Regulating Information in Contractual Relationships

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Abstract

While much has been written about how individual rules of contract law impact parties’ sharing of information, we do not yet have a general theory of the legal regulation of information in contractual relationships. In his recent article, Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere, 92 Va. L. Rev. 565 (2006), Richard Craswell starts in on the project of providing one. This essay critically examines Craswell’s arguments and discusses what such a general theory should look like. One of my central theses is that such a theory should keep apart two regulatory approaches: the use of scientific methods to study the informational effects of individual transaction elements, and interpretive approaches, which take as their object the meaning and veracity of such elements. The essay also discusses legal liability for implicit misrepresentations and the role of everyday interpretive norms in the law of misrepresentation in general.

The essay first summarizes what I take to be Craswell’s central claims about information sharing, summarized by his rejection of the “quantized view” of information. I then discuss the similarities and differences between the two contract doctrines that are most obviously designed to regulate information sharing: nondisclosure and misrepresentation. This lays the groundwork for a detailed analysis of Craswell’s claims about the law of misrepresentation. Craswell uses Grice’s theory of conversational implicature to explain how separate pieces of information can be bundled together in a single speech act. I argue that Craswell wrongly assumes (contrary to Grice’s theory) that it is difficult to divorce implicit misrepresentations from the potentially beneficial speech acts that contain them. This error leads Craswell to overstate the similarities between misrepresentation and nondisclosure. The last part of the essay distinguishes two regulatory approaches, which I label “causal-predictive” and “interpretive”. Causal-predictive regulation, which Craswell advocates broader use of, employs the methods of behavioral economics to mandate how transactions should be structured. The law of misrepresentation, I argue, uses a fundamentally different method, one that focuses not on causation but on meaning and veracity. I make some general observations about the proper scope of these different regulatory approaches, their relative merits, and the prospects for combining them in the ways Craswell recommends.
Economic analyses of contract law are increasingly holistic in their approach. While early theories emphasized the law’s effect on the perform-breach decision, subsequent work has examined how legal liability influences the parties’ behavior through the life of contractual relationships. This begins with the parties’ investment in finding one another and continues, in the case of nonperformance, through their post-breach actions.\(^1\) This broader perspective has brought into view previously neglected aspects of the law of contracts. Thus while the scholarship continues to concern itself with the law’s impact on agreement, reliance and performance, theorists increasingly also consider the law’s influence on search and investment decisions, communication between the parties, post-breach cooperation and recovery, and the like.

The new holism among economists has not much influenced philosophically oriented theories, where the major theme continues to be the relationship between contract law and the morality of promising, with the focus being on the duty to perform and the legal response to breach.\(^2\) At the same time, while economic accounts have discussed other aspects of contract law, few economists have looked up from the individual rules they study to provide a comprehensive accounts.

Richard Craswell is an exception to the latter generalization. In his recent article, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, Craswell sketches a general theory of a previously neglected aspect of contract law: the legal regulation of information within contractual relationships.\(^3\) Craswell

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Regulating Information argues that we would do well to apply lessons from consumer protection law when considering the common law doctrines of nondisclosure and misrepresentation. The experience of the Federal Trade Commission and other agencies, he maintains, demonstrates that information works in ways that scholarship on these common law doctrines has failed to recognize, and that the doctrines themselves are not attuned to. Legal scholars in particular have been held captive by a false picture of how information works, which Craswell labels the “quantized view.” According to the quantized view, information is shared between the parties in discrete packets, each of which is either true or false. In fact, Craswell observes, multiple pieces of information often come bundled together in communications that can be more or less effective and can negatively impact the flow of other information. This reconceptualization suggests to Craswell both a new way of thinking about the legal regulation of information and practical reforms to the doctrines of nondisclosure and misrepresentation.

Craswell’s argument presents a significant challenge to earlier theories of misrepresentation and nondisclosure, my own included. More importantly, his recommended reforms would represent a radical change in the legal regulation of information-sharing within contractual relationships. This Essay critically considers Craswell’s argument and the conclusions he draws from it.

I advance two theses. The broader one, which I do not get to until Part IV, concerns the methods of regulating information in contractual relationships. I distinguish two fundamentally different approaches to such regulation, which I label “causal-predictive” and “interpretive”. Causal-predictive regulation, which Craswell takes as his model, employs the empirical tools of behavioral economics and issues detailed mandates regarding the structure specific transaction types. Interpretive regulation, such as the common law of misrepresentation, does not investigate the causal properties of transaction elements, but focuses on the meaning and veracity of communications between the parties. Any general theory of the legal regulation of information must take the differences between these regulatory approaches into account. I make some observations about the proper scope of each, their relative merits, and the (in my view limited) prospects for combining them in the ways Craswell recommends.

The second thesis, which I develop in Part III, is about the law of misrepresentation. My subject here is Craswell’s analysis of implicit

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misrepresentations, which includes a critique of Ian Ayres and my theory of the law of promissory fraud. Craswell argues that prohibiting implicit misrepresentations is sometimes practically equivalent to imposing a duty to disclose. I argue that this is wrong, and that Craswell neglects the fact that an implicit misrepresentation can always be avoided with a disclaimer. Explaining why this is so will require following Craswell into the weeds of Paul Grice’s theory of conversational implicature. Going there, however, will have a payoff. Close attention to the logic of implicit misrepresentations allows me to make some more general observations about the relationship between the law of misrepresentation and our everyday interpretive practices, laying the groundwork for Part IV’s description of different regulatory approaches.

Parts I and II provide necessary background for the arguments in III and IV. Part I summarizes what I take to be Craswell’s central theoretical claim: his rejection of the quantized view. I suggest that Craswell’s argument can be divided into three related theses: that the law should pay more attention to the effectiveness of different methods of information-sharing; that it should pay more attention to the relative importance of different possible communications, since the sharing of one piece of information can interfere with the sharing of others; and that multiple pieces of information often come bundled together, so that regulating the communication of some information often has unintended consequences for the communication of other information. Part II then describes the relationship between the two common law doctrines that most obviously govern information transfers: nondisclosure and misrepresentation. While the Restatement treats nondisclosure as a species of misrepresentation, I identify several are significant differences between the doctrines. Most importantly for my purposes, a party can misrepresent information only if she has said something about it, while a violation of the duty to disclose does not presuppose that either party has addressed the information in question.

I. Craswell’s central claims

Craswell argues that contracts scholars have not paid sufficient attention to the law of nondisclosure and misrepresentation. Moreover, the scholarship that has addressed these doctrines adopts a false picture of how information works, which Craswell labels the “quantized,” or “particle-based,” view. According to the quantized view,

all information can be decomposed into its smallest particles or bits; and each bit will consist of only a single assertion, so each bit must therefore either be true (accurate) or false (inaccurate). In
addition, the quantized view also assumes that disclosure is a
binary or an all-or-nothing trait (when applied to these smallest
possible bits of information). Under the quantized view, therefore,
there can be no such thing as greater or lesser degrees of disclosure
of any single bit.\footnote{92 Va. L. Rev. at 569.}

Craswell identifies three related features of information sharing that the
quantized view fails to capture, which I will label “effectiveness”,
“interference” and “bundling”. (This is my way of dividing up Craswell’s
argument, not his.\footnote{While I present these as separate aspects of information sharing, they are connected. For
example, interference is often the result of bundling, for bundled implicit representations
can interfere with other communications; effectiveness is impacted by interference, as the
effectiveness of a single communication depends on the informational environment as a
whole; and interference can depend on effectiveness, because a more effective
communication will likely interfere with more other information. Each feature, however,
gives rise to its own regulatory concerns, so it makes sense to distinguish them for
analytic purposes.})

First, the quantized view wrongly assumes a binary picture of
information transfers, according to which information is either shared or
not shared, with no shades of gray in between. In the real world, a chunk
of information can be shared in various ways, and a given means of
communication will disclose more or less information, and be more or less
effective in doing so. Craswell provides a wealth of examples from
consumer protection law, such as studies on the comparative virtues of
presenting information in relative or absolute forms, and in positive or
negative terms.\footnote{92 Va. L. Rev. at 581-93.} His conclusion is that the law should pay attention to not
only \textit{what} information is shared, but also \textit{how} it is communicated. The law
should attend not only to the message, but also to the medium.

The quantized view also wrongly pictures communications as
isolated occurrences, each disconnected from the other. In fact, the sharing
of one piece of information often negatively impacts the sharing others.
Such interference results both from both the decreased effectiveness of
each communication as new ones are added (time, space and attention are
all limited), and from the false inferences hearers will draw from one
disclosure that confuse their understanding of other information (see the
description of bundling below). The Federal Trade Commission (FTC) has
found empirical evidence, for example, that mortgage brokerage fee
disclosures interfere with consumers’ ability to evaluate the positive
benefits of using a broker in obtaining a low-cost loan.\footnote{92 Va. L. Rev. at 584.} The upshot of this
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claim that the costs of communicating information include not only the usual transaction costs (obtaining the information, paying for the medium, time, etc.), but also opportunity costs: effective disclosure one piece of information can prevent the effective disclosure of another. We must therefore prioritize. Where multiple pieces of information meet threshold disclosure requirements, lawmakers should attend to how the communication of each might interfere with the communication of the others, rank their relative importance, and regulate accordingly.

Finally, there is the quantized view’s assumption that communications are decomposable: that information transfers can always be unpacked into their simplest informational units, each true or false, and each individually regulable. In truth, multiple pieces of information often come bundled together. Where this is so, eliminating false or harmful information can prevent true or otherwise beneficial communications. Craswell considers, for example, the argument that the real wrong in *Red Owl v. Hoffman* was Red Owl’s implicit representation that it intended to give Hoffman a franchise, or that it was likely to do so. Assuming there was such an implicit misrepresentation, Craswell argues, there was also a hidden cost of avoiding it. “If representations about Red Owl’s intentions are inferred from the very fact that it offered Hoffman a franchise, then the only way Red Owl could have said less would have been to not offer the franchise at all, and that would have eliminated any chance whatsoever for Hoffman to get the franchise” – possibly leaving Hoffman worse off.

Effectiveness, interference and bundling suggest to Craswell that when one party claims that the other violated a duty to share information (whether by failing to disclose it or by misrepresenting it), the law should attend to three related question. As between all the information that the parties might have communicated, was the information at issue important enough to warrant the costs of interference? How could that information have been communicated most effectively at a reasonable cost? And what are the possible unintended consequences of regulating such communications, given the other information that might come bundled with them? To date, Craswell argues, scholarship on the legal regulation of information in contracts has neglected all three. He therefore proposes a new general theory of how we should describe and evaluate those laws.

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9. 92 Va. L. Rev. at 578.
10. See 92 Va. L. Rev. at 608 note 129 (citing sources); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 268-70 (Wis. 1965). See also infra at 14-15.
11. 92 Va. L. Rev. at 612.
II. Nondisclosure and misrepresentation

The two common law doctrines that most obviously concern themselves information sharing among contracting parties are nondisclosure and misrepresentation, or in Kim Sheppele’s helpful shorthand, the law of secrets and the law of lies.\(^{12}\) Craswell argues that the scholarship on each has wrongly assumed the quantized picture of information. My own work, which Craswell critically discusses, has focused on the law misrepresentation. This Part describes the similarities, connections and differences between misrepresentation and nondisclosure. I argue in Part III that Craswell wrongly imports considerations more pertinent to the law of nondisclosure into his analysis of misrepresentation.

Black-letter law in the United States treats nondisclosure and misrepresentation together.\(^{13}\) According to the Second Restatement of Contracts, where a party has a duty to disclose some fact, her failure to do so is “equivalent to an assertion that the fact does not exist,” and therefore qualifies as a misrepresentation.\(^{14}\) That is, according to the Restatement, an illicit secret is a special type of lie.

One explanation for the doctrinal marriage of nondisclosure and misrepresentation is that contract litigants who allege secrets often also allege lies. The familiar facts of *Laidlaw v. Organ* provide a nice example. In that case, Justice Marshall famously concluded that Hector Organ, a tobacco buyer, had no duty to disclose to Francis Girault, who represented the seller, the news that the War of 1812 had just ended.

The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion that he was not bound to communicate it.\(^{15}\)

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\(^{14}\) Rest. 2d Contr. §§ 161, 159. The equation between fraud and nondisclosure was even starker in the First Restatement, which defined “fraud” to include “non-disclosure where it is not privileged, by any person intending or expecting thereby to cause a mistake by another to exist or continue . . .” Rest. (1st) Contr. § 471.

\(^{15}\) 15 U.S. at 178, 195 (1817).
The case also involved, however, an allegation of misrepresentation. On the morning of the sale, Girault allegedly asked Organ “if there was any news which was calculated to enhance the price or value of the article about to be purchased,” in response to which Organ remained silent. The seller’s attorneys argued that “[t]his reserve, when such a question was asked, was equivalent to a false answer, and as much calculated to deceive as the communication of the most fabulous intelligence.” This argument – that Organ not only kept a secret, but told a lie – accounts for Marshall’s qualification that “at the same time, each party must take care not to say or do any thing tending to impose upon the other,” and the court’s decision to vacate and remand for further factual determinations.

It is no accident that allegations that a person kept illicit secrets are often accompanied by claims that she also lied, especially when the litigants were contracting with one another. Pre-formation negotiation and post-formation coordination consist of talk, and some of that talk is aimed at sharing or discovering information. When a secret-keeper is asked a question that touches on her secret (as in Laidlaw), a lie might be the only way to avoid disclosing it. Alternatively, by expressly sharing some information, a secret-keeper can implicitly represent other facts that are contrary to his secret knowledge. The more communication there is between the parties, the more likely it is that information that should be disclosed must be to avoid misrepresentation.

There are also conceptual connections between secrets and lies. A lie is a tool for hiding the true facts, and can be defeated by their disclosure. Contrawise, where a fact’s nondisclosure violates mutually understood standards of fair dealing, the act of entering into negotiations or into an agreement might be taken to implicitly represent that it does not pertain. Secrets and lies are also similarly motivated. Where the parties are in an exchange relationship, the function of both is to put the other side at an informational disadvantage. Both the liar and the secret-keeper hope to use their special knowledge to secure a larger share of the gains of trade. Finally, from an economic perspective secrets and lies cause the same

16 15 U.S. at 183, 189-90.
17 15 U.S. at 188-90.
18 15 U.S. at 195.
19 Sheppele makes this point: Both the lie and the half-truth, then, can be seen as types of secrets. The motivating force for many lies and half-truths is the desire to maintain a secret. Both the lie and the half-truth hide secrets by aggressively forwarding a version of the knowledge that is hidden. The lie substitutes false information while the half-truth selectively reveals the truth. In both cases, the final impression masks the existence of the secret as well as the content of the secret itself. Sheppele, Legal Secrets at 23.
sorts of harms: allocative inefficiency and higher transaction costs. The buyer who is misinformed as to the goods’ true value, whether because of a secret or because of a lie, is more likely to pay more than they are worth to her, and perhaps also more than they are worth to a third party who values them more highly. And if the buyer thinks the seller may be keeping secrets or telling lies, she is going to expend resources to get the information independently. All of these costs might be avoided by giving the seller a legal reason to reveal the secret or avoid the lie.

A final explanation for the legal classification of secrets as special sorts of lies can be found in the common law’s expansive use of criminal fraud. As Samuel Buell has recently pointed out, prosecutors and courts tend to view fraud as a “residual crime,” one that is not limited to misrepresentations, but includes dishonest dealings in general. In the latter category of cases, the wrong often lies more in the manipulative violation of an extralegal norm, custom or expectation than in any misrepresentation per se. Federal mail and wire fraud statutes, for example, define “defraud” to include schemes or artifices designed “to deprive another of the intangible right of honest services.” Such crimes tend to lump lies, secrets and other wrongs together, blurring the conceptual boundaries between misrepresentation and nondisclosure.

For all these points of contact, however, duties to disclose and duties not to misrepresent have fundamentally different structures, and it is essential to the proper analysis of each to keep those differences in mind. Disclosure duties apply no matter what the parties say. Whether A is under a duty to share some information with B turns on (i) the nature of the information (for example, whether it concerns a “basic assumption on which [the other] party is making the contract”), (ii) the relationship between A and B (whether “non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing”), and (iii) whether A is or should be aware of (i) and (ii). In some cases, the fact that A made certain representations to B might be relevant to showing that one or more of these criteria are satisfied. But a duty to disclose can apply in the absence of any representation relating to the information at issue. Duties not to misrepresent are different. Here in order to prevail, B must show (i) that A made a representation, (ii) that the

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22 See, e.g., United States v. Rybicki, 754 F.3d 124 (2d Cir. 2003) (en banc). This explanation goes both ways: the expansive use of criminal fraud to capture illicit secret keeping is possible because of the conceptual connections between secrets and lies.
23 Rest. 2d Contr. § 161(b).
24 Rest. 2d Contr. § 161(b).
representation was false, (iii) that it induced B to enter into the agreement, and, if B wants the right to rescind, (iv) that the misrepresentation was fraudulent or material. Unlike violations of disclosure duties, a showing of misrepresentation always turns on what the parties said. That is, it always includes an interpretive step. With respect to the elements of the legal claim, secrets and lies are as different as can be.

III. Conversation and misrepresentation

There is another difference between nondisclosure and misrepresentation: The law of misrepresentation prohibits certain communications (material or fraudulent false statements), while the law of nondisclosure requires communications from parties who would otherwise prefer to remain silent. One might think it obvious that the law should care more about the details of what and how information is transferred (importance and effectiveness) when it obliges persons to speak than when it prohibits them from doing so. Just as the tax code does not merely tell people to pay taxes, but informs them how much to pay and when and how to do so, so too the law of nondisclosure must tell people exactly what to say and how to say it. The law of misrepresentation, one might think, is more akin to the law of theft: both define wrongful behavior, and simply tell persons not to do it.

Craswell maintains that prohibitions on misrepresentation are more like requirements to disclose than they first appear, and that at least in some cases courts should attend to what a liar should have said instead of her lie. This thesis has the merit of being counterintuitive. Craswell’s argument for it, however, does not succeed. Where a claimant has satisfied the traditional elements of misrepresentation, the court can and should remain relatively indifferent to how the defendant might have avoided her falsehood. The argument why this is so rests in part on Craswell’s own insight that an act’s representational content depends on an informal cost-benefit analysis that addresses both effectiveness and interference. I will also argue that Craswell overstates the importance of bundling and overlooks ways that a speaker can disaggregate separate pieces of information in a single speech act.

25 Rest. 2d Contr. § 164(1). Ian Ayres and I label the first two questions the “representation inquiry” and the “veracity inquiry” respectively. Ayres & Klass, Insincere Promises at 19-20. If a plaintiff wants to recover in tort, she must instead show, inter alia, both (iv) that the representation was material and (v) that it was knowing or reckless (if she wants punitive damages) or that the speaker was negligent (to recover for negligent misrepresentation). W. Page Keeton et al., Prosser and Keeton on Torts § 105, at 728 (5th ed. 1984).
A. The importance and effectiveness of conversational representations

I have argued an significant difference between misrepresentation and nondisclosure is that one can misrepresent a state of affairs only if one says something about it. I now want to argue that this fact is strong prima facie evidence both of the importance of the information a liar purports to share and the effectiveness of her chosen mode of communication. This is so for at least two reasons, each of which I discuss in detail below. The first is the fact, familiar from economic treatments of contract law, that rationally self-interested parties are likely to choose efficiently. Because parties purport to use their communications in a cooperative effort to arrive at a mutually acceptable transaction, one party’s choice to share, or purport to share, specific information in a certain manner is prima facie evidence that the information is sufficiently important to be worth any interference it might cause and that the chosen means of communicating it is relatively effective. It is simply not in the parties’ joint interest to waste resources communicating unimportant information, or important information in an ineffective manner. The second reason is subtler, and follows from some of Craswell’s insights into Paul Grice’s theory of conversational implicature. As Craswell points out, what a person says on Grice’s theory – the meaning of her acts – itself depends on an informal cost-benefit analysis. This means that effectiveness and importance are secured not only by the parties’ choice, but also by the very rules that determine what they say. While neither fact guarantees that the parties’ communications are optimal, they suggest defeasible reasons (which might in some cases be outweighed by other considerations) to leave it up to the parties to decide what to say and how to say it.26

First, the evidentiary value of party choice. No matter how opposed the parties’ individual interests, the process of entering into a contract is a cooperative one.27 Mutual assent requires that each party be convinced, and that each convince the other, that an agreement is in her interest. Achieving consent requires the cooperative sharing of information. The parties must at least represent themselves to be working together to achieve that shared goal of finding a mutual beneficial transaction.

If we assume that each party is rationally self-interested, and that each treats the other as such, they will share or purport to share information just when the benefits of that information appear worth the

26 For an example of where these reasons might be outweighed, see the discussion of mass consumer contracts infra at 29-30.
27 For simplicity’s sake I focus here on precontractual communications between the parties. The reasons for the parties’ shared interest in the importance and relevance of post-formation communications are more varied.
costs of communicating it. In the precontractual setting, the most salient benefit of shared information is the increased ability of the recipient to know whether an agreement is in her interest. The costs include the various factors Craswell discusses: transaction costs and opportunity costs, where the latter include interference with other possible communications. To the extent that the parties understand – or purport to understand – themselves as jointly attempting to arrive at a mutually acceptable deal, they will choose what information to share and a manner of sharing it that satisfies this cost-benefit analysis. This is not to say that each will choose to disclose everything that can add value to the transaction. Parties negotiating a contract have different and potentially conflicting interests, and often will want to withhold value-creating information. But where they have chosen to share or purport to share information, that choice itself is evidence of the information’s importance. And the fact that the parties’ chose one mode of communication rather than another is prima facie evidence of effectiveness.

This relatively abstract general claim can be illustrated with an imagined modification to the facts in *Laidlaw*. Suppose the quality of tobacco depends on its age. In the course of the negotiations leading up to the sale in *Laidlaw*, Girault (the seller’s representative) might want to share information about the harvest date, though only to an extent and in a manner that would be worth the cost. Thus Organ wouldn’t be surprised if Girault said something like “This is May 1811 tobacco.” Such a statement would give Organ the information he needs in an easily intelligible format, and is therefore appropriate to the situation. It would be surprising, however, if Girault said, “This tobacco was harvested sometime in the last year,” “This tobacco was harvested in the late afternoon of May 15, 1811,” “This tobacco was harvested when Mars was last in the house of Mercury,” or “Dieser Tabak wurde im Mai 1811 geerntet.” The first statement provides insufficient information, the second too much, and the third and fourth use ineffective means of communicating it. The parties’ mutual understanding of the informational needs of each determines both the range of information it makes sense to communicate and the appropriate forms of its communication. Again, their choice to expressly address a topic is prima facie evidence that the information at issue is relatively important and the manner of communication appropriately effective.

Things are somewhat more complicated in the case of implicit communications. Recall the seller’s argument that Organ’s silence in the face of Girault’s question whether there was any news suggested that there
was no news. Because Organ did not choose to say expressly that there was no news, it is not so obvious that the parties engaged in the sort of cost-benefit analysis described above. It might appear, therefore, that we don’t have the same evidence of effectiveness and noninterference as in the case of an express misrepresentation.

At this point we can add to the analysis Paul Grice’s description of conversational implicature, which Craswell discusses at length. As Craswell points out, on Grice’s theory determining what a person has said in a given situation itself involves an informal sort of cost-benefit analysis. This interpretive cost-benefit analysis provides a second, separate reason to expect representations made by the parties to be both relatively important and sufficiently effective.

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

Quantity
- Make your contribution as informative as is required (for the current purposes of the exchange).
- Do not make your contribution more informative than is required.

Quality
- Do not say what you believe to be false.
- Do not say that for which you lack adequate evidence.

Relation
- Be relevant.

Manner
- Avoid obscurity of expression.
- Avoid ambiguity.
- Be brief (avoid unnecessary prolixity).

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28 15 U.S. at 188-90.
30 Grice at 26.
- Be orderly.31

There is a sense in which these maxims simply reflect the fact that in our everyday interactions we treat each other as rational in the sense described above. The maxims of quantity and quality in particular require that a speaker consider the importance of the information she shares and choose an effective means of sharing it. Grice’s maxims are therefore consistent with the above explanation of why, in the case of literal speech acts, party choice is prima facie evidence of both importance and effectiveness.

But the theory of conversational implicature is not merely an account of conversational etiquette: it also describes the rules that determine a speech act’s meaning in context. The rules’ interpretive function comes to the fore in the case of implicit meanings. When an act’s literal meaning appears to violate one or more maxims, a sort of general Principle of Charity requires that we look for an implied meaning to bring the speech act into conformity with those rules. Consider again the argument that Organ’s silence implicitly represented that there was no news. The Cooperative Principle required (so the seller’s argument would go) that if there was any important news, Organ respond to Girault’s question. More precisely, if there was news, the failure to respond violated the first maxim of quality: make your contribution as informative as required. In the context of the question, it was therefore reasonable to interpret Organ’s silence as representing that there was no news. The Gricean maxims are not simply guides to how to behave in conversation. They determine what is said, the meaning of a speaker’s words or actions in context.

Now here is the important point. As Craswell observes, Grice’s maxims themselves involve a sort of conversational cost-benefit analysis.32 If Organ’s silence implicitly represented no news, it was because the question was so salient, the news so important, that if there had been news, his silence would have violated at least the maxim of quantity. Because the benefits of such news were so clearly worth the costs of an answer, no answer implicitly communicated no news. This is not to say that silence was the most efficient means of sharing – or purporting to share – that information. In the context, a short, express

31 Grice at 26-27.
32 “Indeed, the Cooperative Principle itself – ‘make your conversational contribution such as is required by the accepted purpose or direction of the talk’ – could be thought of as a commitment to maximizing the expected value of their conversation, just as economists speak of maximizing the expected value of a transaction or of a business enterprise.” 92 Va. L. Rev. at 605.
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statement would have been less ambiguous. But, if the seller’s interpretation of the silence was correct, it was the method the parties apparently chose, and was within the range permitted by the maxims of quantity and quality. And that is enough to create a presumption that the communication was relatively important and reasonably effective. The cost-benefit analysis built into the rules of conversational implicature provide separate grounds for a presumption both that the parties’ chosen form of communication was effective enough to get the point across and that it contained information important enough to warrant any interference it might be expected to cause.

Another example of how this cost-benefit analysis fits into determining the meaning of implicit representations can be found in the interpretation of *Red Owl v. Hoffman* mentioned in Part I. As Randy Barnett and Mary Becker first suggested, one might defend the Wisconsin Supreme Court’s holding by arguing that Red Owl in fact misrepresented its intent to give that Hoffman a franchise.33 Red Owl’s representatives advised Hoffman to purchase, operate and then sell a small grocery store, assured him that he could put $1,000 down to purchase a site for his franchise, and told him to get his money together, knowing that this would require him to sell his bakery.34 In all of these communications, Red Owl’s representatives never said in so many words that Red Owl intended to give Hoffman a franchise, or that there was a reasonable likelihood it would do so. But, the argument goes, the first maxim of quantity – make your contribution as informative as is required for the current purposes of the exchange – created an implicit representation that they meant to give Hoffman the franchise, or at least that they knew of nothing to suggest that he wasn’t going to get it. And that is so just because, in the context of their encouragements, information to the contrary would be of such obvious value and its communication so cheap that the benefits of sharing it with Hoffman would have been worth the costs.

Now I am not suggesting that this is the only possible reading of Red Owl’s dealings with Hoffman. The Gricean maxims are meant to be sensitive to the relationship between speaker and hearer, and one might argue that in arm’s length negotiations of this sort, the maxims of quantity require very little. And even if there was such a representation, under this reading of the case the court should have required Hoffman to show that it was false (that at the time the representation was made, Red Owl did not intend to give him the franchise or there were other facts suggesting it was

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unlikely to do so) and that Red Owl’s representatives knew or should have known that it was false. The point is not to reargue Red Owl, but to use its well-worn facts to demonstrate two points. First, there is a difference in kind between implicit misrepresentations and violations of disclosure duties. The argument is not that Red Owl had a generic duty to disclose the likelihood that Hoffman would receive a franchise, but that its representatives’ repeated encouragements to undertake reliance on the deal happening implicitly represented its intent to give him the franchise. Second, the presence of the implicit representation by itself goes at least part of the way to answering the importance and effectiveness questions. As Craswell says, Grice’s maxims describe an interpretive process that involves a sort of cost-benefit analysis. If there was an implicit misrepresentation in Red Owl, it is because the rules of interpretation require that the speaker’s meaning – explicit or implicit – be relevant, appropriately informative, non-obscure, and so forth. This goes much of the way to ensuring both the effectiveness of the means of communication and the importance of the information communicated.

Neither the hypothesis of efficient party choice nor the maxims of quality and quantity at work in conversational implicature is equivalent to the more rigorous, all-things-considered cost-benefit analysis in Craswell’s examples from consumer protection law. But taken together they provide a good reason to presume both the importance of the information at issue and the effectiveness of the parties’ chosen means of communicating it. Where the parties have chosen to make a representation, it is not clear that the benefits of an additional inquiry into the importance and effectiveness of that communication would be worth the costs.

**B. Avoiding misrepresentation: saying more and saying less**

The above analysis is not so much a criticism of Craswell’s argument as a comment on its structure. As I pointed out at the beginning of this Part, considerations of importance and effectiveness are of the most obvious relevance to the law of nondisclosure, which requires parties to speak when they would otherwise remain silent. Such considerations are less obviously relevant to the law of misrepresentation, which prohibits bad behavior rather than requiring good. The above argument augments that intuition: the fact that the parties have made and relied on the representation in question creates a strong presumption both that the

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35 Hoffman didn’t want to rescind the contract, the only remedy available under the contract misrepresentation doctrine, but to recover damages. Recovery in tort would require a showing of at least negligence.
information at issue was important and that their chosen means of sharing it was sufficiently effective.

In the case of legally significant misrepresentations, effectiveness and importance are further ensured by the elements of the legal claim.\textsuperscript{36} The first question to be answered in any allegation of misrepresentation, be it in contract, tort or the criminal law, is what was said. Ayres and I label this the “representation inquiry.”\textsuperscript{37} Another way of stating the conclusion of the previous section is that the representation inquiry itself partially establishes the importance and effectiveness of the communication at issue. The requirement that the representation be material is another obvious guarantee of the importance of the information at issue.\textsuperscript{38} Black’s definition is as good as any other: material misrepresentations are “of such a nature that knowledge of [them] would affect a person’s decision-making.”\textsuperscript{39} Finally, both importance and effectiveness are further guaranteed by proof of reasonable reliance and of proximate harm. Taking all of this evidence together, a further showing that the representation was false would seem enough to make the case for its prohibition. There appears no point to further inquiry into the information’s importance or the communication’s effectiveness.

Craswell avoids this conclusion by emphasizing the third component of his alternative to the quantized view: bundling. He makes two related claims, each of which I will discuss in some detail. First, Craswell identifies and rejects the assumption that as between saying something false and saying nothing, it is always better to say nothing. In some cases, a falsehood can be profitably avoided only by saying more. This is so when an implicit misrepresentation is bundled together with value-creating behavior. In such cases, rather than forgoing the value-creating behavior (saying less), it might be better to provide additional information that will prevent the implicit misrepresentation (saying more). This argument lays the groundwork for a second claim: where misrepresentation can be profitably avoided only by saying more, the law should give the speaker a reason to do so, in which case it is effectively a duty to disclose. This allows Craswell to bring the importance and effectiveness theses back into the analysis of misrepresentation. If the law of misrepresentation should sometimes require parties to say more, it

\textsuperscript{36} For the purposes of my analysis, the differences between the elements in contract, tort and criminal law – which mostly have to do with scienter – are of limited importance.

\textsuperscript{37} Ayres & Klass at 19-20.

\textsuperscript{38} Craswell discusses materiality requirements in his analysis of nondisclosure, but not in the account of misrepresentation. 92 Va. L. Rev. at 579-80.

\textsuperscript{39} Blacks Law Dictionary (8th ed. 2004), material.
should attend the new information’s relative importance and to how it can be communicated most effectively.

The argument for the first claim has three steps. First, a single communication often “contains” multiple pieces of information. While I have used Grice’s theory to argue that the communications parties choose are presumptively important and effective, Craswell deploys it to explain how separate pieces of information come packaged together: a single communicative act can have both literal and nonliteral meanings. Second, when multiple pieces of information are bundled together, some might be true while others false. Actually, this description is too narrow. Speech acts function not only to share information, but to effect other changes, such as putting someone on guard (as in a warning) or creating an obligation (like a promise). In the language of speech act theory, we use language to accomplish a variety of perlocutionary effects in addition to the sharing of information. When a speech act has several meanings, the perlocutionary effects of some might be undesirable and of others desirable. The third step is the claim that when harmful perlocutionary effects are bundled together with beneficial ones, the net effect of saying less might be to make the hearer worse off. When a misrepresentation is implicit in a value-creating speech, it might be impossible to excise the harmful representation without also destroying the beneficial perlocutionary effects.

This argument structure appears in Craswell’s discussion of each of the four examples that make up his analysis of misrepresentation. I described in Part I how the argument works in his discussion of Red Owl, where Craswell concludes: “If representations about Red Owl’s intentions are inferred from the very fact that it offered Hoffman a franchise, then the only way Red Owl could have said less would have been to not offer the franchise at all, and that would have eliminated any chance whatsoever for Hoffman to get the franchise.” Craswell again applies the analysis to an example Ian Ayres and I have suggested: that in 1984, when Yale University accepted students’ tuition dollars despite the high likelihood of a strike, the school implicitly misrepresented the likelihood it would be able to provide educational services.

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40 Not all implicit representations depend for their meaning on the rules of conversational implicature. Grice also discusses “generalized conversational,” or “conventional,” implicature. Grice at 37-40, 44-45. This essay does not consider whether or how Craswell’s or my analysis might be extended to cover conventional implicature. One might argue that I owe such an account, since promissory representations of intent are conventional. For some (incomplete) suggestions about what such an account might look like, see Ayres & Klass at 29, 100-101.
41 92 Va. L. Rev. at 612.
42 Ayres & Klass at 163-65.
If saying less were \textit{always} the best solution to misrepresentation, this would imply that Yale should not have offered educational services during 1984. After all, on Ayres and Klass’s analysis, it was precisely Yale’s offer of educational services that gave rise to the implied misrepresentation, so one way to eliminate the misrepresentation would have been to eliminate the offer. However, this solution would have \textit{guaranteed} that no educational services would have been provided during 1984, thus eliminating any possibility of a benefit to those students who would have found it inconvenient or impossible to transfer to another school.\footnote{92 Va. L. Rev. at 613-14.}

Again, the effect of saying less would be a net loss. Craswell next considers the FTC’s finding that Hewlett-Packard misrepresented what customers were getting when it advertised that a printer included a free “economy” ink cartridge without disclosing that the cartridge was only half full. “[T]he only way to cure the misrepresentation by saying \textit{less}” would have been either eliminate the modifier “economy,” which would have made matters worse, or not say that an ink cartridge was included, which again “would have deprived consumers of useful information.”\footnote{92 Va. L. Rev. at 615.} Finally, Craswell discusses cases in which a seller does not disclose that a building is not zoned for its apparent purpose, such as multifamily occupancy. Here, as some courts have suggested, “the very appearance of the building could itself be interpreted as a misrepresentation . . . so it is doubtful that the alternative of saying \textit{less} would have improved matters at all.”\footnote{92 Va. L. Rev. at 617.}

In his analysis of each of these examples, Craswell maintains that the different perlocutionary aspects of the single speech act cannot be unbundled from one another. If this is right, implicit misrepresentations pose a special problem, for they always come bundled with express statements or linguistic acts. Where those other statements or acts provide some benefit, saying less means losing that value.\footnote{It is also possible for an express misrepresentation to have desirable implicit meanings or perlocutionary effects, as in a white lie. I consider the possibility at the end of this Part., \textit{infra} p.21.}

The problem is that Craswell provides no argument for his claim that meanings cannot be unbundled from one another. Nor is it obvious what motivates his analysis of the examples. Red Owl might have continued with the negotiations while informing Hoffman that it made no
representation as his chances of receiving a franchise;\(^47\) Yale University could have said in its acceptance letter that it was not representing that it would be able to provide the usual student amenities, “putting the admitted student on notice that he might do well to investigate for himself”;\(^48\) Hewlett-Packard could have stated on the box that it made no representation about the amount of ink in the cartridge; and real estate sales contracts often include warnings that the seller makes no representation as to the compliance of the property with local statutes or regulations.\(^49\) In all of these cases, a few words would suffice to negate the implicit representation while leaving remainder of the valuable speech act intact.

These alternatives are consistent with Grice’s observation that a speaker can “opt out from the operation both of [any given] maxim and of the Cooperative Principle” as a whole.\(^50\) That is, one can always avoid an implicit meaning by saying that one is not adhering to the relevant maxim; conversational implicature is defeasible. One of Grice’s examples is the statement, “I cannot say more.”\(^51\) Had Organ so responded to Girault’s question, he would have put Girault on notice not to interpret his silence as an answer, without disclosing the news of the war’s end.\(^52\)

Now in all of my proposed examples, the speaker avoids implicit misrepresentation by uttering more words rather than fewer. There is a sense, therefore, in which she has said more. But there is a difference between preventing misrepresentation by giving the hearer more information about the transaction (“The ink cartridge is half full”) and preventing it by saying what one is not saying (“There’s a cartridge, but I’m not saying how much ink is in it”). In the first case, the speaker communicates more first-order information about the subject matter of the

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\(^47\) See Ayres & Klass at 265-66 n.29.
\(^48\) Ayres & Klass at 163.
\(^49\) See, e.g., 11.1 West’s McKinney’s Forms Real Property Practice § 3:10, Option contract for purchase of real estate; example 3, ¶11 (“Seller has made no representations or warranties concerning the Property, including the operation and management thereof or the compliance of the Property with any law, ordinance, or statute, or any subdivision thereof, or of any rule or regulation.”).
\(^50\) Grice at 30. See also Grice at 39 (describing how “a generalized conversational implicature can be canceled in a particular case”); 44-45 (further analyzing the fact that “all conversational implicatures are cancelable”).
\(^51\) Grice at 30.
\(^52\) One might think that this answer itself would be enough to inform Girault that there probably was some news. While true, this is not because of the rules governing implicit meanings, but because of an obvious psychological inference: if there were no news, Organ would have said so. Organ has not said that there is or isn’t news. This is important because it takes the case out of the law of misrepresentation and nondisclosure. And of course that psychological inference would have provided correct information.
otherwise implicit representation. In the second, she makes a second-order statement about how her words or actions should be understood. She tells the other party only what she is not saying, as distinguished from giving him more information about the value of the transaction.

This brings us to Craswell’s second claim: that if the law sometimes gives speakers a reason to say more to avoid implicit misrepresentations, it then operates like a duty to disclose, from which it follows that lawmakers should attend both to the relative importance of the information in the new disclosure and to the most effective means of communicating it. Craswell makes the point in his analysis of Red Owl as follows:

Alternatively, maybe it would have been better for Red Owl to say *more*, by holding out the prospect of a franchise but telling Hoffman honestly what his chances of getting it were. In that case, though, a different set of questions has to be asked, analogous to the ones asked . . . about other disclosure requirements. For example, what precisely should Red Owl have disclosed about that probability? How prominent should they have made the disclosure, to get Hoffman or other potential franchisees to pay attention to it? And what other information, if any, might that disclosure have crowded out? As these questions indicate, a finding that Red Owl may have misled Hoffman is simply not sufficient to decide that Red Owl necessarily should have said something other than what it did.53

53 92 Va. L. Rev. at 609 (footnote omitted). Craswell provides a similar analysis of the additional information Yale University might have provided students regarding the probability of a strike:

However, once additional disclosure is identified as the preferred solution, the case then becomes (for all practical purposes) a case of nondisclosure rather than a case of simple misrepresentation. As a result, all of the issues discussed in Part II become relevant again. For example, was information about the potential strike sufficiently important to be worth the costs of disclosing? In particular, was it the most beneficial information that Yale could have disclosed? (What about disclosing the crime rate in New Haven, or disclosing which professors intend to be on leave in 1984?) Could better disclosure about any of these attributes intensify the competition between Yale and other leading universities, by making it easier for students to see which schools were subject to the greatest risks? If so, which of these attributes would be most likely to trigger competitive improvements? In any case, we would also have to specify a particular format and a particular stage in the admissions process at which these disclosures should have been made. (If some of the information is already publicly available in a library, should *that* be a sufficient disclosure? Or would it be better to require the information to be disclosed in a more accessible format, somewhere in Yale's admissions materials?) We would also have to assess the extent to
Craswell concludes that courts should require parties alleging misrepresentation to “specify some alternative(s) to whatever the defendant actually said,” allow both plaintiff and defendant to argue the costs and benefits of such alternatives, and impose punitive or criminal penalties “only when the balance of costs and benefits makes it obvious that the defendant should have behaved otherwise than she did.”

This is an interesting and original proposal. And as a reform to the law of nondisclosure it might have significant merit. The above analysis, however, suggests that all this extra litigation effort would not add much value in misrepresentation cases.

To begin with, recall that Craswell’s analysis of misrepresentation relies on his bundling thesis and that he describes that thesis at work only in implicit misrepresentations. Craswell does provide an example of an explicit misrepresentation bundled with implicit true representations or with other beneficial perlocutionary effects. This is not to say that such bundling is impossible. A white lie, for example, fits that description. But it is difficult to imagine a case in which an explicit falsehood would satisfy the elements of a legal claim, though the harms it causes are outweighed by the speech act’s implicit and beneficial perlocutionary effects. And even if we can construct an example, it seems clear that most express misrepresentations in contract cases do not come bundled with such salutary meanings. In the vast majority of cases, an express falsehood can be efficiently avoided either by replacing it with the truth, or by saying nothing at all.

So if courts are to apply Craswell’s proposed reforms to the law of misrepresentation, it should be only to claims of implicit misrepresentation. But now consider the neglected disclaimer option. I want to argue that in the case of implicit misrepresentations, the general availability of a disclaimer entails that Craswell’s proposed reforms would not make a difference in case outcomes. This is because disclaimers are so cheap, and their benefits so clear, that they will always satisfy the proposed test.

Consider first the benefits. As I have argued above, information that would prevent legally significant misrepresentations is almost always highly important relative to other information the speaker might communicate. This is so first and foremost because the legal elements (materiality, reasonable reliance, proximate harm) test for the importance which disclosing some of this information would or would not have interfered with the effective communication of other useful information.

92 Va. L. Rev. at 613-14.
54 92 Va. L. Rev. at 624, 625, 629.
and effectiveness of the misrepresentation. The relative importance of the subject matter is further evidenced by the parties’ choice to address it and by the cost-benefit analysis built into the rules of conversational implicature. Taken together, these indicia suggest that any information that would prevent an actionable misrepresentation is highly beneficial.

Craswell’s argument, then, comes down to the costs of added disclosure. It is here that the disclaimer option has the most bite. The costs of printing or stating a disclaimer are generally minimal. So too are the information costs to the speaker. Craswell would require a cost-benefit showing only for punitive and criminal sanctions. But both punitive damages and criminal liability require a showing that the misrepresentation was intentional or reckless, from which it follows that the speaker knew or should have known that a disclaimer would correct it.

If there is a significant cost it comes from possible interference with other information. Thus “if the preferred alternative would have required the defendant to say something more, the defendant should be allowed to argue that the additional information would have diluted the impact of other, more valuable messages.”\(^{55}\) But while this dilution worry has some intuitive plausibility for first-order disclosures, it is difficult to credit in the case of disclaimers. The information in a disclaimer is relatively simple, so it need not take up much real estate. Nor is a disclaimer likely to come with other meanings attached that would interfere with other information. Finally, while a disclaimer might put the hearer on guard, that effect is hardly worrisome. The information in the disclaimer is important precisely because of the harm that would be caused by the otherwise implicit misrepresentation.

The above considerations, I believe, answer the worries about relative importance that Craswell’s proposals are designed to address. Legal liability for implicit misrepresentations has not lead to a proliferation of distracting or interfering disclaimers for a simple reason: it only attaches when one party has chosen to make a material misrepresentations on which the other party has reasonably relied to her proximate harm. Effectiveness concerns are addressed by the everyday interpretive norms that support the application of the law of misrepresentation. where the defendant argues that she did issue a disclaimer, the everyday rules of interpretation suffice to determine whether it was clear and prominent enough to prevent the alleged misrepresentation. Where there has been no disclaimer, a claimant will have no difficulty coming up with a hypothetical communication that satisfy Craswell’s counterfactual hypothetical test.

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\(^{55}\) 92 Va. L. Rev. at 625.
None of this is to say that a disclaimer is always the best option for avoiding an implicit misrepresentation. Sometimes a disclaimer raises more questions than it answers (“If you’re not saying that the ink cartridge is full, I’ll assume it is empty”), and the speaker would do better by disclosing more first-order information (“Includes a half-full full ink cartridge”). Alternatively, in some cases either a disclaimer or more first-order information might be so costly to the speaker (e.g., when it would kill the deal) that she will prefer to avoid the behavior that gave rise to the implicit misrepresentation altogether. In such cases, this too is a good thing. Most importantly, however, for all the reasons canvassed in the first section of this Part, the law can leave the decision between these options to the parties. Because the disclaimer will always efficiently prevent an implicit misrepresentation, it is enough for the law to focus on the falsehood and the harm it caused.

I believe this argument answers one of Craswell’s central objections to Ian Ayres and my theory of promissory misrepresentations. The action for promissory fraud recognizes that while a promise is first and foremost a device for putting oneself under a new obligation, promising also implicitly represents an intent to perform. Ayres and I argue that while these two meanings of promissory speech acts generally come together, they can be unbundled from one another. That is, we argue that the implicit representation of intent is defeasible. If a promisor says, for example, “In promising to x, I do not represent that I intend to x,” we would be hard pressed to understand her as having represented an intent to x.56 Our category of opaque promises depends on possibility of unbundling these two meanings of a promise. As we define it, an opaque promise is just an act that puts the speaker under a legal obligation to perform without representing that she intends to do so.57 We suggest that a promise can be opaque (1) because the promisor has provided other information about the probability of her performance that implicitly negates the usual representation of intent or renders it superfluous, (2) because the promisor has expressly disclaimed any representation of intent to perform, or (3) because that is the best interpretation of the promise in light of the transaction as a whole (the relationship of the parties, industry practice, the contract terms, etc.).58

We argue that courts should recognize opaque promises so parties who do not intend to perform (for example, because they intend to perform or pay damages) can enjoy the benefits of undertaking a

56 Ayres & Klass at 105.
57 Ayres & Klass at 23-24.
58 Ayres & Klass at 105-12.
contractual obligation without misrepresenting their intent.\(^{59}\) Craswell argues that this is not enough.

Ayres and Klass do not address such questions as what, precisely, ought to be disclosed by such a promisor, or how much prominence those disclosures ought to be given, or when such disclosures would be cost-effective. As a result, even Ayres and Klass do not fully come to grips with all of the costs and benefits involved in preventing misrepresentation.\(^{60}\)

But while we allow that one way a promisor can avoid misrepresenting her intent is by saying more – for instance, by providing the promisee other information about the probability of performance – we observe that she might also avoid misrepresentation by saying less – by disclaiming any representation of intent. Craswell does not argue that such disclaimers interfere with other information in the same way first-order disclosure does. Nor is there an obvious reason to think they would. Given the general availability of the disclaimer option, we can leave it up to the promisor to determine the cheapest way to avoid misrepresenting her intent.

**IV. Two methods: Causal-predictive and interpretive regulation**

While I do not agree Craswell’s conclusions about the law of misrepresentation, he has identified an important and until now neglected question: how can, does and should the law regulate information sharing between contracting parties. While previous scholarship has considered the informational effects of individual rules, including nondisclosure and misrepresentation, no one has attempted a general theory of the legal regulation of the information flow within contractual relationships. In this last Part, I venture some suggestions about what such a theory should look like. My thesis is that any such theory must distinguish between two fundamentally different approaches to the legal regulation of information

\(^{59}\) If it is not obvious that a promise can be valuable to both of the parties even though the promisor does not intend to perform, see Ayres & Klass at 91-99. I’m not sure whether Craswell appreciates the difference between our analyses. He writes, for instance, that Ayres and I “recognize that it may not be possible to get rid of some misrepresentations without getting rid of some useful speech as well. That is, if a promise *by itself* conveys a false impression, then eliminating the false impression might require eliminating the promise *itself*.” 92 Va. L. Rev. at 573. But the whole point of recognizing opaque promises is to enable promisors who don’t want to represent an intent to perform (for whatever reason) to eliminate the representation without eliminating the promise.

\(^{60}\) 92 Va. L. Rev. at 573.
in contractual relationships. (I do not claim that these are the only approaches; only that they are two important ones.\textsuperscript{61})

The first approach, which I will call “causal-predictive” regulation and which Craswell takes as his model, takes as its data the effects of individual transaction elements on parties’ perception of or behavior in transactions that include them. (I use “transaction element” to refer to any aspect of a contractual transaction, including terms, communications between the parties, and structural features.) Because the approach inquires into the causal properties of individual transaction elements, as distinguished from their meaning or veracity, causal-predictive regulation need not limit itself to communications \textit{per se}. Its methods can be applied to any transaction element that has a predictable effect on the parties’ perception or understanding of the transaction. Such informational effects are, as a general matter, highly fact specific. They depend both on the details of the transaction element, such as the wording of a disclosure form, and on broader contextual factors, like party sophistication. As a result, causal-predictive regulation often applies to the details of specific transaction types, rather than issuing general mandates.

One can further distinguish two versions of the causal-predictive approach. The first version, which Craswell emphasizes in the article under discussion, begins with empirical studies of the effects of individual transaction elements. Consider, for example, a recent study by the FTC, which concluded that existing mortgage disclosure forms failed to convey key information to consumers, and that a different format would result in significantly better consumer comprehension.\textsuperscript{62} The study did not conclude that existing forms disclosed insufficient information, or that they misrepresented the terms of the deal. That is, the FTC found neither that the forms kept secrets nor that they contained lies. The conclusion was rather that providing the information in a different format would result in more informed consumers, and that regulations requiring lenders to use that format would likely result better informed consumers.

The other version of the causal-predictive regulatory approach applies psychological theories of cognitive or behavioral biases to predict how a given transaction element is likely to affect a party’s understanding of or behavior in the transaction. Oren Bar-Gill, for example, has analyzed

\textsuperscript{61} Neither of the approaches I describe fully captures the law of nondisclosure or other rules designed to incentivize the sharing of information the parties might otherwise want to keep to themselves (e.g., penalty defaults). There are other considerations and methods at work in the legal regulation of information, and the picture I draw here is but one view of the whole.

the likely informational effects of bundling separate products together, such as a free cell phone with a two-year contract, or a low-cost printer with high-cost cartridges.\footnote{Oren Bar-Gill, \textit{Bundling and Consumer Misperception}, 73 U. Chi. L. Rev. 33 (2006). \textit{See also} Oren Bar-Gill, \textit{Seduction by Plastic}, 98 Nw. L. Rev. 1373 (2004) (examining credit card issuers’ exploitation of common consumer cognitive and behavioral biases).} He concludes that because consumers often over- or under-estimate their own use of a product, or the value they will get from it, such transaction structures often result in consumer misperception of both value and price, and that regulations discouraging such bundling might improve consumer information. Like the FTC’s study of mortgage disclosures, these results have nothing to do with whether sellers are telling lies or keeping secrets. In fact, unlike the FTC study, the transaction elements at issue in Bar-Gill’s study are not even communications \textit{per se}. But because they have predictable informational effects, such elements are amenable to both the empirical approach emphasized by Craswell or the more theoretical one adopted by Bar-Gill.

The law of misrepresentation employs a very different regulatory approach, which I label “interpretive” regulation. While causal-predictive regulation takes as its data cause and effect, interpretive regulation starts from meaning and veracity. On this approach, finding a legal wrong requires first determining what a party said and then evaluating whether it conformed to the legal standard of accuracy. Interpretive regulation thereby recognizes and incorporates everyday norms of interpretation.\footnote{While not essential to my argument here, it is worth noting that I use “recognize” here in the technical sense defined by Joseph Raz, \textit{Voluntary Obligations and Normative Powers – II}, in Proceedings of the Aristotelian Society 79, 87 (Supp. 46, 1972). Joseph Raz. \textit{See} Joseph Raz, \textit{Voluntary Obligations and Normative Powers at 87; The Institutional Nature of Law}, in The Authority of Law, 103, 120 (1979); Practical Reason and Norms 153-54 (2d ed. 1990).} Because it is interpretive, such regulation applies only to communicative acts – transaction elements that are objectively meant to share information. As Bar-Gill argues, these are not the only elements that have informational effects. But communications between the parties do constitute a subset of transaction elements especially pertinent to the informational economy. Finally, rather than attempting to fine-tune transactions, interpretive regulation typically sets a regulatory floor (e.g., do not tell a material lie) and permits the parties to structure their transaction as they wish so long as they remain above it.

One way to reformulate the argument in Part III is to say that Craswell would apply considerations more pertinent to causal-predictive regulation to interpretive regulations. It is certainly correct to point out that the \textit{theory} of information regulation should pay attention to importance, effectiveness and bundling. These aspects of information-
transfers will strongly affect the success of any regulatory project. It does not follow, however, that the law should always attend to the factors as such. By using everyday norms of interpretation and conversation to define minimal behavioral standards, the law of misrepresentation captures the effects of bundling and ensures both importance and effectiveness without requiring that courts or juries separately address those issues. Attention to these aspects of information-sharing is more important in causal-predictive regulation. Such regulation does not incorporate everyday interpretive standards of importance and effectiveness. And rather than setting minimum standards, it often attempts to micro-manage the details of transactions. All of this leads to a greater risk of unintended consequences, such as interference or bundled meanings, and therefore a need to attend to the factors Craswell emphasizes.

This last point is not meant to imply that the interpretive model is superior to the causal-predictive one. But any systematic theory of the legal regulation of information in contractual relationships should attend to the differences between these two approaches. And a general theory of information regulation should have something to say about their relative strengths and weaknesses. It is not this Essay’s ambition to provide such a theory, or even the prolegomenon to one. I will, however, venture a few additional observations.

The first concerns the proper objects of the two regulatory approaches. I have already noted that interpretive regulation applies only to communications – transaction elements that the parties understand as the purposive sharing of information. In this respect, interpretive regulation governs a narrower range of behavior than causal-predictive regulation. In another respect, however, the interpretive approach is broader in scope.

Individual transaction elements can be classified as more or less repeat or discrete. Repeat elements are aspects of a transaction that are replicated in substantially the same form across many other transactions. Most mass consumer contracts, for example, are comprised mainly of repeat elements: a single seller provides the same product on similar terms to many different buyers. A transaction element is discrete if it does not

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65 Repeat elements can also appear in transactions where neither party is a repeat player. Thus the seller and purchaser of an existing home typically rarely engage in transactions of that sort, though their sales contract probably includes elements identical to those in most other sales contracts.
reappear in many other transactions. Highly negotiated transactions, for example, are likely to include many discrete elements.66

The methods of causal-predictive regulation can be applied only to repeat transaction elements. This is most obvious when the method employs empirical studies. The law first sees a discrete element only at the end of its natural life, after the transactions has broken down. There is therefore no opportunity for prior empirical study of the element’s informational effects. And because it is unlikely to be repeated, factual findings about those effects are unlikely to have much impact on future parties. The same holds, however, for causal-predictive regulations based on the analysis of cognitive or behavioral biases. The theory of behavioral economics is so unfamiliar, and its conclusions so unpredictable, that it cannot serve as a general guide to legal actors. A rule against exploiting cognitive or behavioral biases would provide no guidance, create no clear incentives for legal actors. What are needed are more specific mandates: provide information in such-and-such a format, do not bundle products in such-and-such transactions, and so forth. And mandates of this sort can only apply to repeat elements. Neither version of causal-predictive regulation is suited to the regulation of discrete transaction elements.

If the law is to regulate discrete transaction elements in the hope of improving the information flow between parties, it must do so through more generic rules. Such rules will not attempt to micromanage the details of the transaction, which are water under the bridge, but will be designed to have a net positive effect across many different transaction types. This casts new light on the interpretive approach of law of misrepresentation. Because the law of misrepresentation is formulated at a high level of abstraction, it can be usefully applied to transaction elements at the discrete end of the spectrum. It achieves this generality by targeting transaction elements that are objectively meant to share information (communications) and by ignoring all but the most obviously harmful behavior (lies). While a communication’s veracity is amenable to this approach, other aspects of it are not. The effectiveness of a given method

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66 The ideas of repeat and discrete transaction elements describe the ends of a spectrum, not exclusive categories. For one thing, an element might be replicated more or less widely. Boilerplate, for example, can be common to contracts written by a single law firm, to contracts between certain repeat players, to contracts in a segment of the market, or to all contracts in the market. And there are degrees of similarity. Elements of many mass consumer transactions — such as the words used in an advertisement — are identical across different transactions. They exhibit a high degree of similarity. At the opposite end of the spectrum is the “promise”, an element that the Restatement says must appear in every contract, but that takes many different forms. Rest. 2d Contr. § 1. Finally, we might also characterize entire transactions as more or less discrete, depending on how many elements they share with other transactions.
of communicating, for example, is highly context-dependant. As Craswell himself recognizes, it is difficult to formulate any generally applicable rules about what format parties should use to share information.\(^{67}\) It is much easier to predict the probable effects of a false material representation. By limiting itself to clearly harmful behavior, the interpretive regulation of the common law achieves more general applicability.

This generality does not mean that interpretive regulation is insensitive to the details of individual transactions. While causal-predictive regulation gets at a transaction element’s informational effects by setting it as the independent variable or by applying sophisticated psychological theories to it, interpretive regulation piggybacks on the context-sensitivity of our everyday interpretive practices. Here again Grice’s description of conversational implicature is highly relevant, as is Craswell’s point that the Gricean maxims involve a degree of cost-benefit analysis. Our everyday interpretive practices, which courts and juries apply to determine the meaning of communicative transaction elements, are attuned to a statement’s informational costs and benefits in the context in which it is made. Moreover, the legal obligation maps onto a familiar extralegal one: do not lie. By employing the rules of interpretation and imposing a legal duty that generally corresponds to the familiar obligation to tell the truth, the generically formulated rules of misrepresentation both capture the context-dependent aspects of information sharing and put the parties on notice of what their obligations are.

We should also inquire into the relative effectiveness of the causal-predictive and interpretive methods. I have argued that the two approaches apply to different categories of transaction elements. Those categories, however, overlap. Consider Hewlett-Packard’s promotional statements that its printers included “economy” ink cartridges. Such representations might be subjected to the empirical or psychological tools of causal-predictive regulation (it is a repeat element), or to the interpretive methods of the law of misrepresentation (it is a communication), or to both.\(^{68}\)

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\(^{67}\) For example, “the ideal balance between absolute and relative information is likely to vary with the facts of each case.” 92 Va. L. Rev. at 591. Thus in the case of fuel efficiency, it is probably more useful to rank the relative efficiency of various vehicles, while relative information about creditors’ remedial practices might lead to an adverse selection problem. See 92 Va. L. Rev. at 587-91.

\(^{68}\) Craswell points out that the plaintiffs in the case from which he draws the example “alleged common-law fraud and negligent misrepresentation, as well as a violation of Minnesota’s state consumer protection statutes.” 92 Va. L. Rev. at 615 (describing Johnson v. Hewlett-Packard Co., No. CX-01-1641, 2002 WL 1050426, at *1 (Minn. Ct. App. May 22, 2002)).
A full-blown theory of the proper objects of and balance between these different regulatory approaches would require an article of its own. But there are some simple reasons to think that causal-predictive regulation is the preferable approach to mass consumer transactions such as the Hewlett-Packard case. For one thing, interpretive norms are less fixed in such contexts. It is less certain what Grice’s Cooperation Principle requires of advertisements or product packaging, as compared to what it requires parties in face-to-face negotiations. Implicit meanings are therefore less clear. At the same time, there is more reasons to expect sellers to attempt to exploit consumer cognitive biases in ways that fall short of misrepresentation. For these reasons we should expect empirical studies of consumer protection to be better predictors of the informational effects of a given communication. Finally, because a mass consumer transaction does not include the conversational give and take of a negotiated or face-to-face agreement, we should also be less sanguine that, left to their own devices, that the parties will arrive at reasonably effective disclosures of important information. These appear to be cases where the detailed forward-looking transaction management that is characteristic of causal-predictive regulation is in order.

That said, such regulation has its costs. These include both the obvious out-of-pocket costs of empirical studies and analysis, and the more difficult to quantify costs of agency capture, regulatory neglect and simple error. A further layer of interpretive regulation might serve as a useful backstop, and the optimal regulatory environment involve a mix of interpretive and causal-predictive regulation.

This last point raises the further point of institutional design. Craswell would consider removing “misrepresentation and nondisclosure cases from the common-law courts entirely and [handing them] over to regulatory agencies.”\(^69\) Certainly agencies are better situated than courts to empirically study the informational effects of repeat transaction elements, to apply sophisticated theories of cognitive and behavioral bias to them, and to use the results to predict the effects of regulatory change. Agency expertise does not extend, however, to interpreting discrete acts on the basis of the everyday rules of meaning. Such commonsense judgments are reasonably left to courts and juries, who are regularly tasked with evaluating the compliance of individual actors with extralegal norms.

Finally, to return once again to the themes of Part III and to bring together some of the above observations, we should consider the extent to which these regulatory methods can be mixed and matched. Craswell would permit parties in misrepresentation cases “to dispute the costs or

\(^69\) 92 Va. L. Rev. at 623.
benefits of” alternative representations and “to introduce empirical evidence as to how similar contracting parties would be likely to respond to the identified alternatives,” and he would have courts impose punitive or criminal penalties “only when the balance of costs and benefits makes it obvious that the defendant should have behaved otherwise than she did.”

These reforms are designed to lead courts to think more like regulatory agencies. But there is a real question about whether these different regulatory methods can be sensibly combined. Interpretive regulation puts parties on notice that if their behavior falls below a certain threshold, they are likely to face punitive or other supercompensatory damages. Such laws can guide behavior because parties are competent at the interpretive rules and extralegal obligations that the law incorporates. Speakers thereby know roughly how far they can go before they face sanction, and hearers know how far they can trust what they are told. Introducing the results of empirical studies or sophisticated psychological analysis into the liability decision threatens the ability of interpretive regulation to provide such guidance. Where the parties do not know the results of such studies or analyses in advance, or are unsure of their legal implications, they will not be able to predict the legal consequences of their actions. The methods of behavioral economics are quite valuable for regulating future transactions on the model of causal-predictive regulation. They are not suited for identifying past wrongs on the model of interpretive regulation.

**Conclusion**

The above observations are not intended as conclusive arguments, but as suggestions about where we might be heading if we take seriously the questions Craswell raises. It is remarkable how little contracts scholars have had to say about the overall structure of the legal rules that regulate information between parties. These include the obvious common law doctrines of fraud and nondisclosure, statutory regimes like the Lanham Act and state consumer protection law, disclosure requirements that apply to specific transaction types, such as auto sales or stock offers, and less obvious rules such as penalty defaults and damages measures. While much has been written about each of these mechanisms, very little has been said about their different methodologies, how they fit together, or how they relate to the broader purposes of contract law.

The argument in the last Part suggests that any such general theory must, among other things, provide an account of the difference between causal-predictive and interpretive regulation, and the place of each in the regulatory environment as a whole. Readers might recognize in my

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70 92 Va. L. Rev. at 625, 626, 629.
distinction between these approaches Wilhelm Dilthey’s differentiation between the methodologies of *Naturwissenschaften* and the *Geisteswissenschaften*, or the natural and the human sciences.\(^{71}\) And it is not surprising that the law should employ both approaches, for the law concerns human action, which both methods can take as their object.

Perhaps more surprising to those familiar with the path of Dilthey’s distinction in twentieth-century social theory is the suggestion that the law can employ the interpretive method for purely instrumentalist ends, such as maximizing efficiency. While the methods of the natural sciences are sometimes associated with instrumental reason and those of the human sciences with a more disinterested knowledge, the connection is contingent at best.\(^{72}\) Dilthey’s categories describe forms of empirical knowledge, not the uses to which such knowledge can be put.

At the same time, the reader should be warned that the focus on cost-benefit analysis, efficiency and consequentialist principles in the above analysis is a side effect of Craswell’s, and Ayres and my, emphasis on those analytic criteria. I do not mean to claim that the law’s only interest in regulating information in contractual relationships is efficiency. A complete explanation of those rules will no doubt also include considerations of fairness and morality. But this is just to say how far we are from a general theory of such rules. To return to a point from the Introduction, while contract theorists continue to have much of value to say about the relationship between contract law and the morality of promising, they have so far said very little about how the law’s regulation of information within contractual transactions might relate to the duty to tell the truth or to our other moral obligations. We might reasonably expect the distinction between causal-predictive and interpretive regulation to figure into the answer to these questions as well, not in the least because interpretive regulation is so closely tied to extralegal conversational norms.

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