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# A PSYCHOLOGICAL INVESTIGATION OF CONSUMER VULNERABILITY TO FRAUD: LEGAL AND POLICY IMPLICATIONS

*Jessica M. Choplin, Debra Pogrund Stark, & Jasmine N. Ahmad\**

## INTRODUCTION

Despite the high incidence of consumer fraud in the United States<sup>1</sup> and its dire consequences, especially in the home loan context,<sup>2</sup> very little research has been conducted on the psychological factors that leave consumers vulnerable to fraud and deceptive sales practices. In particular, few have tested different explanations for consumer vulnerability to various types of fraud and to analyze the legal and policy implications in terms of creating better laws to protect consumers.<sup>3</sup> This article focuses on the problem of consumer susceptibility to deception when a consumer notices a problematic term in a contract but is persuaded to proceed with the deal. To convince the consumer to proceed, sales representatives may use a number of techniques, which include providing various types of reassurances and deceptive explanations of the problematic term. Such explana-

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1. KEITH B. ANDERSON, FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY ES-2 (2004), available at <http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf> (last visited Jul. 12, 2011).

2. See, e.g., ELLEN SCHLOEMER ET AL., CENTER FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 4-5 (2006), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosure-paper-report-2-17.pdf> (last visited Jul. 11, 2011).

3. But see John E. Swan, Michael R. Bowers & Lynne D. Richardson, *Customer Trust in the Salesperson: An Integrative Review and Meta-Analysis of the Empirical Literature*, 44 J. BUS. RES. 93 (1999) (providing a review of research on factors that cause consumers to trust salespeople); Debra Pogrund Stark & Jessica M. Choplin, *A License To Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617 (2009) [hereinafter Stark & Choplin, *A License To Deceive*] (examining the extent to which consumers are vulnerable to fraud when they fail to read carefully the terms of the contracts they enter); Debra Pogrund Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCH. PUB. POL'Y & L. 85 (2010) [hereinafter Stark & Choplin, *Psychological Analysis of Disclosure Laws*] (In that article, we analyze the effectiveness of home loan disclosure laws mandated by Congress to prevent predatory home loans by providing consumers with the information necessary to shop around for the lowest cost and most affordable loan possible. In that article, we provide a literature review of certain key cognitive and social psychological phenomena that we hypothesized impede the ability of consumers to use these disclosures as Congress intended and that contributed to so many consumers entering into overpriced and unaffordable home loans.).

tions can be effective even when the proffered explanation makes no sense.<sup>4</sup> As discussed in the legal and policy implications section of this article, the ability of salespeople to deceive consumers in this manner is particularly harmful because these techniques may not be actionable in some jurisdictions.<sup>5</sup>

We hypothesize that when unscrupulous salespeople, including mortgage brokers and lenders, reassure consumers and explain away “problematic” contract terms (*i.e.*, terms inconsistent with what was previously promised and against the consumer’s interest), many consumers will acquiesce to the problematic terms. Acquiescence frequently occurs even when the explanation offered does not make sense. For example, Hill and Kozup interviewed victims of predatory loans who discussed how predatory lenders dismissed their concerns by providing after-the-fact rationales and explanations claiming that the terms that were contrary to promises made early in discussions—such as a promise that the loan would accrue interest at 4.5% even though that rate was just for the first year and then would adjust—were legitimate or in the borrowers’ best interests.<sup>6</sup>

We conducted two fraud simulation studies to test our hypothesis that consumers are vulnerable to deception through reassurances and explanations even if the proffered explanations do not make sense. In an attempt to determine the factors that make some consumers more vulnerable to fraud through deception, we also conducted a follow-up survey that the participants from Fraud Simulation Study 1 and a replication of Fraud Simulation Study 1 were given, which asked them to self-report the factors that motivated them to read, sign, or object to problematic terms in a contract. Fraud Simulation Study 2 investigated whether demographic and

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4. See, *e.g.*, Ellen Langer, Arthur Blank, & Benzion Chanowitz, *The Mindlessness of Ostensibly Thoughtful Action: The Role of “Placebic” Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 635, 641 (1978).

5. For example, in a case where the insurance company had allegedly misrepresented that there would be no premium charge for the first year of coverage but the contract terms did include a charge for the first year of coverage, the Alabama Supreme Court ruled that the insured would not have a viable cause of action for common-law fraud under the reasonable reliance requirement because of the duty to exercise “some measure of precaution to safeguard their interests” and “[i]f the purchaser blindly trusts, where he should not, and closes his eyes where ordinary diligence requires him to see, he is willingly deceived.” *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 433 (Ala. 1997) (quoting *Munroe v. Pritchett*, 16 Ala. 785, 789 (1849)). In addition, while fraud is an exception to the parol evidence rule, some jurisdictions require that the fraud relate to the nature of what has been signed (“fraud in the execution”), such as when one party deceives the other contracting party into believing that a signed document is something different than a binding contract. BLACK’S LAW DICTIONARY 549 (8<sup>th</sup> ed. 2005). This is in contrast to other types of fraud that induce a person to sign the contract (“fraud in the inducement”), such as a fraud connected with an underlying transaction and not with the nature of the document itself. *Id.* For an example of a jurisdiction that limits the fraud exception to the parol evidence rule only to fraud in the execution, see *Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 531 (W.D. Pa. 2000).

6. Ronald Paul Hill & John C. Kozup, *Consumer Experiences with Predatory Lending Practices*, 41 J. CONSUMER AFF. 29, 40 (2007).

other characteristics of the consumers surveyed affected their vulnerability to fraud.

Section II of this article describes the prevalence of consumer fraud, the most common contract scenarios where it arises, and the findings from our prior studies that investigated consumer fraud which contextualize this paper. Section III discusses five psychological explanations for why consumers might be vulnerable to deception that we then empirically test in the two fraud simulation studies and follow-up survey. Section IV reports the methods and results of Fraud Simulation Study 1 and analyzes those results. Section V describes the results from a follow-up survey given to the participants from Fraud Simulation Study 1 and a replication of Fraud Simulation Study 1. Section VI reports the methods and results of Fraud Simulation Study 2, which was designed to generalize the results of Fraud Simulation Study 1 to realistic consumer fraud situations and to investigate how demographic and other factors affect consumers' vulnerability to fraud. Finally, Section VII analyzes the policy and legal implications from the findings of the two fraud simulation studies and the follow-up survey, including how to modify existing laws or create new rules to better protect consumers in light of our findings.

## I. THE PREVALENCE OF CONSUMER FRAUD AND RESULTS FROM OUR PRIOR RESEARCH

Consumer fraud is a pervasive and destructive problem in the United States.<sup>7</sup> In 2003, for example, approximately twenty-five million Americans were victims at least one of twelve types of consumer fraud tracked by the Federal Trade Commission.<sup>8</sup> Currently, the most infamous and widespread example of consumer fraud involves mortgage loans. One report calculated that homeowners lost as much as \$164 billion between 1998 and the third quarter of 2006 in total foreclosure losses, due at least in part to predatory loan practices.<sup>9</sup> In addition, a large number of adjustable rate loans set to adjust in 2008 were projected to cause an increase in a typical borrower's monthly payment by \$350, with many such loans expected to go into default.<sup>10</sup> The Center for Responsible Lending estimates that foreclosures cost neighbors \$502 billion in the decline of property values in 2009 alone.<sup>11</sup> Many homeowners may have been deceived into

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7. See generally ANDERSON, *supra* note 1.

8. See *id.* at 28.

9. See SCHLOEMER ET AL., *supra* note 2, at 27-28.

10. See Ruth Simon, *Rising Rates to Worsen Subprime Mess—Interest Payments Set To Grow on \$362 Billion in Mortgages in 2008*, WALL ST. J., Nov. 24, 2007, at A1.

11. Center for Responsible Lending, *Soaring Spillover: Accelerating Foreclosures to Cost Neighbors \$502 Billion in 2009 Alone; 69.5 Million Homes Lose \$7,200 on Average, Over Next Four Years*,

thinking that they had entered into an affordable fixed rate loan but actually signed floating rate loans.<sup>12</sup> Borrowers were also fraudulently induced to enter into overpriced loans (*i.e.*, loans at a higher interest rate or costs than the borrower could have otherwise qualified for) by brokers who deceived them into thinking that no better loans were available.<sup>13</sup> Warren and Tyagi estimate that approximately 40% of homeowners would have qualified for lower-cost loans than they were induced to take by unscrupulous mortgage brokers and lenders.<sup>14</sup> Such deception leads to thousands of dollars of losses for individual consumers. As an illustration, if a homeowner took out a \$300,000 loan at an interest rate 1.5% higher than a possible loan for which the homeowner could have qualified, she would pay approximately \$300 more each month during the term of the loan; the homeowner would thus lose \$18,000 over five years, and \$108,000 over a thirty-year term.

In our studies, we have simulated several common types of fraud.<sup>15</sup> The first type of fraud happens when a salesperson lies to the consumer about the good or service, but includes the truth in the contract or includes a merger clause that states that the consumer has not received or relied upon any representation prior to entering into the contract, that the consumer will not raise any such representations, and that the company will have no liability for any such alleged representations. The merger clause or term that conflicts with what the salesperson originally told the consumer is usually buried in a long form contract that is not intended to truly be read and negotiated.<sup>16</sup> We simulated this type of fraud in a study that asked participants to sign a consent form to participate in research.<sup>17</sup> The consent form was three pages long and it was opened to the third page for them to sign. Immediately above the line where they were asked to sign, three sentences read: "I have read the above information. I have all my questions answered. I consent to be in this study."<sup>18</sup> Eighty-seven of the 91 participants in the study signed the form. Nearly all of those participants did not read the contract, and none of them read the form in its entirety.<sup>19</sup> The form they signed committed them to participate in any future

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91.5 Million Families to Lose \$1.9 Trillion in Home Value; \$20,300 on Average (2009), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf> (last visited Jul. 11, 2011).

12. See Hill & Kozup, *supra* note 6, at 31, 36; Stark & Choplin, *Psychological Analysis of Disclosure Laws*, *supra* note 3, at 94.

13. See Hill & Kozup, *supra* note 6, at 43.

14. ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003).

15. See generally Stark & Choplin, *License to Deceive*, *supra* note 3.

16. *Id.* at 671-73.

17. *Id.* at 678.

18. *Id.* at 679.

19. *Id.* at 681-83.

studies that the researchers might wish to conduct with or without credit in their undergraduate courses for doing so and with or without any compensation for their time.<sup>20</sup> This was contrary to promises made to them when they first agreed to participate in the experiment and to what they were told immediately before they were given the consent form – that they would receive one credit for one hour’s participation time.<sup>21</sup> It also committed them to administer electric shocks to fellow participants, if instructed to do so (even if that participant screamed, cried, or asked for medical assistance) and to do push-ups if the experimenter instructed them to do so.<sup>22</sup> Contrary to human-subject protection guidelines, the form required them to remain in the laboratory until and unless the experimenter allowed them to leave.<sup>23</sup>

We also investigated whether the finding that people fail to read contracts applies to important consumer transactions such as mortgage loan documents and home purchase agreements by surveying consumers about whether they read contracts. Twenty-seven percent of participants who had purchased a home admitted that they did not read the entire mortgage contract.<sup>24</sup> Forty-three percent admitted that they did not read the entire home purchase agreement, 71% admitted that they did not read car rental contracts, and 95% admitted that they did not read end-user license agreements when they downloaded software from the Internet.<sup>25</sup> Some of the psychological causes of failure to read contracts that we discussed in our 2009 work include: participants’ assessment that the form was long and boring, their own attribution to themselves of laziness, information overload,<sup>26</sup> social norms not to read contracts,<sup>27</sup> and most importantly trust in what the researcher told them, as well as trust in DePaul University’s Institutional Review Board. There is also a phenomenon called “reciprocity of trust,” wherein signees may act as if they trust mortgage brokers and lenders, so that the mortgage broker or lender will trust them in return and loan them money).<sup>28</sup>

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20. *Id.* at 679.

21. *Id.* at 678.

22. *Id.* at 679.

23. *Id.*

24. *Id.* at 695. This is a surprisingly low percentage considering it takes at least three hours to read all of the terms of a standard set of mortgage loan documents, and indicative that while they may have believed that they had read all of the loan documents, in fact they probably read only what was called to their attention by the mortgage broker for the transaction.

25. *Id.*

26. Denis A. Lussier & Richard W. Olshavsky, *Task Complexity and Contingent Processing in Brand Choice*, 6 J. CONSUMER RES. 154, 164 (1979).

27. Stark & Choplin, *License to Deceive*, *supra* note 3, at 688. Participants in a fraud simulation study self-reported that they didn’t read the consent form presented to them because the researcher asked them to sign it and did not suggest that they read it first, rating this factor 3.7 on a 5-point scale for reasons why they did not read the form before signing it. *Id.*

28. See generally, R. B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 17-56 (1984).

Another common fraud scenario is bait-and-switch.<sup>29</sup> This type of fraud happens when a consumer is lied to at the beginning to get him interested in the good or service, and then told the truth just before the transaction concludes.<sup>30</sup> Perhaps because of sunk cost effects, consumers often decide to proceed with the transaction and sign contracts even if they would not have entered into the agreement had they known of the truth when they were first contemplating the transaction.<sup>31</sup> One victim of predatory lending interviewed by Hill and Kozup described the experience with bait-and-switch fraud this way: "When I talked to them they told me one [interest] rate, but they gave me a higher rate at closing. I noted it but didn't press it with them. I had invested all this time and energy; I'm here so I might as well go through with it."<sup>32</sup> We investigate this type of fraud in the control condition of Fraud Simulation Study 1 and in Fraud Simulation Study 2, reported in this article.

Another type of fraud occurs when consumers are lied to but realize before signing the contract that the contract contains contradictory terms. At this point, the salesperson further deceives the consumer by explaining away the problematic term to reassure him.<sup>33</sup> Nonetheless, some consumers still sign the agreement after being told a deceptive explanation for the problematic contractual term.<sup>34</sup> We investigate people's vulnerability to this type of fraud and explore some of the psychological causes of this phenomenon in the experimental conditions of Fraud Simulation Study 1 and in Fraud Simulation Study 2.

Two Illinois consumer fraud cases provide a sense of how unscrupulous salespeople have in fact persuaded consumers to enter contracts with problematic terms even when the consumer notices the term.<sup>35</sup> In *Ginsburg v. Bartlett*,<sup>36</sup> a real estate broker lied to a prospective lot purchaser, telling her that a railroad line was going to be built from Chicago to Highland Park, where the lot was located and that this railroad line would provide transportation to the site. The purchaser read the contract and found that it contained a disclaimer clause stating that the broker made no representations regarding new transportation to the lot. There was no other easy way

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29. BLACK'S LAW DICTIONARY 116 (8th ed. 2008).

30. See, e.g., *In re Sheppard*, 299 B.R. 753, 765, 769 (Bankr. E.D. Pa. 2003) (holding that a borrower closing a loan who decided to go forward even though the terms were different from what he been previously told would not prevail in a common law fraud action against the lender since the borrower could not establish causation).

31. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124, 124-25 (1985).

32. Hill & Kozup, *supra* note 6, at 37.

33. *Id.* at 40.

34. *Id.* (providing examples where predatory lenders provided after-the-fact rationales to explain away discrepancies between final loan products and promises made during early discussions).

35. *Id.*

36. *Ginsburg v. Bartlett*, 262 Ill. App. 14, 14 (Ill. App. Ct. 1931).

to the site, so she questioned the broker, concerned about the disclaimer. He told her not to worry, reassured her that the contract was old, and showed her a map indicating where the railroad would be built. Her concerns allayed, she signed the contract and closed, but later discovered that there would be no railway. The court found the verbal representations of the salesperson constituted fraud in the inducement.<sup>37</sup>

The consumer in *Bates v. William Chevrolet/Geo, Inc.*<sup>38</sup> experienced a similarly deceptive explanation of a problematic contract term. The consumer told the car salesperson that she could afford only a certain maximum amount each month to finance the car. The car salesperson handed the consumer a contract that reflected a higher monthly payment figure. When the consumer saw this, she said that she would not be able to afford that figure. The car salesman told the consumer that the monthly payment figure in the form was not final or binding, but that the consumer needed to sign this form in case she was pulled over by the police while driving the car. After being told this, the consumer signed the document. The dealer refused to change the monthly payment figure and sought to hold the consumer to the agreement she signed.<sup>39</sup> The court, however, ruled in favor of the consumer.<sup>40</sup> These two consumer fraud cases illustrate that consumers are vulnerable to deception not only when they fail to read contracts, but also when they do read and notice problematic provisions but are provided deceptive explanations for the presence of these terms in the contracts.<sup>41</sup>

Indeed, even in the context of a business-type transaction, people are vulnerable to deceptive explanations of problematic contract terms. In *Lucas v. Oxigene, Inc.*,<sup>42</sup> an employee was helping the company he worked for make an initial public stock offering under a contract where his compensation was based upon fixed cash payments and stock options. The employee, a recovering alcoholic, had a relapse, and the company he worked for insisted on renegotiating his contract. Under the new contract, the board of directors of the company could withdraw the stock option at their discretion. When the employee raised concerns about that term in the

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37. *Id.* at 32-33. This ruling was hardly a foregone conclusion, since to prevail in a common law fraud action, the plaintiff must show "reasonable" reliance. Stark & Choplin, *License to Deceive*, *supra* note 3, at 647-48; *Foremost*, 693 So. 2d at 433; *see also* *Bates v. Southgate*, 31 N.E.2d 551, 558 (Mass. 1941) (referring to "the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses. . . in reliance upon the honesty of supposed friends, the *plausible* and disarming statements of salesmen, or the customary course of business," implying that while people might reasonably rely upon plausible false explanations, they do not necessarily reasonably rely upon implausible ones (emphasis added)) (emphasis added).

38. *See* *Bates v. William Chevrolet/Geo, Inc.*, 785 N.E.2d 53 (Ill. App. Ct. 2003).

39. *Id.* at 57.

40. *Id.* at 62.

41. *Id.*

42. *Lucas v. Oxigene*, 1995 WL 520752 (S.D.N.Y. Aug. 31, 1995).



contract, he was told, "don't worry" and that the clause "doesn't mean anything."<sup>43</sup> The employee relied upon those statements, signed the contract, and continued to help the corporation go public.<sup>44</sup> Later, the board of directors withdrew the stock option as permitted under the contract language but contrary to what the employee had been assured prior to signing the contract.<sup>45</sup> The employee brought an action for fraud, but the court ruled that he could not raise the alleged fraudulent statements made prior to his signing of the contract because not only did the signed contract contain numerous disclaimer clauses that no representations were made, but the employee also had notice of those clauses and, being a sophisticated party, understood the terms in the contract, including the specific contradictory terms to the alleged fraudulent statements.<sup>46</sup>

The contract in *McEvoy Travel Bureau v. Norton Co.*<sup>47</sup> contained a "kickout" clause that would allow one party to end the agreement after a short period of time, which concerned McEvoy, who would be expending significant funds to perform under what he hoped would be a longer term contract. McEvoy noticed the problematic contract term and objected to it but was told the term was "inoperative," just something technical Norton's legal department required.<sup>48</sup> Relying on this explanation and assurance, McEvoy signed the contract. When Norton later exercised the kickout clause, McEvoy successfully sued for fraud.<sup>49</sup> In other jurisdictions, however, McEvoy could have lost in a common law fraud action based on the argument that he had not reasonably relied on the false statements.<sup>50</sup>

## II. HYPOTHESES AS TO WHY CONSUMERS MIGHT PROCEED WITH A PROBLEMATIC DEAL

This section discusses five psychological phenomena that might help explain why consumers might be susceptible to being persuaded to proceed with a deal even if they notice problematic terms in a contract: (i) communication rituals, including mindlessly following explanation scripts, (ii) difficulty in detecting and acknowledging lies, (iii) reciprocity of trust, (iv) social norms to sign contracts as presented, and (v) sunk cost effects. These explanations are tested in the research that follows.

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43. *Id.* at \*3.

44. *Id.*

45. *Id.* at \*3.

46. *Id.* at \*3-\*5.

47. *McEvoy Travel Bureau, Inc. v. Norton Co.*, 563 N.E.2d 188, 191 (Mass. 1998).

48. *Id.*

49. *Id.* at 192-94.

50. See Stark & Choplin, *License to Deceive*, *supra* note 3, at 647-48; see also *Foremost*, 693 So. 2d at 433; see also *Bates v. Southgate*, 31 N.E.2d at 558.

The first psychological phenomenon involves communication rituals. Consumers might be vulnerable if they interpret the contract and the verbal communications involved in the contract signing procedure as a type of communication ritual or indirect communication. Under this type of communication, people do not process words literally. Barshi and Healy illustrated a communication ritual using the example of the typical American greeting where one person will greet the other by saying, "How are you?"<sup>51</sup> The other person will respond by saying either "fine" or "good" and then ask how the first person is, at which time the first person replies with either a "fine" or a "good."<sup>52</sup> The response is always "fine" or "good" no matter how miserable their lives might be because what is actually being communicated is not the literal enquiry about the person's state of well-being but the greeting itself.<sup>53</sup> Similarly, people do not process the literal meaning of indirect requests such as "Do you know what time it is?,"<sup>54</sup> which is actually a request to be told the time, and "Can you pass the salt?," which is actually a request that the salt be handed to the speaker.<sup>55</sup> If taken literally, these questions should be answered with either a yes or a no.<sup>56</sup> Likewise, if consumers raise concerns about contractual provisions, the directive not to worry may actually communicate that the provisions do not mean what the consumers are concerned that they might mean and that the consumers' original beliefs are still correct. Notice, however, that the words "do not worry" do not literally mean any such thing. The provisions can certainly be against the consumer's better interests at the same time that the salesperson wishes that the consumer would not worry.

Consumers might expect salespeople to provide explanations for seemingly problematic provisions. Oddly, however, consumers might still follow communication rituals and be satisfied that there is an explanation as long as the salesperson provides the syntax of an explanation, even if the literal meaning of the salesperson's words have in fact provided no explanation at all. This phenomenon, which we call "explanation scripts," was demonstrated in an experiment by Langer, Blank, and Chanowitz.<sup>57</sup> In their experiment, the researcher asked people who were about to make copies at a photocopy machine to go first.<sup>58</sup> The experimenter either pro-

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51. Immanuel Barshi & A. Healy, *Checklist Procedures and the Cost of Automaticity*, 21 *MEMORY & COGNITION* 496, 496 (1993).

52. *Id.*

53. *Id.*

54. See Herbert H. Clark, *Responding to Indirect Speech Acts*, 11 *COGNITIVE PSYCHOL.* 430, 432-34 (1979).

55. Raymond W. Gibbs, *Do People Always Process the Literal Meanings of Indirect Requests?*, 9 *J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY AND COGNITION* 524, 524-25 (1983).

56. Clark, *supra* note 54, at 430.

57. Langer et al., *supra* note 4.

58. *Id.* at 637.

vided no reason for the request (*i.e.*, "May I use the Xerox machine?"), provided the syntax of an explanation with a plausible explanation inserted inside (*i.e.*, "May I use the Xerox machine, because I'm in a rush?"), or provided the syntax of an explanation with a senseless explanation inserted inside (*i.e.*, "May I use the Xerox machine, because I have to make copies?").<sup>59</sup> The senseless explanation added no information; the person making copies already knew that the researcher also needed to make copies. Nevertheless, Langer, Blank, and Chanowitz found that even senseless explanations were surprisingly effective at gaining compliance.<sup>60</sup> It would appear that people mindlessly follow communication rituals and explanation scripts when they make and grant requests.<sup>61</sup> These explanation scripts require people to provide the syntax of explanations, but the literal content of the explanations may be less important.

A similar phenomenon could be at work in situations where people sign contracts or read through a home loan disclosure form. Even if people notice and raise concerns about problematic provisions, the contract signing script likely creates an expectation among consumers that salespeople will provide an explanation or at least the syntax of one. The content of the explanation may be less important.

In the studies reported here, we tested participants' vulnerabilities to explanations of this type. In Fraud Simulation Study 1, we tested a plausible explanation, which stated that the form contained a provision contrary to what they had previously been promised because it was an old form. In Fraud Simulation Studies 1 and 2, we tested senseless explanations. In Study 1, it was stated that the form contained this provision because it was drafted that way; in study 2, the researcher said the provision was there because it was a standard form. These senseless explanations added no new information. They already knew from reading the form that it was drafted that way and that it was a standard form contract.

Second, consumers frequently have difficulty detecting and acknowledging lies. People have difficulties calling liars on their lies even when the lies are known;<sup>62</sup> moreover, doing so when there is no evidence of a lie could be considered socially inappropriate.<sup>63</sup> Salespeople sometimes lie, but consumers may not be able to tell that they are. A large amount of psychological literature has documented the difficulties involved in detect-

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59. *Id.*

60. *Id.* at 641.

61. See generally Robert P. Abelson, *Script Processing in Attitude Formation and Decision-Making*, in COGNITION & SOC. BEHAV. 13, (J. S. Carroll & J.W. Payne eds. 1976); see also Ellen Langer & Robert P. Abelson, *The Semantics of Asking a Favor: How to Succeed in Getting Help Without Really Dying*, 24 J. PERSONALITY & SOC. PSYCHOL. 26 (1972).

62. Patricia Keith-Spiegel et. al., *Why Professors Ignore Cheating: Opinions of a National Sample of Psychology Instructors*, 8 ETHICS & BEHAV. 215, 217-22 (1998).

63. Stark & Choplín, *Psychological Analysis of Disclosure Laws*, *supra* note 3, at 104.

ing whether someone is lying;<sup>64</sup> even the ability of professionals, such as police officers, to detect a lie is remarkably low.<sup>65</sup> Furthermore, double-checking verbal statements will often be uncomfortable. Performing due diligence could be interpreted as calling the person a liar.

The third psychological phenomenon is reciprocity of trust. Consumers might be motivated to trust those with whom they enter into contracts because there is a norm of reciprocity.<sup>66</sup> If someone places trust in them by offering them an apartment, a loan, or a job, it will be incumbent upon them to reciprocate by trusting in return.<sup>67</sup> This norm of reciprocity may have played a role in *Lucas*, where the employee assisted the company's public offering.<sup>68</sup> The initial contract stipulated that his compensation would be based on salary and stock options, but then he had an alcoholic relapse and the company renegotiated his contract.<sup>69</sup> The renegotiated contract stipulated that the stock options would be at the board of director's discretion.<sup>70</sup> He read the contract and was concerned about this change, but he was told not to worry, that the language did not mean anything, and that of course the board of director's would grant him the stock option.<sup>71</sup> Mr. Lucas was a sophisticated party, but he was in a vulnerable situation. He wanted the company to trust him after his relapse, and he could not afford to violate the norm of reciprocity by distrusting the company that was placing trust in him not to have another relapse.<sup>72</sup> Unsophisticated parties applying for apartments, loans, jobs, or any other type of reciprocal relationship may be even more vulnerable,<sup>73</sup> especially if there is a difference in status between the parties.<sup>74</sup> In the experiments reported here, we simulated a lie by telling participants that a certain provision in the contract they were asked to sign would not be enforced.

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

65. *Id.*; See e.g., Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469 (2008).

66. Cialdini, *supra* note 28; see also John K. Rempel, John G. Holmes, & Mark P. Zanna, *Trust in Close Relationships*, 49 J. PERSONALITY & SOC. PSYCHOL. 95 (1985); J. Mark Weber, Deepak Malhotra, & J. Keith Murnighan, *Normal Acts of Irrational Trust: Motivated Attributions and the Trust Development Process*, 26 RES. ORGANIZATIONAL BEHAV. 75, 87-90 (2005).

67. See generally Hill & Kozup, *supra* note 6; Madan M. Pillutla, Deepak Malhotra & J. Keith Murnighan, *Attributions of Trust and the Calculus of Reciprocity*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 448, 448-49 (2003).

68. *Lucas v. Oxigene, Inc.*, 1995 WL 520752 (S.D.N.Y. Aug. 31, 1995).

69. *Id.* at \*1.

70. *Id.*

71. *Id.* at \*2.

72. *Id.*

73. Weber et al., *supra* note 66.

74. Kessely Hong & Iris Bohnet, *Status and Distrust: The Relevance of Inequality and Betrayal Aversion*, 28 J. ECON. PSYCHOL. 197, 209 (2007).

The fourth psychological phenomenon involves social norms to sign contracts as presented. Consumers often receive social signals that they are expected to sign. Research in social psychology has documented many ways in which expectations shape behavior and cause people to conform to those expectations.<sup>75</sup> The expectation that a person should sign the contract is signaled in many ways. For example, Hill and Kozup qualitatively interviewed victims of predatory lending and documented how predatory lenders established rules of engagement wherein borrowers were not allowed to ask questions.<sup>76</sup> They established these rules of engagement by first presenting a friendly veneer to desperate would-be borrowers, creating a "honeymoon" period after which predatory lenders reacted aggressively to borrowers who violated the rules of engagement by providing dismissive rationales and explanations and blaming the borrowers for any supposed misunderstandings.<sup>77</sup> In Fraud Simulation Study 1, the social norm that the participants were expected to sign was established by the DePaul University Department of Psychology's subject pool in which participants know that they need to enroll in studies to receive class credit and that enrolling in studies often involves signing consent forms.

The fifth psychological phenomenon that makes consumers susceptible to signing a contract even if they notice problematic terms is the sunk cost effect, which, as discussed in Section II, is thought to be the phenomenon responsible for bait-and-switch type fraud. Sunk costs are the time, effort, and other expenses that consumers have already spent pursuing a transaction or goal.<sup>78</sup> Research has found that once consumers have sunk these costs, the amount they are willing to continue spending toward that transaction or goal will often exceed what they would have originally been willing to spend, even if the additional expenses exclude the original sunk costs.<sup>79</sup> Due to this sunk cost effect, consumers might agree to problematic provisions even if no other type of deception is involved. In Fraud Simulation Study 1, we tested this phenomenon by simulating bait-and-switch type fraud in the control condition. In Fraud Simulation Study 2, we tested this phenomenon by asking participants whether they would have

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75. See Mark Snyder, *When Belief Creates Reality*, 18 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 247 (1984); Mark Snyder & William B. Swann Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 *J. EXPERIMENTAL SOC. PSYCHOL.* 148 (1978); Stephen C. Jones & Deborah Panitch, *The Self-Fulfilling Prophecy and Interpersonal Attraction*, 7 *J. EXPERIMENTAL SOC. PSYCHOL.* 356 (1971); D. Michael Kuhlman & David L. Wimberley, *Expectations of Choice Behavior Held by Cooperators, Competitors, and Individualists Across Four Classes of Experimental Game*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 69 (1976); ROBERT ROSENTHAL, *ON THE SOCIAL PSYCHOLOGY OF THE SELF-FULFILLING PROPHECY: FURTHER EVIDENCE FOR PYGMALION EFFECTS AND THEIR MEDIATING MECHANISMS* (1976).

76. Hill & Kozup, *supra* note 6.

77. *Id.* at 35-40.

78. See Arkes & Blumer, *supra* note 31, at 124.

79. *Id.*

agreed to sign even if they knew the contract read that way when they began pursuing the deal.

### III. FRAUD SIMULATION STUDY 1

Fraud Simulation Study 1 sought to investigate people's vulnerabilities to fraud even when they read contracts or disclosure forms and find problematic provisions. This study also provided an opportunity to extend previous research by exploring the degree to which people read contracts when contracts are short, user-friendly, and have highlighted problematic provisions.<sup>80</sup> The purpose of Fraud Simulation Study 2 was to generalize the results of Fraud Simulation Study 1 to realistic consumer fraud situations and to investigate how demographic factors affect consumers' vulnerability to fraud.

Participants were asked to sign a bogus consent form which, contrary to verbal assurances by the experimenter, their instructor, and the Internet-based experiment registration system that they would receive one credit for one hour's work, required them to participate for three hours and receive only one credit. We call this provision the "problematic provision" because it contradicts prior assurances. Unlike the fraud simulation study we reported in 2009,<sup>81</sup> where the problematic provisions were buried in the middle of a long consent form, this fraud simulation study maximized the likelihood that participants would discover the fraud by presenting the entire bogus consent form on a single page and printing the problematic provision in a large, red, and bolded font. We expected that even in this case some participants would sign the bogus consent form without discovering and expressing concerns about the problematic provision, and also expected that the vast majority would notice the problematic provision and at least ask the researcher why the consent form contained that provision, which would allow us to investigate how vulnerable participants would be to explanation scripts and deception.

### *Method*

#### *Participants*

Eighty undergraduate students participated to fulfill a course requirement. Of these, 35 (43.8%) did not raise concerns about the problematic provision. Of the 45 remaining, 15 were randomly assigned to each of the control, plausible, and senseless conditions.

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80. See Stark & Choplin, *License to Deceive*, *supra* note 3.

81. *Id.*

### *Materials*

This experiment used a bogus consent form, a real consent form, and a follow-up survey. To make the them as user-friendly as possible, both consent forms were very brief. The bogus consent form was 276 words long including the title and signature line. The title of the bogus form read "CONSENT TO PARTICIPATE IN RESEARCH" in all capital letters, bolded, and underlined. Below the title the subtitle read "Protecting Consumers Against Fraud" in both capital and lower case letters, bolded, but not underlined.

The bogus consent form itself was subdivided into seven sections. The section entitled "What is the purpose of this research?" informed participants that the research was designed to learn more about how to protect consumers from fraud. Contrary to verbal assurances that the experiment was going to take only five more minutes of their time, the section entitled "What will I be asked to do?" obligated those who signed the form to participate in three additional hours of research: one hour at that time, one hour the following week, and one additional hour the week after that. Also contradicting verbal assurances, the section entitled "How much time will this take?" obligated those who signed the form to spend three hours of their time as research participants. The section entitled "What are the risks involved in participating in this study?" explained that the study did not involve risks other than what participants would encounter in daily life. The section entitled "Can I decide not to participate?" informed participants that they could choose not to participate. The section entitled "Whom can I contact for more information?" provided contact information for the first author and DePaul University's director of research protections. The section directly in the middle of the form entitled "What are the benefits of my participation in this study?" was designed to give participants the most pause. Unlike the rest of the form, which was printed in black, 11-point font, this section was printed in bright red, bolded, 16-point font and read "You will receive 1 hour's credit for your 3 hours of participation." At the bottom of the form was the statement of consent, declaring, "I have read the above information. I have had all my questions answered. I agree to participate." The form provided a place for participants to sign and date it.

The actual consent form entitled "CONSENT TO USE DATA IN RESEARCH" was 415 words long including the title and signature line. This form described the purpose of the research, what the participants were actually being asked to do; the actual time it would take to complete the rest of the experiment, including time to complete the follow-up survey; and the risks and the steps we would take to protect their confidentiality and repeated the contact information for the first author and the director of research protections from the bogus consent form. At the bot-

tom of the form was the statement of consent, allowing the researchers to use participants' data and consenting to complete the survey.

The follow-up survey asked participants whether, in their perception, they had read the bogus consent form and, if they read part of it, whether the only part they read was the portion highlighted in red. The portion highlighted in red was problematic in that it contradicted prior assurances. However, since it is possible that some participants enjoy being in experiments and might have signed just for the opportunity to provide two hours of additional service, the follow-up survey asked participants whether they found the provision highlighted in red problematic. Participants who signed the bogus consent form were asked whether they still would have signed it if they believed that the highlighted red portions were going to be enforced. Participants who did not sign it were asked whether they did not sign it because they believed that the provisions might be enforced. The follow-up survey also attempted to gauge some of the factors that could have affected participants' decisions to read the form and some factors that could have affected their decisions to sign the form.

As presented in Table 2, the follow-up survey asked them about their degree of trust in the researcher, whether they believed what the researcher told them, and whether they felt free to question the researcher and negotiate. It asked how important it was for them to be perceived as cooperative and trustworthy and to be treated with respect by the researcher. It also asked them how important they thought it was for the consent form to be consistent with their previous understanding. As presented in Table 3, the follow-up survey asked participants whether they know what information to look for when reading, whether they feel as if they are expected to read, whether they feel as if they are expected to sign, whether they relied upon what they had previously been told and their prior experiences, and whether the length of the form or the provision highlighted in red affected their decision. As presented in Table 4, participants who did not read and express concerns about the bogus consent form were asked whether they did not read because they were lazy, they found the consent form boring or long, they presumed all consent forms read the same way, they felt the form did not contain important information, they assumed the Institutional Review Board would protect them, or they had never before heard of anyone having problems with consent forms.

The follow-up survey asked participants about their beliefs about whether a contractual term ought to be enforced under different articulated standards relating to the "fairness" of a term in a contract. We included these questions for two reasons. First, we sought to investigate the extent to which consumers desire protection from unfair contract terms, since our earlier studies found that consumers often fail to read and understand the contracts they sign, causing them to be vulnerable to agreeing to highly unfair contract terms as well as the form of protection they desired.



Second, we sought to investigate whether those vulnerable to being deceived into signing forms with problematic provisions would be more likely than those who were not vulnerable to desire courts or legislatures to protect them from unfair contract terms.

The first standard we asked the participants to respond to was articulated by the European Union's Directive on Unfair Contract Terms: "I think if there is a term in the consumer transaction contract that causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, and if the term was not specifically discussed and negotiated between the consumer and the company, the law should be that a court should not enforce that term."<sup>82</sup> The second standard was articulated by the American Law Institute's Restatement Second of Contract Law: "I think that if there is a term in a consumer transaction contract that the company has reason to know the consumer would not agree to had the consumer known the term was in the written contract, the law should be that a court should not enforce that term."<sup>83</sup> The third standard we articulated is the classic common law definition of unconscionability: "I think that all of the terms in a consumer transaction contract that the consumer signs should be enforced by the courts unless the term is so overly harsh, one-sided, or oppressive that it 'shocks the court's conscience.'"<sup>84</sup> We created a fourth standard that was even broader and more vague than the prior three standards: "I think that if a consumer contract contains 'unfair terms' a court should not enforce the unfair terms." Finally, the fifth standard delegated the decision as one to be made by a legislature in the form of a regulation prohibiting a specific term or set of terms in a contract: "I think that legislatures should review consumer transactions to identify terms that would be considered unfair and prohibit the enforcement of such terms."

### *Procedure*

After participants had completed a previous, unrelated experiment, the researcher asked them to sit down and handed them the bogus consent form. The researcher said, "We need you to sign this form consenting to being a participant in the next study which will take approximately five

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82. See Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, art. 3, available at [http://ec.europa.eu/consumers/policy/developments/unfa\\_cont\\_term/uct01\\_en.pdf](http://ec.europa.eu/consumers/policy/developments/unfa_cont_term/uct01_en.pdf) (last visited Jul. 11, 2011).

83. RESTATEMENT (SECOND) OF CONTRACTS § 163 (1981) ("If a misrepresentation as to the character or essential terms of a proposed contract induces conduct...by one who neither knows nor has reasonable opportunity to know . . . of the . . . essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.").

84. See 8 WILLISTON ON CONTRACTS § 18:10 (4<sup>th</sup> ed.); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

minutes. Do you have any questions?" Participants were given as much time as they wanted while the researcher timed how long they spent looking at the form. In the case of students who raised concerns about the problematic provision, the time they spent looking at the form included both the time from when they received the form until they raised concerns and the time from after the researcher had explained the problematic provision until they either signed or refused to sign. To control for any differences in the time it took to express concerns or to explain the problematic provision, the timing measure did not include the time during which the participant expressed the concern or the time during which the researcher explained the problematic provision. The researcher also noted whether participants: (i) did not look at the bogus consent form at all, (ii) looked so briefly that they could not have read it, (iii) skimmed enough to get a vague idea about some provisions, (iv) read parts but skimmed the rest, (v) read the bogus consent form in its entirety. If the participant signed the form without expressing concerns, the experiment ended, and participants were debriefed as described below.

If participants expressed concerns about the problematic provision, they were randomly assigned to one of three conditions: the control condition, the plausible condition, or the senseless condition. The goal of the control condition was to simulate bait-and-switch type fraud. Bait-and-switch fraud was chosen as the control because we wanted to investigate why consumers are susceptible even when they notice problematic terms in a contract, but are nonetheless persuaded to proceed with the deal. Under bait-and-switch type fraud, the deception is disclosed before signing. As such, the deception continues in the experimental conditions, but ceases in the control or bait-and-switch condition, and other factors such as sunk cost effects<sup>85</sup> and participants who might have chosen to participate for three hours because they enjoy doing so are held constant. In this study, the researcher simulated bait-and-switch by disclosing to participants that contrary to previous assurances the problematic provision would be enforced. Participants would be expected to participate for three hours, one hour over three separate weeks, and they would only receive one hour's credit.

The goal of the plausible and senseless conditions was to emulate another type of consumer fraud situation where the consumer is told one thing, but the contract says something to the contrary. The consumer then notices the discrepancy, and the salesperson explains away the discrepancy.

In the plausible condition, the researcher told participants not to worry because the consent form read that way only because it was an old form.

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85. See generally Arkes & Blumer, *supra* note 31.

In the senseless condition, the researcher told participants not to worry because the consent form read that way only because that is the way that the consent form was drafted. In both the plausible and senseless conditions, the researcher reassured participants that “of course” the problematic provision would not be enforced, the study would only take approximately five minutes, and they would receive one hour of credit.

Following realistic consumer fraud situations, the plausible and senseless conditions differ from the control or bait-and-switch condition in several respects that allow for the continuation of the fraud. The researcher told participants not to worry, provided an explanation for the problematic provision and continued to lie by reassuring them that what they had initially been led to believe was still true.<sup>86</sup>

After the fraud manipulation, the researcher asked all participants to sign the consent form. After participants had either signed or refused to sign, participants were debriefed. They were told that the goal of the research was to understand why people sign contracts that are not in their interests and that the form they had just signed or not signed was bogus and was not in their interests. The researcher pointed to the highlighted problematic provision. The participants were told that this provision would not be enforced, and the researcher tore the form in half.

The DePaul University Institutional Review Board required us to ask participants for permission to use their data. This requirement was fortuitous as it allowed us to investigate whether people learn to read contracts more carefully after being deceived. Participants were then asked to read and sign the actual consent form. The researcher timed how long participants looked at the actual consent form and noted whether they did not even look at the actual consent form, looked so briefly that they could not have read it, skimmed enough to get a vague idea about some provisions, read parts but skimmed the rest, or read the actual consent form in its entirety. After participants signed the actual consent form, they filled out the follow-up survey.

### *Fraud Simulation Study 1 Results*

A rather high 43.8% of participants (35 out of 80) did not express concerns about the problematic provision even though it was part of a short consent form, boldfaced, in a large 16-point font, and printed in red ink. Still, this result was an improvement compared with the 4.4% of participants (4 out of 91) who expressed concerns about the problematic provisions in our 2009 study, where the problematic provisions were buried in a much longer consent form. This difference in the proportion of partic-

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86. Future research should unbundle and isolate these factors to investigate the degree to which each allows fraud to be perpetuated and how these factors might interact.

ipants who expressed concerns about the problematic provisions in these two studies was statistically significant,  $\chi^2(1, N=171)=56.12, p < .01$ .

The 35 participants who did not express concerns about the problematic provision spent less time looking at the form ( $M=6.0$  seconds,  $SD=10.6$  seconds) than the 45 participants who did express concerns ( $M=17.4$  seconds,  $SD=13.7$  seconds),  $t(78)=4.06, p < .01$ . Of these 35 participants, the researcher rated 14 (40.0%) of them as not even looking at the bogus consent form before signing it; 13 (37.1%) as looking over the bogus consent form so briefly that the researcher doubted that the participant had read much; 6 (17.1%) as skimming the bogus consent form enough to get a vague idea about some provisions; one (2.9%) as reading parts of the bogus consent form but skimming the rest; and one (2.9%) as reading the bogus consent form in its entirety. An analysis of these 35 participants' own judgments of whether they themselves had read the consent form found similar proportions, with 14 (40.0%) of them reporting that they did not read the consent form at all; 11 (31.4%) reporting that they had read only the portion highlighted in red ink; 5 (14.3%) reporting that they read only parts of the consent form and insisting that they read more than just what was highlighted in red ink; and 5 (14.3%) insisting that they read the consent form in its entirety.

These results suggest that 60% of the participants (21 out of 35) who failed to raise concerns about the problematic provision had read or skimmed enough of the consent form to notice the problematic provision. It seems somewhat mysterious, then, why these 21 participants failed to raise concerns. Clues as to why they proceeded to sign the form without raising concerns can be gleaned from the follow-up survey. These 21 participants differed from the 31 participants who expressed concerns about the problematic provision but nevertheless signaled that they placed significantly greater importance on being perceived as cooperative,  $t(50)=2.52, p < .05$ , trustworthy,  $t(50)=2.37, p < .05$ , and respected by the researcher,  $t(50)=2.46, p < .05$ . These 21 participants were also more likely to say that they were influenced by the fact that they felt that they were "expected to sign the consent form,"  $t(50)=2.28, p < .05$ , less likely to say that the provision highlighted in red was "problematic,"  $\chi^2(1, N=52)=10.16, p < .01$ , and more likely to assume that they would receive the same amount of credit for their time as they had previously received for other experiments "no matter what the bogus consent form said,"  $t(50)=3.31, p < .05$ . The degree to which they were more likely to trust the researcher reached marginal significance,  $t(50)=1.77, p < .1$ .

It is clear, then, that those consumers who more greatly wish to be perceived as cooperative and trustworthy, more greatly seek respect, and more greatly feel they are expected to sign a form are more vulnerable to deceptive sales practices than others due to these characteristics (hereinafter, "vulnerability characteristics"), which courts and legislators do not

currently recognize as important. Fraud Simulation Study 2 also investigated whether other demographic factors such as gender and lower socioeconomic status are associated with greater vulnerability to deceptive sales practices. The policy and legal implications from these findings are further discussed in Section VII.

We next analyzed the 45 participants who raised concerns about the problematic provision. Of the 15 participants in the control bait-and-switch condition, 6 (40.0%) signed the consent form; 9 did not. In the plausible condition, 13 (86.7%) signed and 2 did not. In the senseless condition, 12 (80.0%) signed and 3 did not. These omnibus differences were statistically significant,  $\chi^2(2, N=45)=8.92, p < .05$ , as was the difference between the control and the plausible condition,  $\chi^2(1, N=30)=7.03, p < .01$ , and the difference between the control and the senseless condition,  $\chi^2(1, N=30)=5.00, p < .05$ . The difference between the plausible and the senseless conditions was not statistically significant,  $\chi^2(1, N=30)=0.24, p > .05$ . This suggests that test subjects followed explanation scripts rather than critically challenged the statements of the researchers.

Of the 14 participants who refused to sign, 11 said that they did not sign because they believed that the provision highlighted in red might be enforced. Of the 66 participants who signed, only 15 said that they still would have signed if they believed that the provision highlighted in red was going to be enforced. An analysis of the follow-up survey found that the 5 participants in the plausible and senseless conditions who refused to sign the consent form differed from the 25 participants in these two conditions who accepted the explanation and proceeded to sign. The 5 non-signers were less likely to believe what the researcher told them about the red highlighted portion of the bogus consent form,  $t(28)=2.96, p < .01$ , more likely to feel that they are expected to read all of the words in a consent form before signing,  $t(28)=2.35, p < .05$ , and less likely to say that they were influenced by the expectation that they would sign the consent form,  $t(28)=2.43, p < .05$ . These participants displayed characteristics, which are hereinafter referred to as "resistance factors," that were almost the mirror opposite of the vulnerability characteristics. Future studies should attempt to explore what causes some consumers to possess these resistant factors that make them less vulnerable to consumer fraud.

We also analyzed the time that the 45 participants who raised concerns about the problematic provision spent looking at the consent form. A 3 x 2 analysis of variance (ANOVA) mapping the control, plausible and senseless conditions against whether the subject signed the form found a main effect of condition,  $F(2,39)=4.81, MSE=155.31, p < .05$ . A *post hoc* Fisher's Least Significant Difference test found that participants in the control condition spent more time looking at the consent form ( $M=26.00$  seconds,  $SD=18.21$ ) than did participants in the plausible ( $M=13.33$  seconds,  $SD=7.93$ ) and senseless ( $M=12.87$  seconds,  $SD=8.75$ ) condi-

tions, perhaps because they were deliberating whether to break the social norm and expectation that they would sign after being told that they would get only one credit for three hours' work.<sup>87</sup> Because this analysis excluded participants who signed without noticing and expressing concerns, the difference between the remaining participants who signed or not was not significant,  $F(1,39)=0.02$ ,  $MSE=155.31$ ,  $p>.05$ , and there was no interaction,  $F(2,39)=1.67$ ,  $MSE=155.31$ ,  $p>.05$ .

Participants spent more time reading the true consent form ( $M=15.78$  seconds,  $SD=13.21$ ) than they spent reading the bogus consent form ( $M=12.43$  seconds,  $SD=13.60$ ),  $t(79)=2.33$ ,  $p<.05$ . Of the 80 participants in Fraud Simulation Study 1, the researcher rated 4 (5.0%) of them as not even looking at the true consent form before signing it; 12 (15.0%) as looking over the true consent form so briefly that the researcher doubted that the participant had read much; 18 (22.5%) as skimming the true consent form enough to get a vague idea about some provisions; 25 (31.3%) as reading parts of the true consent form but skimming the rest; and 21 (26.3%) as reading the true consent form in its entirety.

The results of the follow-up survey are analyzed in more detail below and shed light on our participants' beliefs regarding why they failed to express concerns about the problematic provision or proceeded to sign even after expressing concerns.

### *Discussion of Fraud Simulation Study 1*

Fraud Simulation Study 1 demonstrated that consumers are vulnerable to communication rituals, explanations, and deception. Participants were less likely to sign the consent form if the deception was disclosed as in bait-and-switch type fraud than if the researcher continued to deceive them and provided a bogus explanation for the problematic provision. One surprising finding of Fraud Simulation Study 1 was that many participants (43.8%, or 35 out of 80) failed to express concerns about the problematic provision even when the consent form was short, user-friendly, and the problematic provision was highlighted. Furthermore, even if participants succeeded in reading the consent form, discovering the problematic provision, and expressing concern about it, they were still vulnerable to interpreting the verbal conversation and written text as a type of communication ritual, mindlessly following senseless explanations, and deception. Of the participants who noticed and expressed concerns about the problematic provision, the vast majority (86.7%, or 13 out of 15 participants in the plausible condition and 80.0%, or 12 out of 15 participants in the sense-

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87. Stark & Choplin, *License to Deceive*, *supra* note 3.

less condition) went ahead and signed the form after being further deceived to do so.

Our findings on consumer vulnerability to deception and mindlessly following explanation scripts suggest several legal implications, discussed in Section VII.

#### IV. RESULTS AND ANALYSIS OF FOLLOW-UP SURVEY TO FRAUD SIMULATION 1

The follow-up survey was administered to the 80 participants in Fraud Simulation Study 1 and to 104 participants in a replication of Fraud Simulation Study 1 in which participants were required to initial the problematic provision. The results are presented in Tables 1 through 4.

##### *Trust and the Cooperation of Participants*

Table 1 presents the average responses to questions regarding trust and cooperation given by those who signed and those who did not sign the bogus consent form. The extent to which participants endorsed factors relating to trust and cooperation varied,  $F(8,1424)=45.29$ ,  $MSE=1.07$ ,  $p<.01$ . A Fisher's Least Significance Difference test found that more than other factors, participants thought they trusted the researcher, placed great importance on being treated with respect, and did not feel free to negotiate. They did not feel rushed. There were also differences in how those who signed and those who did not sign responded to these questions,  $F(8,1424)=6.24$ ,  $MSE=1.07$ ,  $p<.01$ , such that those who refused to sign reported that they trusted the researcher less, were less likely to believe what the researcher told them about the highlighted provision, felt less rushed, and believed it less important to be perceived as cooperative.

##### *Social Norms*

Table 2 presents average responses to questions regarding how social norms and signing scripts or learned sequences of behavior typically engaged without thinking when signing contracts affected those who signed and did not sign. The extent to which participants endorsed these factors varied,  $F(8,1424)=22.11$ ,  $MSE=1.26$ ,  $p<.01$ . A Fisher's Least Significance Difference test found that the most important factors were: (i) participants believing that they were influenced by what they had previously been told, (ii) participants assuming that they would receive the same amount of credit they received in previous experiments, and (iii) the fact that they were already in the lab for a prior experiment. Participants felt that they were expected to sign the consent form and that they were expected to read all of the words before signing. Those who signed differed

from those who did not,  $F(8,1424)=22.61$ ,  $MSE=1.26$ ,  $p<.01$ , in that those who did not sign more likely felt that they knew what to look for when reading consent forms, felt more strongly that they were expected to read all of the words, less likely assumed that they would receive the same amount of credit as they had in previous experiments, were less influenced by the expectation that they would sign, were less influenced by the length of the form, were more influenced by the fact that the problematic provision was printed in red, and were more likely to be influenced by the inconsistency.

The follow-up survey results from Tables 1 and 2 demonstrate that consumers with certain vulnerability characteristics were even more likely to fall prey to deception and mindlessly follow explanation scripts than those with resistance characteristics.<sup>88</sup> Some of these vulnerability characteristics—most notably, the degree of trust and the wish to be perceived as cooperative—are consistent with the results from a qualitative investigation by Hill and Kozup on how borrowers perceive and experience predatory lenders.<sup>89</sup> Their study found an industry practice by lender representatives of presenting a “friendly veneer” that was initially empowering to the borrowers.<sup>90</sup> The borrowers also reported, however, how lenders would then insist on “rules of engagement,” such as discouraging questions, closing the loan quickly, and promptly releasing the payments.<sup>91</sup> If the consumer failed to comply with these rules of engagement, the lenders responded aggressively to obtain compliance.<sup>92</sup> Hill and Kozup found that lenders typically gave consumers very brief, cursory descriptions of the documents that they were asked to sign and that the consumers were expected to sign without reading these documents for themselves.<sup>93</sup> People likely did not object because the friendly veneer of lenders’ representatives and their professed trust in the consumer created a situation in which consumers were required to place reciprocal trust in the lenders’ representatives by accepting their synopsis of the contractual provisions.<sup>94</sup> These factors noted by Hill and Kozup, most notably the degree of trust and the wish to be perceived as cooperative, were also more likely present in those who were deceived in the two fraud simulation studies we report here. These vulnerability characteristics may explain how unscrupulous salespeople can obtain misplaced trust from consumers is one of the social psychologi-

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88. See *infra* Tables 1-2.

89. Hill & Kozup, *supra* note 6, at 35-36 (exploring the veneer of engaging in acts of kindness, signs of respect, and confirmation of the consumer’s status as trustworthy).

90. *Id.* at 37-39.

91. *Id.*

92. *Id.* at 39-42.

93. *Id.* at 36.

94. See *id.*; see also Cialdini, *supra* note 28; Pillutla et al., *supra* note 67, at 453; Weber et al., *supra* note 66, at 83.



cal phenomena that may explain why certain consumers are more likely to fall prey to fraud and deception than others.<sup>95</sup>

### *Failure to Note or Express Concerns*

Table 3 presents average responses from participants who failed to notice and express concerns about the problematic provision regarding why they did not read the bogus consent form. We analyzed only 79 responses, however, because 11 of the 90 participants did not answer these questions. The extent to which participants endorsed each of the potential reasons for not reading varied,  $F(1,6)=25.77$ ,  $MSE=1.05$ ,  $p<.01$ . A Fisher's Least Significance Difference test found that participants primarily attributed their failure to read the bogus consent form to their assumptions that (i) all consent forms would read the same way and (ii) that regulatory agencies, such as the DePaul University Institutional Review Board, would protect them. These two factors did not significantly differ from each other. In a similar fashion some consumers, when presented with federally mandated disclosure forms and quasi-governmental form loan documents, may assume that the loan terms are regulated in such a way that unfair loan terms are not permitted. The extent to which people believe that regulatory agencies will protect them from predatory lending and other harmful practices should be empirically tested in future research.

The next important factor noted by these participants was their assumption that the consent form did not contain anything important for them to know, which did not significantly differ from their confession that they were lazy. Similarly, consumers who fail to notice and express concerns about problematic terms in contracts they sign may be doing so because they assume that there is nothing important for them to agree to in the contracts. This situation suggests either the need to educate consumers better on contractual rights and obligations or the need to hire an attorney to look out for their interests. Participants attributed their failure to read the bogus consent form more to their assumption that the consent form did not contain anything important for them to know than to how boring the consent form was or to never having heard of anyone having any problems.

### *Beliefs About Problematic Contractual Terms*

Table 4 presents average responses to questions regarding participants' beliefs and attitudes regarding the enforcement of "unfair" contractual terms. The extent to which participants endorsed these attitudes varied,

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95. Stark and Choplin, *License to Deceive*, *supra* note 3, at 668-71.

$F(8,1424)=22.11$ ,  $MSE=1.26$ ,  $p<.01$ . A Fisher's Least Significance Difference test found that participants rated greater agreement with the view that contracts "should be enforced by the courts unless the term is so overly harsh, one-sided, or oppressive that it 'shocks the court's conscience'" than to endorse the view that "if a consumer contract contains 'unfair terms' a court should not enforce unfair terms." Participants also rated greater agreement with the view that "legislatures should review consumer transactions to identify terms that would be considered unfair and prohibit the enforcement of such terms" than with any of the other views. There were no statistically significant differences in how participants who signed and did not sign answered these questions.

In the participants' comments explaining why they rated each test as they did, a very large number of participants emphasized that a consumer should read a contract before signing it. Participant responses otherwise varied greatly. First, one group of participants expressed that there should be no protection of a consumer who has signed a contract even if the contract contains unconscionable terms. One participant noted, for example, "There can't always be fairness within a contract." Another participant mused, "They didn't have to sign it." A second group of participants stated that consumers should be protected when they are deceived. A third group of participants stated that companies should not hide important information in their contracts. For example, those participants stated that all terms, or at least the important terms, should either be discussed and explained up front or not be introduced into the contract at all. Still, a fourth group of participants stated that courts should intercede to protect consumers against contract terms that are highly imbalanced or contain severely harsh terms, though some participants also noted that it is difficult to measure and define what is "overly harsh" and that all the contract terms must be taken into account.

A fifth group of participants stated that courts should refuse to enforce "unfair" contract terms. Specifically, several participants noted the need to create a definition of what is "unfair" and asked who would draft that definition. Furthermore, one participant noted "This is why we have a justice system," and another participant noted "Why enforce something that's unfair? The courts are there to provide equality." In responding to a suggested regulatory approach, several participants stated that the government does not have a responsibility to regulate this kind of fraud and expressed concern with the government having too much power over businesses. Other participants stated that a regulatory approach makes the most sense to prevent unfair terms from being put in contracts and to keep businesses in check. Reflecting the ambivalence of some participants with regulation, one participant stated, "[It] [w]ould be nice," but then raised the practical point, "but does the legislature have time to do that for all transactions?" Section VII addresses the legal and policy implications of the results of

this portion of the follow-up survey in terms of how courts and legislatures should address unfair terms in consumer contracts.

## V. FRAUD SIMULATION STUDY 2

The purpose of Fraud Simulation Study 2 was to generalize the results of Fraud Simulation Study 1, which was based upon participants signing a consent form to participate in an experiment run in a university setting, to real situations in which consumers sign contracts: apartment leases and catering contracts. The survey in Fraud Simulation Study 2 specifically investigated consumers' self-reports of whether they would sign contracts with terms that were contradictory to what they had been promised when they were also given a senseless explanation for the discrepancy and reassured that the problematic contractual terms would not apply. It also examined how demographic variables influence the likelihood that consumers will accept senseless explanations.

The survey presented hypothetical vignettes that described realistic consumer contract signing situations in which a representative gives verbal reassurances that contradict the terms of the contract. In the first scenario, for example, the contract stated that a parking space was not included in the rental agreement, but the leasing agent reassured the consumer that there was a parking space included and provided the senseless explanation for the discrepancy by stating that the contract read that way only because it was a standardized form. This study also provided an opportunity to extend the results from the fraud simulation study by examining a non-student sample outside of the laboratory setting.

### *Methods*

#### *Participants*

One hundred and twenty-six participants (64 men, 61 women, and 1 who did not self-identify) were recruited from public locations in Chicago, Illinois. The sample was racially diverse and approximately representative of the U.S. population, with 72 participants who identified themselves as White, 24 who identified as African American, 19 who identified as Hispanic/Latino, 9 who identified as Asian, 1 who identified as a Native Hawaiian/Pacific Islander, and 1 participant who did not identify race or ethnicity. The sample also included participants from a wide range of ages, with thirteen participants between the ages of 18 and 21, twenty-nine participants between the ages of 22 and 25, twenty-two between the ages of 26 and 30, twenty-two between the ages of 31 and 40, seventeen between the ages of 41 and 50, eight between the ages of 51 and 60, thirteen who were 61 and over, and two who did not identify. The sample also included

a wide variety of educational backgrounds. One participant did not complete high school, 10 graduated from high school, 18 attended college but did not complete a degree, 11 completed an Associate's degree, 48 completed a Bachelor's degree, 19 completed a Master's degree, 7 completed a doctoral or professional degree, and 1 did not identify an educational background. Eleven participants were identified as current students. The range of incomes in our sample was also diverse. We excluded current students from this analysis due to their financial dependence; their incomes did not reflect their socio-economic status. Of the remaining participants who were not current students, twelve reported making less than \$10,000; six made between \$10,000 and \$14,999; nine made between \$15,000 and \$24,999; eleven made between \$25,000 and \$34,999; nineteen made between \$35,000 and \$49,999; nineteen made between \$50,000 and \$74,999; twenty made between \$75,000 and \$99,999; nine made between \$100,000 and \$149,999; one made between \$150,000 and \$199,999; six made over \$200,000 a year; and six did not identify income. A majority of the participants, 106 out of 126, reported a belief in God, 12 reported that they did not believe in God, and 8 participants did not answer the question. As for political affiliation, 57 were Democrats, 17 were Republicans, 3 identified with the Green Party, 2 were Libertarians, 33 were Independents, and 14 did not answer the question.

### *Materials and Procedure*

Potential participants were approached in public areas such as parks, sidewalks, and festivals in downtown Chicago, as well as in laundromats, bus stops, and train stops in the northern residential areas of Chicago. The experimenter asked them whether they would be interested in taking a five-minute survey. If potential participants asked for clarification regarding the content of the survey, they were told that the survey contained three scenarios that a consumer may encounter followed by demographic questions. If they agreed to participate, they were given a questionnaire and asked to fill out the survey.

The survey contained three hypothetical vignettes that consumers were instructed to imagine encountering. The first scenario asked participants to imagine that they were about to sign a lease for a studio apartment. The leasing agent assured the consumer that a parking space would be included. The lease, however, explicitly stated that no parking space would be provided. Parking in the neighborhood was difficult, so the participant would want the parking spot that was promised. The participant asked the landlord about the provision and the landlord told the participant not to worry, that there would be a parking space, and that the lease read that way only because it was a standard form.

The second scenario was designed to disguise the nature of the study by controlling the possibility that participants might figure out that they were supposed to reject the explanations and refuse to sign the contract in the first and third scenarios.<sup>96</sup> It asked participants to imagine that they were shopping and noticed a sign which stated that shoppers were being videotaped. The participant asked the security guard about the videotaping, and she explained that the cameras were set up to deter shoplifters.

The last scenario asked participants to imagine that that they needed catering for a small party of six people. The payment schedule was supposed to require that 50% of the payment would be due one week before the party. However, the contract stated that the full amount was due one week before the event. The participant did not want to pay the full amount before the party in case something went wrong and the catering functions were not performed the day of the party. The participant asked the caterer about the provisions and the caterer told the participant not to worry, that the participant would need to pay only 50% one week before the event, and the contract read that way only because it was a standard form.

After reading the apartment lease scenario, participants marked their agreement with each of the following statements by marking "agree," "disagree," or "unsure": "I would agree to sign the lease as it is; I would have agreed to sign the lease even if I knew the lease read that way when I first contacted the landlord; I do not like the explanation for the language in the lease regarding parking; I accept the explanation of the language in the lease regarding parking; and I have signed an apartment lease in the past."

If participants marked that they agreed with the first statement—that they would agree to sign the lease as it was—but disagreed with the second statement—that they would have done so even if they knew that the lease read that way when they first contacted the landlord—then their agreement to sign reflected vulnerability to bait-and-switch type fraud. By contrast, if participants marked that they agreed with both statements, then their agreement to sign reflected vulnerability to other types of fraud, such as deception through communication rituals and explanation scripts. The third statement—*i.e.*, "I do not like the explanation for the language in the lease regarding parking"—was designed to gage whether the participants who agreed with the fourth statement—*i.e.*, "I accept the explanation of the language in the lease regarding parking"—embraced the explanation or accepted the explanation only grudgingly.

The other two scenarios contained substantially similar questions, seeking similar information. After completing the three scenarios, partici-

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96. See Martin T. Orne, *On the Social Psychology of the Psychological Experiment: With Particular Reference to Demand Characteristics and Their Implications*, 17 AM. PSYCHOLOGIST 776, 782 (1962) (discussing the importance of disguising the nature of the study from the subject).

pants answered demographic questions about themselves including their gender, age, highest level of education, income, race and ethnicity, belief in God, and political affiliation. Participants were debriefed upon request.

### *Results*

#### *Apartment Lease*

The apartment lease scenario had participants imagine they were about to sign a lease for a studio apartment that they believed included a parking space. The lease explicitly stated that no parking space was included, but the landlord told the participant that they would get the parking space and that the lease read that way only because it was a standard form. Ten participants (8%) reported that they would agree to sign the apartment lease as it was, 26 (21%) were unsure, and 90 (71%) disagreed. Although the proportion of participants who either agreed to sign or were uncertain (29%) is smaller than the 80% observed in Fraud Simulation Study 1 (80%, *i.e.*, 12 out of 15 in the senseless condition of Fraud Simulation Study 1), it is still not reassuring from a public policy perspective that so many participants were vulnerable to deception and fraud. The results from the follow-up survey of Fraud Simulation Study 1 suggest that one reason for the observed difference between the two studies might be that participants in Fraud Simulation Study 1 trusted that DePaul University's Institutional Review Board would protect them, which is similar to some consumers assuming that federal agencies regulate unfair loan terms because disclosures are presented on federally mandated disclosure forms and quasi-governmental form loan documents. Participants may have been less likely to make this assumption in Fraud Simulation Study 2.

Furthermore, this proportion may very well underestimate the actual proportion vulnerable to deception and fraud because many participants may have been able to tell from the scenario descriptions that they were not supposed to sign.<sup>97</sup> Because this proportion includes only those participants who self-reported that they would sign, it is almost certainly a lower bound estimate. The fact that so many participants said they would sign the contract or were uncertain as to whether they would do so not only reflects bait-and-switch type fraud. Of the 36 participants who either agreed to sign the apartment lease as it was or were unsure, only 13 of them (36%) said they would not have done so if they had known that the lease read that way when they first contacted the landlord. These results demonstrate vulnerability to other types of fraud, such as deception through communication rituals and explanation scripts.

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97. *Id.*

Thirty-eight participants, 30%, marked either that they accepted the explanation or were not sure whether they would do so, and 88 participants, 70%, marked that they would not. Thirty-three of the 38 participants who accepted the explanation or were not sure disagreed with the statement that they did not like the explanation or were not sure (21 disagreed, and 12 were not sure); so only 5 of the 38, or 13%, grudgingly accepted the explanation. A majority of participants (97 out of 126, or 77%) reported that they had signed a lease in the past.

Two demographic factors, income and age, significantly correlated with agreement to sign and acceptance of the explanation that the lease did not include the parking space because it was a standard form. There was a significant negative correlation between income and acceptance of the explanation,  $r(112) = -.19, p < .05$ , such that higher-income participants were less likely to accept the explanation. A negative correlation between income and agreement to sign was marginally significant,  $r(112) = -.18, p = .06$ . This marginal difference suggests that participants with higher income were less likely to say that they would sign the apartment lease, and this finding would support the hypothesis that those with higher status would be more alert to fraud and more cautious when signing contracts in order to maintain their status.<sup>98</sup> Similarly, 100% of the participants who accepted the explanation and earned less than \$30,000 did so grudgingly, compared to 43% of participants who accepted the explanation and earned more than \$50,000,  $\chi^2(1, N = 19) = 4.94, p < .05$ .

Age was negatively correlated with agreement to sign the apartment lease,  $p(124) = -.26, p < .01$ , such that older participants were less likely to sign the lease without the parking space than younger ones. This could be because age and experience have given older participants more familiarity with contract signing and more confidence to refuse to sign the lease, or perhaps because older participants were less likely to be willing to go through the trouble of constantly finding parking should the landlord later refuse to give them a parking space.

Other demographic factors appeared not to affect responses to the apartment lease scenario. Demographic factors that did not affect the agreement to sign the apartment lease were: gender,  $t(123) = .44, p > .05$ ; education,  $p(114) = -.14, p > .05$ ; race,  $t(120) = .14, p > .05$ ; belief in God,  $t(116) = -1.4, p > .05$ ; and political affiliation  $F(2,104) = 1.83, p > .05$ . Demographics that did not affect whether or not participants accepted the explanation were: gender  $t(123) = 1.17, p > .05$ ; age,  $p(124) = -.09, p > .05$ ; education  $p(114) = -.13, p > .05$ ; race,  $t(123) = .14, p > .05$ ; belief in God  $t(116) = -1.19, p > .05$ ; and political affiliation,  $F(2,104) = .03, p > .05$ . Past experience signing apartment leases

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98. See Stark & Choplin, *License to Deceive*, *supra* note 3, at 669-71.

did not affect whether participants said they would sign the lease,  $\chi^2(4, N=126) = 5.88, p > .05$ .

### *Shopping Scenario*

In the shopping scenario, participants were asked to imagine that they were in a supermarket and noticed a sign that said that they were being videotaped. When they asked about the videotaping, the security guard explained that the cameras were set up to track shoplifters. Since this scenario was included to control for the possibility that participants might figure out that the appropriate response was to reject the explanations and refuse to sign the contract in the first and third scenarios, perhaps it is not surprising that 98% of participants reported that they would continue shopping after being notified they were being videotaped. Eighty-seven percent of the participants accepted the explanation for the videotaping (to deter shoplifters), 9% were unsure, and 4% did not accept the explanation. Of the 124 participants who agreed to continue shopping, 123 would have entered the store to shop even if they knew about the videotaping before entering or were not sure, and only one would not have entered the store. The decision to continue shopping was, therefore, not due to a sunk cost effect. Of the 119 participants who accepted or were not sure about the explanation for the videotaping, only 5 did not like the explanation and were classified as having grudgingly accepted the explanation. The remaining 114 participants apparently accepted the explanation.

Age was the only demographic that affected responses to the shopping scenario. Age was negatively correlated with the decision to continue shopping,  $p(124) = -.18, p < .05$ : older participants were less likely to say that they would continue to shop once notified that they were being videotaped. Perhaps younger participants are more accepting of security measures, although age was not significantly correlated with acceptance of the explanation,  $p(123) = -.06, p > .49$ .

Other demographic factors appeared not to affect responses in the shopping scenario. Demographic factors that did not affect whether participants would continue shopping included: gender,  $t(123) = -.48, p > .05$ ; education  $p(112) = .05, p > .05$ ; race,  $t(123) = .25, p > .05$ ; income,  $p(112) = .12, p > .05$ ; belief in God,  $t(116) = -1.4, p > .05$ ; and political affiliation,  $F(2,104) = 1.83, p > .05$ . Demographic factors that did not affect whether or not participants accepted the explanation included: gender  $t(123) = 1.24, p > .05$ ; age,  $p(123) = -.06, p > .05$ ; education  $p(113) = -.3, p > .05$ ; race,  $t(122) = -.39, p > .05$ ; income,  $p(111) = .01, p > .05$ ; belief in God  $t(115) = 1.22, p > .05$ ; and political affiliation,  $F(2,103) = 1.24, p > .05$ .



*Catering Contract*

The catering contract scenario involved a discrepancy between the caterer's description of the payment process and the written contract's description. The contract required that the full bill be paid before the event. However, the participants were verbally assured that only half of the bill was due before the event. The latter was preferable, in case something went wrong with the catering services. Similar to the apartment lease scenario, the caterer reassured the participants that they would need to pay only half one week before the event and that the contract read that way only because it was a standard form. Thirty-eight participants, 30%, either marked that they would sign the contract as it was or were not sure, while 88 participants, 70%, marked that they would not sign. This effect reflected not only vulnerability to bait-and-switch type fraud, but also vulnerability to other types of fraud such as deception through communication rituals and explanation scripts, because of the 38 participants who agreed or were not sure about signing the contract as it was, 23 said that they would have done so even if they knew that the contract read that way when they first contacted the catering company or were not sure. That is, only 15 participants said that they would not have signed if they knew when they first contacted the company and were thereby classified as being vulnerable to bait-and-switch type fraud. Fifty-two participants, 41%, either accepted the explanation or were not sure, while 74, 59%, marked that they did not. Three participants did not respond. Of the 52 participants who accepted the explanation or were not sure, 8 did not like the explanation and were classified as having grudgingly accepted it. Twenty-nine participants were classified as having wholeheartedly accepted the explanation, and 15 were not sure. Fewer participants, 40%, reported having signed a catering contract in the past, as compared to the 77% of participants who had signed apartment leases.

Age and race were the only demographic variables that seemed to have any relationship to the willingness to sign the catering contract as it was written and acceptance of the explanation. There was a statistically significant negative correlation between age and the agreement to sign the catering contract,  $p(124) = -.22, p < .01$ , and between age and acceptance of the explanation,  $p(121) = -.16, p < .05$ . Older participants were less likely to sign or accept the catering contract explanation, however age did not make a difference between grudgingly or completely accepting the explanation,  $\chi^2(1, N=32) = .46, p > .05$ . Older participants were as likely as younger participants to accept an explanation grudgingly.

White and nonwhite participants did not differ in willingness to sign the catering contract,  $t(123) = .09, p > .05$ , but nonwhite participants

were marginally more likely to accept the explanation ( $M=1.75$ ,  $SD=.86$ ) than white participants ( $M=1.47$ ,  $SD=.72$ ),  $t(120) = 1.90$ ,  $p = .06$ .<sup>99</sup> Race did not have an effect on grudging acceptance,  $\chi^2(1, N=32) = .46$ ,  $p > .05$ , or sunk cost effect  $\chi^2(1, N=27) = .07$ ,  $p > .05$ .

Other demographic factors appeared not to affect responses in the catering contract scenario. Demographic factors that did not affect the agreement to continue shopping were: gender,  $t(123) = -.54$ ,  $p > .05$ ; education,  $p=114) = .08$ ,  $p > .05$ ; race,  $t(123) = .09$ ,  $p > .05$ ; income,  $p=112) = .01$ ,  $p > .05$ ; belief in God,  $t(116) = -.52$ ,  $p > .05$ ; and political affiliation,  $F(2,104) = .94$ ,  $p > .05$ . Demographic factors that did not affect participants' acceptance of the explanation for videotaping are: gender,  $t(120) = .50$ ,  $p > .05$ ; education,  $p=111) = -.11$ ,  $p > .05$ ; income,  $p=109) = -.15$ ,  $p > .05$ ; belief in God,  $t(113) = -.30$ ,  $p > .05$ ; and political affiliation,  $F(2,102) = 1.18$ ,  $p > .05$ . Whether participants signed catering contracts in the past did not appear to affect whether or not they agreed to sign the contract in this scenario,  $\chi^2(4, N=126) = 6.41$ ,  $p > .05$ .

### *Discussion of Fraud Simulation Study 2*

The purpose of Fraud Simulation Study 2 was to generalize the results of Fraud Simulation Study 1 to realistic consumer fraud situations and to measure the extent to which demographic variables would affect whether participants would accept disadvantageous contractual terms if they were also given contradictory verbal assurances. The results found that 29% of participants in the apartment scenario and 30% in the catering scenario reported that they either would sign the contract or were unsure whether they would do so even after concerns were raised about the problematic provisions as long as they were given a senseless explanation and were verbally assured that those provisions would not be enforced. This result is perhaps partially, but not entirely, due to sunk cost effect in bait-and-switch type fraud. Other factors such as grudging and full acceptance of the proffered explanation also played a role. These results demonstrate that many consumers in realistic consumer fraud situations are vulnerable to being deceived to sign contracts with problematic provisions if sales representatives assure them that the problematic provision will not apply and provide an explanation for the discrepancy between verbal assurances and the contract.

These results also demonstrated that some demographic factors appear to affect the vulnerability to deception through mindlessly following explanation scripts and fraud. Age was consistently a significant factor. Al-

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99. Responses were coded as Disagree = 1, Not Sure = 2, and Agree = 3

though older participants remained vulnerable, younger participants were more likely to be vulnerable to deception through communication rituals and explanation scripts. The participants in Fraud Simulation Study 1 were college students and may, therefore, have been more vulnerable than their older, middle-aged counterparts would have been. Future research should manipulate the type of fraud participants observe as was done in Fraud Simulation Study 1 to investigate whether middle-aged participants are less likely to be deceived by senseless explanation. Furthermore, the sample in Fraud Simulation Study 2 included only 13 participants age 61 years old or over. Future studies should investigate the vulnerability of elderly participants to senseless explanations. Income was an influential factor in the apartment lease scenario. Those with higher incomes were less likely to agree to sign the lease, accept the explanation, and grudgingly accept the explanation. Those with lower income were more susceptible to signing the lease and accepting the explanation grudgingly. Race appeared to be a marginally significant factor in whether or not participants accepted the senseless explanation in the catering scenario, and future research ought to pursue this question further. The finding that income was associated with agreement to sign the catering contract and grudgingly accept the explanation also supports the hypothesis that those with lower status are more likely to agree and accept senseless explanations if they are treated with respect. Those with higher status seem to be more vigilant, perhaps in an effort to protect their higher status.<sup>100</sup>

## VI. SUMMARY OF FINDINGS & LEGAL AND POLICY IMPLICATIONS

Fraud Simulation Studies 1 and 2 found that participants were vulnerable to being deceived into signing contracts with problematic provisions, and this vulnerability was not limited to just those cases in which participants failed to read the contract.<sup>101</sup> In Fraud Simulation Study 1, many participants went ahead and signed the consent form even though it contained a conspicuous problematic provision that was bolded and printed in a large, red font. Furthermore, many of those who raised concerns were induced to sign anyway by the researcher who told them not to worry, explained the problematic provision away, and reassured them that it would not be enforced. Consumers were even vulnerable to senseless explanations, such as that the consent form reads as it does because it was drafted that way. In Fraud Simulation Study 2, a smaller but still troubling proportion of participants self-reported that they would go ahead and sign an apartment lease and a catering contract once they were told that the lease and the contract read contrary to verbal promises only because it was

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100. Stark & Choplin, *License to Deceive*, *supra* note 3, at 669-71.

101. *Id.* at 617-744.

a standard form. Following realistic consumer fraud situations, Studies 1 and 2 bundled several factors including the researcher telling participants not to worry, the researcher providing an explanation for the problematic provision, or at least the syntax of an explanation, and the researcher continuing to lie by reassuring them that what they had initially been led to believe was still true. Future research should isolate these and other factors that contribute to consumers' vulnerabilities and investigate possible interactions between these factors in order to design strategies to better protect consumers.

The results from these studies provide insights that implicate three important areas of law. First, our results call into question the effectiveness of certain federal measures to prevent predatory home lending. The federal government's primary method of protecting consumers from predatory home lending was to enact laws that mandate the disclosure of the basic economic terms of the home loan applied for in order to enable consumers to shop around and obtain the lowest cost loan possible.<sup>102</sup> Notwithstanding these disclosure laws, unscrupulous mortgage brokers and lenders were able to convince borrowers to take out higher cost loans than the borrowers qualified for<sup>103</sup> and caused some borrowers to think that they were taking out affordable fixed rate loans when in fact they were entering into an adjustable rate loan that could rise to unaffordable levels.<sup>104</sup> One explanation for how mortgage brokers or lenders were able to induce borrowers to enter into overpriced and unaffordable loans, even when the borrowers received disclosures reflecting the problematic loan terms, is the five psychological phenomena discussed in Section III and tested in the fraud simulations studies and follow-up survey, including the use of deception by mortgage brokers and lenders and their ability to induce borrowers to mindlessly follow explanation scripts.<sup>105</sup>

The results of our fraud simulation studies support anecdotal evidence that when some mortgage brokers and lenders presented the mandatory disclosure forms to home borrowers, they were likely able to do so in ways that caused the borrowers to fail to realize that they were entering into an overpriced or unaffordable loan.<sup>106</sup> Although the disclosure forms were recently revised to make clearer when a loan is an adjustable rate loan and how high the monthly payments can rise,<sup>107</sup> the results from our

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102. Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617 (1974); Truth in Lending Act, 15 U.S.C. § 1601 (1968).

103. WARREN & TYAGI, *supra* note 14.

104. See HOUSING ACTION ILLINOIS, FINDINGS FROM THE HB 4050 PREDATORY LENDING DATABASE PILOT PROGRAM (2007) (on file with author).

105. Langer et al., *supra* note 4.

106. See HOUSING ACTION ILLINOIS, *supra* note 104; Swan et al., *supra* note 3.

107. HUD Rule to Simplify and Improve the Process of Obtaining Mortgages, 24 C.F.R. §203 (2008).

fraud simulation studies call into question whether these or future problematic terms can still be deceptively explained away. Due to the problem of consumer vulnerability to deception and mindlessly following explanation scripts,<sup>108</sup> relying upon disclosure forms alone is inadequate to protect borrowers, especially those who possess some of the vulnerability characteristics identified in this article.

Our results similarly suggest that the federal government's primary consumer-oriented response to the subprime lending crisis, trying to make home loan disclosure forms contain important information in a more user-friendly format, is inadequate and therefore misguided. Instead, for the disclosure forms truly to become an important protection against overpriced or otherwise unsuitable home loans, they need to be supplemented with additional protection. For example, a mortgage counseling intervention, both "in-person" and through an interactive computer training program, could be conducted by an independent and trained mortgage counselor who can review the home loan disclosure with the borrower in the manner Congress intended.<sup>109</sup> This counseling, which should be empirically tested for its effectiveness against deceptive presentation of disclosure forms by mortgage brokers and lenders, should also better empower consumers to overcome the many other cognitive and social psychological barriers to rational home loan decision-making identified in our 2010 research.<sup>110</sup> In that research,<sup>111</sup> we engaged in a detailed cost/benefit analysis of mandating mortgage counseling for borrowers when they were seeking home loans that appeared to be overpriced or otherwise contained risky features and concluded that the benefits should outweigh the costs.<sup>112</sup> We also noted that mandating counseling interferes less with consumer autonomy to make decisions than would outright prohibition of certain terms.<sup>113</sup> While some terms may be harmful to most consumers, they may still be beneficial to a small minority of others due to their higher tolerance for risk or other special circumstances.<sup>114</sup>

A second area of law where the results from our research provide insight relates to consumer fraud law. The common law action for fraud in most of the states requires not only that a knowing false statement of material fact is made by the defendant and relied upon by the plaintiff to the plaintiff's harm, but also that the plaintiff show that she "reasonably" re-

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108. See Langer et al., *supra* note 4.

109. Stark & Choplin, *A Psychological Analysis of Disclosures*, *supra* note 3, at 113-130.

110. *Id.*

111. *Id.*

112. *Id.* at 125-30.

113. *Id.* at 111.

114. *Id.*

lied upon the false statement.<sup>115</sup> Moreover, it is a fundamental principle of contract law that individuals are presumed to have read and understood the terms of the contracts that they sign and are generally bound to such terms even if they do not read or understand them.<sup>116</sup> Consequently, if a consumer fails to read the contract and the contract contains a term contradictory to what the salesperson falsely told the consumer, some courts will rule that the consumer failed to “reasonably rely” upon the false statement. Some courts may exclude evidence of the misrepresentation under the parol evidence rule in jurisdictions that limit the fraud exception to “fraud in the execution” versus “fraud in the inducement” and rule that such misrepresentation provides no basis for relief.<sup>117</sup> The consumer is then unable to recover her losses in a common law fraud action.<sup>118</sup> Yet, as Fraud Simulation Study 1 shows, even when a problematic term is highlighted in red, in a larger font than the rest of the document, initialed, and in a short, one-page document, a significant proportion of participants—43.8% in Fraud Simulation Study 1— still failed to read and object to the problematic term. This is a vast improvement over the results of our 2009 work, where a problematic term was buried in a lengthier document and only 4.4% of participants read and objected to it. The difference in results suggests that courts should generally take into account how conspicuous a problematic term has been presented in the contract when determining whether to enforce the term, but courts should be cautioned that even when a problematic term is conspicuously displayed in a contract and noticed by the consumer who then questions it, the term can be deceptively explained to the consumer to persuade the consumer to sign the contract anyway.<sup>119</sup>

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115. Stark & Choplin, *License to Deceive*, *supra* note 3, at 713-21 (containing a table summarizing the laws of all fifty states on the elements necessary for common law fraud).

116. See *Harding County, S.D., v. Frithiof*, 575 F.3d 767, 775 (8<sup>th</sup> Cir. 2009); *Interdonato v. Interdonato*, 521 A.2d 1124, 1133 (D.C. 1987). See also *Rainier Nat'l Bank v. Lewis*, 635 P.2d 153, 155 (Wash. Ct. App. 1981) (explaining that in the absence of fraud, deceit or coercion, one who has knowingly affixed his signature to an agreement is bound by the contract); *Pers Travel, Inc. v. Canal Square Assocs.*, 804 A.2d 1108, 1110 (D.C. 2002) (stating that a person “who signs a contract which he had an opportunity to read and understand is bound by its provisions unless enforcement of the agreement should be withheld because the terms of the contract are unconscionable”); *Phoenix Leasing, Inc. v. Kosinski*, 707 A.2d 314, 317 (Conn. App. Ct. 1998) (explaining that “[t]he general rule is that where a person of mature years and who can read and write, signs or accepts a formal written contract, . . . it is [that person’s] duty to read it and notice of its contents will be imputed to [that person] if [that person] negligently fails to do so”) (internal citation omitted).

117. See, e.g., *Castellana v. Conyers Toyota, Inc.*, 407 S.E.2d 64, 67-68 (Ga. Ct. App. 1991) (There is a duty to read and understand the contract and to verify the contract terms and representations, which bars persons from relying on what they are told without independently verifying.) See also *supra* note 5 (discussing courts’ different approaches to the fraud exception to the parol evidence rule).

118. See *Foremost*, 693 So.2d 409.

119. *Id.*

The basic foundation of contract law, that both parties have read and agreed to the terms of a contract they sign, is inaccurate in the context of a consumer transaction where the contract is typically on a take-it-or-leave-it basis<sup>120</sup> and the consumer is not represented by an attorney who reviews the contract on her behalf.<sup>121</sup> Yet courts generally need to presume both that consumers read and understand the contracts they sign and that an authentic agreement took place in order to prevent consumers from being able to argue that they did not truly agree to the specifics of a deal whenever they are later disappointed regarding the agreement.<sup>122</sup> Courts need to maintain a largely false presumption of assent to all terms in the contract in order to safeguard the goal of certainty of contract.<sup>123</sup> While this presumption may generally be necessary, we contend it is inappropriate in the context where a consumer is alleging that the contract term at issue is inconsistent with what they had been promised and when the presumption would then bar the consumer from being able to prove the inconsistent prior promise or representation was made in an action for fraud.

In addition, even when a consumer does read the problematic term in the contract, such reading will not necessarily cause the consumer to object to it. The results of the follow-up survey to Fraud Simulation Study 1 suggest that this failure on the consumer's part is primarily due to consumers' vulnerability to deception, to explanation scripts and to the phenomena of sunk costs. Some consumers are unable to detect lies or are uncomfortable with calling someone a liar, feel pressure to conform with the social norm to sign contracts presented to them, and trust in the salesperson based upon the concept of reciprocity of trust and respect. Consequently, if a consumer relies upon a false, but implausible, explanation for the presence of a term in the contract that contradicts what has been promised, or an implausible explanation as to the effect of the presence of this term in the contract, it is inappropriate for courts to rule that this causes such reliance to be "unreasonable."<sup>124</sup> In addition, courts should be made aware of the vulnerability characteristics identified in the follow-up survey, especially if those who possess these vulnerability characteristics are more likely to be persons of a lower socio-economic status, when determining whether the consumer had "reasonably" relied upon deceptive explanations when the consumer brings a common law fraud action.<sup>125</sup>

In order to understand why the common law action for fraud required reasonable reliance rather than simple reliance, it is important to note that

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120. BLACK'S LAW DICTIONARY 342 (8<sup>th</sup> ed. 2005).

121. Stark & Choplin, *License to Deceive*, *supra* note 3, at 625.

122. *Id.* at 653-56.

123. *Id.*

124. Stark & Choplin, *License to Deceive*, *supra* note 3, at 620-26.

125. *Id.*

common law fraud applies to any fraud action, whether between sophisticated parties or merchants and consumers.<sup>126</sup> When deception occurs between two sophisticated parties in a business transaction, they tend to be represented by attorneys who will carefully review all of the contract terms and negotiate for changes to problematic terms before the parties sign the contract. In this context, where negotiation is available, it makes more sense to require reasonable reliance. The duty to read and the barring of a fraud action based upon an allegedly false statement that is inconsistent with a term in the written, signed contract promotes certainty of contractual obligations and does not result in unfairness to the parties. But, when applied to consumer transactions, where consumers fail to read the terms of the contracts they sign and are not represented by attorneys who do so on their behalf, the reasonable reliance requirement under the common law action for fraud can lead to unfairness to consumers and a license to deceive to the companies supplying them with goods and services.<sup>127</sup>

Due to the difficulty of prevailing in a common law action for fraud, state legislatures began in the 1960s to enact consumer fraud and deceptive practices statutes to better protect consumers by making it more economically feasible for consumers to bring statutory fraud actions by awarding attorneys' fees to a prevailing consumer under the statute and reducing the required elements for a cause of action.<sup>128</sup> In most of the states, this reform changed the requirements for bringing claims so that consumers no longer had to prove that the seller had "knowingly" made a false statement and no longer had to prove that the consumer had "reasonably relied" upon the false statement, and instead required them to show simply that the false statement "caused" the consumer to be economically harmed.<sup>129</sup> However, state courts in Georgia, Indiana, Maryland, Michigan, Ohio, and Pennsylvania have interpreted the "causation of harm" element in these statutes to mean reasonable reliance.<sup>130</sup> Although causation of harm in this context is similar to "reliance on the false or deceptive statement," these six states' courts additionally require that the reliance be "reasonable," since that is how reliance was usually applied under the common law action for fraud.<sup>131</sup> Courts that interpret the causation of harm element to mean reasonable reliance fail to take into account the legislative purpose of abandoning the onerous elements for a common law fraud action when a

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126. *Id.*

127. *Id.* at 706-12.

128. Deborah Pogrud Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 484 (2008).

129. Stark & Choplin, *License to Deceive*, *supra* note 3, at 713-21.

130. *Id.*

131. *Id.*



claim is raised by a consumer rather than a sophisticated company represented by attorneys in the transaction.

The results of our fraud simulation studies strongly militate against court interpretation of the causation element in consumer fraud and deceptive practices statutes to mean reasonable reliance. Many companies include provisions in their contracts stating that the consumer agrees that no salesperson has made any representations to the consumer about the product or service and that the consumer is not relying on any representations other than what is in the contract.<sup>132</sup> Companies include no reliance provisions in their contracts in an attempt to influence courts to rule that there is no valid action for fraud because the consumer could not reasonably rely upon any false or deceptive statement when they agreed in the contract that no representations were made or relied upon.<sup>133</sup> Yet companies know that consumers will often ask the salesperson questions regarding the product, service, or terms of its purchase, including occasionally asking about the meaning of a term in the contract, and, as supported by our fraud simulation studies, that consumers will often rely upon what they have been told. The results of our studies suggest that courts should not enforce this type of exculpatory provision, since rather than reflecting reality, its enforcement instead creates a license for unscrupulous companies to deceive consumers.

In summary, based upon the results of our fraud simulation studies we propose four recommendations relating to the law of consumer fraud. First, in a common law fraud action, courts should require only a showing of actual reliance as opposed to reasonable reliance in consumer transactions. This showing would apply to either a specific contradictory term or a more general no reliance/exculpatory term. Second, when a consumer has read the contract and asks about a problematic term, if the consumer relies upon an implausible explanation, courts should not rule this reliance unreasonable. Third, when interpreting a consumer fraud and deceptive practices statute, courts should not imply reasonable reliance from a "causation" element in the statute. Finally, courts that currently narrowly limit the fraud exception to the parol evidence rule to fraud in the execution should instead apply the fraud in the inducement standard to provide relief to consumers who have relied upon false representations that induced them to sign contracts when the deception relates to a problematic term in the contract rather than require that the misrepresentation relate to the nature of the contract they are signing.

The third area of law that our research provides some insights into involves how courts and legislatures should treat "unfair" contract terms

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132. See, e.g., *id.* at 652-53.

133. *Id.* at 618-620.

even where there has been no prior misrepresentation relating to the terms of the contract. Three facts suggest that courts should consider expanding the scope of what is considered an unconscionable term in a consumer contract, or that legislatures should enact laws that prohibit specific terms in the context of certain consumer contracts. The first fact is that typically only a small percentage of consumers carefully reads and understands the terms of the contracts they sign, a point supported in the studies reported here. The second fact is the demonstrated susceptibility of consumers to deception and mindlessly following explanation scripts that can be used to explain away problematic contract terms when they do read<sup>134</sup> and the influence of the other four psychological phenomena described in Section III in causing consumers to sign contracts containing problematic terms. Third, consumers are typically unable to negotiate for a change to the contract's terms in the context of a typical consumer transaction. These three facts make it likely that consumer contracts will contain terms that are very one-sided in favor of the drafter of the contract and that consumers will still be entering into these contracts. Nevertheless, due to the goal of certainty of contract and the presumption that people read the contracts they sign (or should do so), a court very rarely rules that a term in a contract is unconscionable and unenforceable.<sup>135</sup> Equally problematic is that some of the standards courts articulate as to what would make a term unconscionable are vague and difficult to apply. For example, in one classic articulation, a court should enforce each contract term unless it is so overly harsh, one-sided, or oppressive that it "shocks the court's conscience."<sup>136</sup>

By articulating a standard that is so difficult to meet, courts further the goal of certainty of contract but fail adequately to take into account the fact that a true negotiated agreement may not occur in a typical consumer contract. Consequently, consumers are likely to be surprised by highly unfair contract terms. Based upon our data on vulnerability factors, it would make sense to reform the unconscionability test to direct courts to take into account the vulnerability factors identified in Fraud Simulation

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134. Langer et al., *supra* note 4.

135. See, e.g., *CC-Aventura, Inc. v. The Weitz Co.*, 2008 WL 691687 (S.D. Fla. 2008) (explaining that the Florida policy that unconscionability is a highly disfavored defense and instructing courts not to employ that concept to relieve a part of an individual's obligation under a contract because he has made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him); Warkentine, *supra* note 65, at 472 (stating that the unconscionability doctrine places an extremely high burden on the challenging party that most plaintiffs will have a hard time making the showing required for a court to find unconscionability).

136. See, e.g., *Arguelles-Romera v. Superior Court*, 184 Cal. App. 4th 825, 843-44 (Cal. Dist. Ct. App. 2010) (explaining that "[s]ubstantive unconscionability traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms") (internal citations omitted); *Jackson v. S.A.W. Entertainment Ltd.*, 629 F. Supp.2d 1018, 1024 (N.D. Cal. 2009) (applying same test).

Study 2 and in the follow-up survey when considering whether any terms in the contract the consumer signed are unconscionable. Indeed, courts already focus on more than just the substance of the contract in determining if there has been unconscionability and consider “procedural” forms of unconscionability (such as the age of the party claiming unconscionability—one of the factors reflected in our data) together with “substantive” unconscionability.<sup>137</sup> For example, one court identified the following factors of procedural unconscionability, *inter alia*: the “age, education, intelligence, business acumen and experience” of the party claiming unconscionability, the “relative bargaining power” of the parties, “who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract.”<sup>138</sup> Courts should expand this list to include the additional characteristics our data reflect that make some consumers more vulnerable to signing contracts containing highly problematic terms, namely: consumers with lower incomes and generally from a lower socioeconomic status who are more likely to want to be perceived as cooperative and more eager to be treated with respect.

Other standards besides the typical common law tests for unconscionability have been articulated that try to better balance the goal of certainty of contract with the goal of fairness. Under the Restatement (Second) of Contracts, a court would be directed not to enforce a term in the contract if there is a term in a consumer transaction contract that the company has reason to know the consumer would not agree to had the consumer known the term was in the written contract.<sup>139</sup> The Restatement test is vague, lacking a clear standard for transactional certainty or even-application by the courts. The European Union’s Directive on Unfair Contract Terms also articulated a standard that would likely lead to more terms being struck than under the current American common law unconscionability standard. Under the EU standard, if a term in the consumer transaction contract causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer, and if the term was not specifically discussed and negotiated between the consumer and the company, a court should not enforce that term.<sup>140</sup> The EU test is costly

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137. See, e.g., *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Cal. Ct. App. 1997); *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 6 P.3d 669, 767 (Cal. 2000); and *Cottonwood Financial v. Estes*, 784 N.W.2d 726, 730 (Wis. Ct. App. 2010).

138. *Cottonwood Financial, LTD v. Estes*, 784 N.W.2d 726, 730 (Wis. Ct. App. 2010).

139. RESTATEMENT (SECOND) OF CONTRACTS §211(3) (1981). See, e.g., *Broemmer v. Abortion Services of Phoenix*, 840 P.2d 1013 (Ariz. 1992); and *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984).

140. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 131-41 (2003) (discussing the EU test for unconscionability).

because the company would be forced to negotiate each potentially unfair clause to avoid a later challenge. Because of the ambiguity and likely difficulty in applying the Restatement test and the added expense of attempting to comply with the EU test, it might make more sense to attempt to identify specific unfair terms routinely found in consumer contracts in various contexts and create rules or legislation to regulate or prohibit those specific unfair terms. The advantages of the regulatory approach are that it would make clear what terms would be prohibited, preserving the important goal of certainty of contract, while at the same time furthering the equally important goal of creating a fair and just system of law. On the other hand, under the regulatory approach companies could always create new problematic terms not expressly covered by the statute. In addition, it will be a difficult process for a legislative body to enact regulations limiting or prohibiting certain identified unfair contract terms in different consumer contract contexts. This difficulty is due to many factors, including potential lack of consensus on the need or benefits from this type of protection and pressure from various special interest groups who would find this type of reform against the interests of companies who supply goods and services to consumers.

In the follow-up survey to Fraud Simulation Study 1, we queried participants as to their degree of approval or disapproval with each of: (i) the EU test, (ii) the Restatement test, (iii) the common law test, (iv) a made-up standard (that simply stated courts should not enforce “unfair” contract terms), and (v) the regulatory approach. We also asked them to explain their responses. Participants rated greatest agreement with the regulatory approach, expressing agreement with it at an average of 3.89 on a 5-point scale, and the least agreement with the made-up standard. They rated more agreement with the common law test than the EU test or the Restatement test.<sup>141</sup> To the extent the justice system strives to be consistent with the values, expectations, and thoughts of the general population, the results from the follow-up survey provide support for the idea of expanding consumer protection through regulation, but not necessarily through expanding upon the common law test in the manners set forth in the EU test or the Restatement test.

Finally, the results from both fraud simulation studies caution against over-reliance on protections based solely upon making problematic terms conspicuous. In the context of a home purchase, regulators could require that the waiver of the warranty of habitability be conspicuously presented in the purchase contract.<sup>142</sup> Due to the high level of vulnerability of some

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141. See *infra* Table 4.

142. Our data in Fraud Simulation Study 1 reflected that fewer consumers failed to notice and object to a problematic term in a contract when the term was more conspicuously highlighted in a shorter form contract, compared with the percentage who failed to do so in the fraud simulation study

consumers to deception through, among other things, following explanation scripts, for many consumers making a problematic term more conspicuous will not help them be able to negotiate for the term to be removed from the contract.

Instead, the results of our fraud simulation studies and follow-up survey suggest that to protect consumers from unduly unfair contract terms while still promoting the goal of certainty of contract, legislatures need to enact regulations that attempt to identify and prohibit specific categories of highly unfair terms in various consumer contract contexts. Another appropriate example of when laws should be created by a legislature to prohibit certain widespread terms or practices that are highly unfair to consumers is the recent prohibition by Congress of “yield spread premium[s]” in the Dodd-Frank Act of 2010.<sup>143</sup> When a term is highly unfair to all consumers—versus problematic to some but not all consumers, such as adjustable rate loans—it makes more sense to prohibit the term than to try to better disclose its existence and risks in the contract.

We identify three categories of potentially unfair contract terms for legislatures to consider prohibiting in various consumer contexts even when fraud or deception is not present: (i) terms that take away rights the consumer would otherwise have under the law, (ii) terms that provide for non-parallel treatment, such as no remedy upon default to the consumer but extensive remedies to the company, or (iii) provisions inconsistent with what the consumer thought were the basic terms of the deal, such as being told the price of the good is “X”, but other terms in the contract significantly increase the cost of the good and are not anticipated by the typical consumer. Legislatures should also consider requiring consumers to be represented by an attorney in the two contexts where consumers have the most to lose: the purchase of a home and obtaining a loan secured by the consumer’s home. To the extent that legislation fails to prohibit a specific highly unfair contract term, the presence of a specially trained attorney representing the consumer can help the consumer to identify and potentially bargain for the removal of such terms.<sup>144</sup> Without such protections, consumers will continue to fall prey to highly unfair contract terms due to the numerous cognitive and social psychological barriers to reading,

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presented in *License to Deceive*. Stark & Choplin, *License to Deceive*, *supra* note 3. Nevertheless, a large percentage of consumers was still deceived into signing the contract even when they noticed the term. See, e.g., *Eckel v. Orleans Construction Co.*, 519 A.2d 1021 (Pa. 1986) and *Burbo v. Harley C. Douglass, Inc.*, 106 P.3d 258 (Wash. Ct. App. 2005) for examples of jurisdictions that require that a waiver of implied warranty of habitability provision be conspicuous to be enforceable.

143. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639b(c)(4)(A) (West 2010), Pub. L. No. 11-203 § 1403(c)(4)(A), 124 Stat. 1376, 2140 (2010).

144. The law should require that the attorneys handling these type of transactions receive special training and licensing as experts in these areas to ensure that if the consumer is required to hire an attorney for these two types of transactions that the attorney in fact possesses the knowledge and training to provide real value to their clients.

understanding, and successfully bargaining for a contract with more fair terms, including the tendency of consumers to mindlessly follow explanation scripts.

## VII. CONCLUSION

The results of the two fraud simulation studies and follow-up survey demonstrate that many consumers are vulnerable to deception even when they notice problematic terms in contracts (*i.e.*, terms inconsistent with the consumers' interests and contrary to what was represented or promised) and question salespeople. Salespeople can deflect consumer concerns by responding in a deceptive fashion to their questions, even when the deceptive explanation for the term would be considered senseless to a rational consumer. The results from the studies support the hypothesis that consumers are vulnerable to this type of deception based upon the five psychological phenomena we discussed and empirically tested: (i) communication rituals and explanation scripts, (ii) sunk cost effects, (iii) difficulty in detecting and acknowledging lies, (iv) reciprocity of trust, and (v) social norms to sign contracts as presented. Our investigation also found that consumers with certain identified vulnerability characteristics are more likely to accept deceptive explanations than other consumers.

The results pose important implications for several areas of law including the reliance on mandatory home loan disclosures to empower consumers to make wise home loan decisions, the common law action for fraud, statutory causes of action for consumer fraud, the fraud exception to the parol evidence rule, and the law of unconscionability. Modifications to these areas of law to better account for consumer vulnerability to deception reflected in the studies and survey are necessary to protect consumers. The results from our psychological investigation of consumer vulnerability to fraud also supports a policy prescription for legislatures to collect data on contract terms in the most important consumer contexts, such as home loans and home purchases and consider enacting laws that prohibit specific terms that are highly unfair. By prohibiting specific, highly unfair contract terms, rather than having courts articulate a much more broadly based definition of unconscionability, lawmakers can better promote both the policy of certainty of contract and the policy of fairness in contract formation and terms.

**Table 1: Trust and Cooperation**

Question Asked Rating: 1="No, not at all" 5="Yes, completely"

	Signed	Did not Sign
Did you trust the researcher?	4.54	3.77**
Did you believe what the researcher told you about the red highlighted portion of the bogus consent form?	3.81	3.12*
Did you feel free to question the researcher?	3.95	4.49
Did you feel that you could negotiate the terms of the form?	2.72	2.80
Did you feel rushed?	2.72	2.03*

Rating: 1="Not Important" 5="Very Important"

How important was it to you that the consent form be consistent with what you originally understood was the amount of time the experiment would take and the amount of credit you would receive for your participation?	3.93	4.20
How important was it to you that you were perceived as cooperative to the researcher?	4.02	3.14**
How important was it to you that you were perceived as trustworthy by the researcher?	3.85	3.29
How important was it to you to be treated with respect by the researcher?	4.36	4.11

Note: \* =  $p < .05$ , \*\* =  $p < .01$  by Fisher's Least Significant Difference Test.

**Table 2: Social Norms & Signing Scripts**

Question Asked Rating: 1="Do not agree at all" 5="Agree completely"	Signed	Did Not Sign
I know what to be looking for when reading and before signing a consent form.	3.46	4.06*
I feel that I am not expected to read all of the words in a consent form before signing one.	2.79	2.26*
In deciding whether to read and sign the bogus consent form, I was influenced by what I had previously been told on how much credit I would receive for the time I put in on an experiment.	4.02	3.66
No matter what the bogus consent form said, I assumed that I would receive the same amount of credit for the time spent on this experiment as I had previously received for other experiments.	4.11	2.86***
In deciding whether to read and sign the bogus consent form, I was influenced by the fact that I had just participated in an experiment and was already sitting there to participate in the second experiment.	4.00	3.49
In deciding whether to sign the bogus consent form, I was influenced by the fact that I felt I was expected to sign the consent form.	4.19	2.66***
In deciding whether to read the bogus consent form, I was influenced by the length of the bogus consent form.	3.15	2.23***
In deciding whether to read the bogus consent form, I was influenced by the fact that a portion of the form was highlighted in red.	3.40	3.94*
In deciding whether to sign the bogus consent form, I was influenced by the fact that the portion of the form highlighted in red was inconsistent with what I had originally been told.	3.27	4.47***

Note: \* =  $p < .05$ , \*\* =  $p < .01$ , \*\*\* =  $p < .001$  by Fisher's Least Significant Difference Test.



**Table 3: Reasons Not to Read**

Question Asked Rating: 1="Do not agree at all" 5="Agree completely"

I didn't read the bogus consent form, because I was lazy.	3.44
I didn't read the bogus consent form, because it was boring.	3.23
I didn't read the bogus consent form, because I have read other Consent forms and I presumed that they all read the same.	4.06
I didn't read the bogus consent form, because I presumed that there was nothing problematic in the form because all experiments at DePaul must conform with federal standards and be approved by the IRB (Institutional Review Board).	4.30
I didn't read the bogus consent form, because I didn't think it contained anything important for me to know or agree to.	3.73
I didn't read the bogus consent form, because I have never heard of anyone having a problem with the consent forms they have signed.	3.25
I didn't read the bogus consent form, because it was too long.	2.56

**Table 4: Beliefs Regarding Standards for Enforcement of Unfair Contractual Terms**

Question Asked Rating: 1="Do not agree at all" 5="Agree completely"

I think if there is a term in the consumer transaction contract that causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, and if the term was not specifically discussed and negotiated between the consumer and the company, the law should be that a court should not enforce that term.	3.33
I think that if there is a term in a consumer transaction contract that the company has reason to know the consumer would not agree to that term had the consumer known the term was in the written contract, the law should be that a court should not enforce that term.	3.29
I think that all of the terms in a consumer transaction contract that the consumer signs should be enforced by the courts unless the term is so overly harsh, one-sided, or oppressive that it "shocks the court's conscience."	3.44
I think that if a consumer contract contains "unfair terms" a court should not enforce the unfair terms.	3.15
I think that legislatures should review consumer transactions to identify terms that would be considered unfair and prohibit the enforcement of such terms.	3.89