCHOL. 1193 (2003); Travis J. Carter & Thomas Gilovich, *I Am What I Do, Not What I Have: The Differential Centrality of Experiential and Material Purchases to the Self*, 102 J. PERSONALITY & SOC. PSYCHOL. 1304 (2012); Travis J. Carter & Thomas Gilovich, *The Relative Relativity of Material and Experiential Purchases*, 98 J. PERSONALITY & SOC. PSYCHOL. 146 (2010); Elizabeth W. Dunn, Daniel T. Gilbert & Timothy D. Wilson, *If Money Doesn't Make You Happy, Then You Probably Aren't Spending It Right*, 21 J. CONSUMER PSYCHOL. 115 (2011); and Emily Rosenzweig & Thomas Gilovich, *Buyer's Remorse or Missed Opportunity? Differential Regrets for Material and Experiential Purchases*, 102 J. PERSONALITY & SOC. PSYCHOL. 215, 216 (2012).

¹⁵³ For a discussion of these terms in the legal context, see Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); see also Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 242–44 (1998).

¹⁵⁴ This discussion relies on Becher & Zarsky, *supra* note 46.

Individuals often misperceive the change in their first-order preferences, which may not match their second-order ones—a change they are likely to regret later. In this respect, minimizing the effect of NVMMs, in particular with respect to goods, allows shoppers to better align their own preferences and pursue their own long-term goals. When current enjoyment is balanced against long-term interest and happiness, regulating NVMMs makes a lot of sense.

C. *State Paternalism v. Consumers' Responsibility*

The third and last reservation we tackle is that people should be more responsible for their own decisions and acts: the state should not function as a “nanny.” The law should not be quick to intervene in the market to help consumers advance their own wellbeing and satisfaction. Opponents of state paternalism contend that before allowing legal interference, other meta-legal means should be considered. In short, state paternalism should be viewed with suspicion and used only as a last resort.

Against the fear of unjustified paternalism, it is important to highlight the unique characteristics of NVMMs. First, we noted that NVMMs influence consumers unconsciously, an effect that is obviously very hard to cope with. As we have shown throughout the Article, leaving NVMMs unregulated might lead to inefficient decisions that may undermine overall utility. Requiring consumers to be responsible for decisions that are unconsciously affected by sellers' manipulation seems like a mistaken and inefficient demand. In this sense, neutralizing the negative effect of NVMMs is merely a restorative step which removes the distortion produced by sellers.

Moreover, typical consumers are one-time shoppers who interact with sellers who are typically repeat players. As such, the sellers design and control their own tactics. True, consumers may gain experience over time, but they are still unable to grasp how NVMMs distort their decision-making process due to the nature of such manipulations.¹⁵⁵ It has been suggested that here, paternalistic rules might be justified where the weaker party's discretion is not fully autonomous and voluntary.¹⁵⁶

¹⁵⁵ It has already been argued that paternalistic means might be justified in the context of cognitive biases since in these situations consumers are unlikely to learn from their own mistakes. See, e.g., M. Neil Browne et al., *Protecting Consumers from Themselves: Consumer Law and the Vulnerable Consumer*, 63 *DRAKE L. REV.* 157 (2015).

¹⁵⁶ Thaddeus Mason Pope, *Limiting Liberty to Prevent Obesity: Justifiability of Strong Hard Paternalism in Public Health Regulation*, 46 *CONN. L. REV.* 1859 (2014).

Another justification for paternalistic rules is that while it might be permissible to allow a person to undermine his own wellbeing, allowing others to take advantage of that is unacceptable.¹⁵⁷ According to this view, paternalistic rules may prevent situations where a party in a superior position exploits a weaker party who is willing to hurt himself. True, people should have the right to be wrong and the ability to learn from their own mistakes. Yet we find it morally and ethically unacceptable that businesses equipped with superior knowledge and resources take advantage of human weaknesses by utilizing NVMMs.

From yet another perspective, when considering whether to admit state intervention one should also take into account the public values that must be protected. That is, we should consider the private gain by consumers, but also the collective benefit in terms of public interest, utility and morals. For example, promoting public health and welfare is a legitimate governmental objective which may admit paternalistic rules.¹⁵⁸ We believe the same is true for promoting fairness in consumer markets, which are characterized by undue influence in the form of NVMMs.

Last but not least, it has also been suggested that state paternalism is viewed with distrust because sometimes it is a disguising tool. Those who oppose state intervention at times claim that the state often merely declares that its rules are intended to promote the interest of individuals. Actually, they argue, state rules have the reverse effect as they preserve individuals' dependence on the state. Commentators even use a "puppet on a string" metaphor to illustrate how manipulatively some of the worst governments in human history have treated their citizens.¹⁵⁹

To address this concern we introduce the notion of cooperative paternalism.¹⁶⁰ While state paternalism is understood to be alienated, paternalism crafted by the community or its representatives may be viewed as cooperative. Such paternalism is regarded as a true and genuine concern for the interests of the people it is supposed to serve and protect. We believe that the approach suggested in this Article indeed reflects and serves the public interest.

Our suggestion to grant the FTC the authority and responsibility to address NVMMs corresponds with this notion. The FTC represents

¹⁵⁷ See Joel Feinberg, *Noncoercive Exploitation*, in PATERNALISM 201 (Rolf Sartorius ed., 1983).

¹⁵⁸ See Zita Lazzarini & David Gregorio, *Personal Health in the Public Domain: Reconciling Individual Rights with Collective Responsibilities*, 46 CONN. L. REV. 1839, 1857 (2014).

¹⁵⁹ See Sunstein, *supra* note 44, at 216.

¹⁶⁰ Jack D. Douglas, *Cooperative Paternalism Versus Conflictual Paternalism*, in PATERNALISM 171 (Rolf Sartorius ed., 1983).

consumers' true interest, and as noted, its mission is to promote that interest. We hope that the rules proposed by the FTC will give the general public a better sense of cooperation and true concern. Legal rules that express concern for consumers' wellbeing can, in this respect, be justified as an exercise of self-government; that is, replicating the rules that people would anyway have established voluntarily to protect themselves.¹⁶¹

CONCLUSION

Humans act on their beliefs rather than on the facts. Sometimes, they make mistakes. This is perhaps inevitable. Oftentimes, it is also beneficial.

Generally speaking, people should be held responsible for the consequences of the facts diverging from their beliefs, even if they are mistaken. This is particularly so when people have the capacity to allocate the risk of a divergence, yet fail to exercise it. Furthermore, people should be allowed to make mistakes. Learning from one's mistakes and improving by this process is an important element in our autonomous lives.

However, the hidden elements of non-verbal market manipulation conflict with the human preference for autonomous and voluntary decisions for two main reasons. First, individuals are unable to perceive the hidden ways in which such manipulations work. Second, external forces—equipped with strong incentives—generate a powerful effect to manipulate individuals' choices. Such manipulations stir consumers' decision-making in a way that yields extensive economic profit to the exploiting party. In competitive markets sellers cannot afford not to employ such manipulations, which unfortunately inevitably become the norm.

So far the law has largely ignored the issue of manipulations and did not put it on its view-screen. True, coping with NVMMs and correcting the market failures it creates is no simple task. But in spite of the many difficulties and challenges that NVMMs pose, we believe that turning a blind eye to such manipulations undermines the efficiency of consumer markets. It undercuts consumers' ability to make rational and autonomous decisions which promote their long-term preferences.

¹⁶¹ For developing this idea in the context of legal rules designed to advance public health, see Parmet, *supra* note 1. In a way, this resembles John Rawls' idea of "veil of ignorance." See JOHN RAWLS, A THEORY OF JUSTICE (The President and Fellows of Harvard College rev. ed., 1999) (1971).

Consumers are thus exploited by sellers and lured into deals that do not serve their own interests.

Consumer law seeks to promote efficiency while protecting consumers' autonomy and dignity. Therefore, protecting consumers only from the verbal, relatively easy to detect manipulation cannot be justified behaviorally or normatively. To effectively protect consumers, the law must handle non-verbal market manipulations. Current principles and doctrines of consumer law can and should be adjusted to fit this purpose.

Manipulations may occur in various settings and contexts, for a range of purposes, by firms as well as by other entities (including, for instance, by governments). Developing a sustained legal analysis of manipulations is without doubt a challenge. To make this challenge even thornier, people are heterogeneous and may respond in different ways to market manipulations.

In the context of consumer markets—the focus of our analysis—further research, especially empirical, is essential. Yet we hope that this Article, while focusing on non-verbal market manipulation in the sphere of consumer–seller relations, may contribute to this imperative challenge. It is a present need that should not be ignored.