

34. *Id.*

35. *Id.* at 640....

36. See Comment, Informed Consent in Medical Malpractice, 55 Calif.L.Rev. 1396, 1407 n. 68 (1967).

37. See, e.g., *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, *supra* note 24, 317 P.2d at 181 (1957); Waltz & Scheuneman, Informed Consent to Therapy, 64 Nw.U.L.Rev. 628, 641-43 (1970).

38. E.g., *Roberts v. Wood*, 206 F.Supp. 579, 583 (S.D.Ala. 1962); *Nishi v. Hartwell*, 52 Haw. 188,

473 P.2d 116, 119 (1970); *Woods v. Brunlop*, *supra* note 2, 377 P.2d at 525; *Ball v. Mallinkrodt Chem. Works*, 53 Tenn.App. 218, 381 S.W.2d 563, 567-568 (1964).

39. E.g., *Scott v. Wilson*, 396 S.W.2d 532 at 534-535; Comment, Informed Consent in Medical Malpractice, 55 Calif.L.Rev. 1396, 1409-10 (1967); Note, 75 Harv.L.Rev. 1445, 1448 (1962).

40. Note, 75 Harv.L.Rev. 1445, 1448 (1962).

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## The Ethics of Sales

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### PRELIMINARIES: A CONCEPTUAL ROADMAP

We need to distinguish between lying, deception, withholding information, and concealing information. Roughly, deception is intentionally causing someone to have false beliefs. Standard dictionary definitions of lying say that a lie is a false statement intended to deceive others. The *Oxford English Dictionary* (1989) defines a lie as: "a false statement made with the intent to deceive." *Webster's* (1963) gives the following definition of the verb *lie*: "to make an untrue statement with intent to deceive." The word *deception* implies success in causing others to have false beliefs, but lying is often unsuccessful in causing deception. A further difference between lying and deception is that, while a lie must be a false statement, deception needn't involve false statements; true statements can be deceptive and many forms of deception do not involve making statements of any sort. Thus, many instances of deception do not constitute lying. Withholding information does not constitute deception.

It is not a case of *causing* someone to have false beliefs; it is merely a case of failing to correct false beliefs or incomplete information. On the other hand, actively concealing information usually constitutes deception.

### THE COMMON LAW PRINCIPLE OF CAVEAT EMPTOR

According to the common law principle of *caveat emptor*, sellers are not required to inform prospective buyers about the properties of the goods they sell. Under *caveat emptor*, sales and contracts to sell are legally enforceable even if the seller fails to inform the buyer of serious defects in the goods that are sold. Buyers themselves are responsible for determining the quality of the goods they purchase. In addition, English common law sometimes called for the enforcement of sales in cases in which sellers made false or misleading statements about the goods they sold (Atiyah 464-65).

Currently, all U.S. states operate under the Uniform Commercial Code of 1968. Section 2-313 of the code defines the notion of sellers' warranties (Preston 52). The code provides that all factual affirmations or statements about the goods being

sold are warranties. This means that sales are not valid or legally enforceable if the seller makes false statements about the goods s/he is selling. The American legal system has developed the concept of an "implied" (as opposed to an express or explicit) warranty. Implied warranties are a significant limitation on the principle of *caveat emptor*. According to the Uniform Commercial Code, any transaction carries with it the following implied warranties: 1) that the seller owns the goods he is selling and 2) that the goods are "merchantable," i.e., suitable for the purposes for which they are sold (Preston 56-57). Many local ordinances require that people who sell real estate inform buyers about all known serious defects of the property they sell. These ordinances are also a significant limitation on the traditional principle of *caveat emptor*.

Deceptive sales practices also fall under the purview of the Federal Trade Commission (FTC). The FTC prohibits deceptive sales practices—practices likely to materially mislead reasonable consumers (FTC Statement 1983). . . .

### HOLLEY'S THEORY

Holley's theory is based on his concept of a "voluntary" or "mutually beneficial" market exchange (Holley uses the terms *voluntary exchange* and *mutually beneficial exchange* interchangeably). He says that a voluntary exchange occurs "only if" the following conditions are met (Holley takes his conditions to be *necessary* conditions for an acceptable exchange):

1. Both buyer and seller understand what they are giving up and what they are receiving in return.
2. Neither buyer nor seller is compelled to enter into the exchange as a result of coercion, severely restricted alternatives, or other constraints on the ability to choose.
3. Both buyer and seller are able at the time of the exchange to make rational judgments about its costs and benefits. (Holley 463)

These three conditions admit of degrees of satisfaction. An ideal exchange is an exchange involving people who are fully informed, fully rational, and "enter into the exchange entirely of their own volition" (Holley 464). The conditions for an ideal exchange are seldom, if ever, met in practice. However, Holley claims that it is still possible to have an "acceptable exchange" if the parties are "adequately informed, rational, and free from compulsion."

According to Holley, "the primary duty of salespeople to customers is to avoid undermining the conditions of an acceptable exchange." He makes it clear that, on his view, acts of omission (as well as acts of commission) can undermine the conditions of an acceptable exchange (Holley 464).

Because of the complexity of many goods and services, customers often lack information necessary for an acceptable exchange. Careful examination of products will not necessarily reveal problems or defects. According to Holley, *caveat emptor* is not acceptable as a moral principle, because customers often lack information necessary for an acceptable exchange. In such cases, salespeople are morally obligated to give information to the buyer. The question then is: *What kind of information* do salespeople need to provide buyers in order to ensure that the buyer is adequately informed? Holley attempts to answer this question in the following passage in which he appeals to the golden rule:

Determining exactly how much information needs to be provided is not always clear-cut. We must in general rely on our assessments of what a reasonable person would want to know. As a practical guide, a salesperson might consider, "What would I want to know, if I were considering buying this product?" (Holley 467)

This principle is very demanding, perhaps more demanding than Holley realizes. Presumably, most reasonable people would *want* to know a *great deal* about the things they are thinking of buying. They might want to know *everything* relevant to the decision whether or not to buy something (more on this point shortly).

## CRITICISMS OF HOLLEY

First, when time does not permit it, a salesperson cannot be morally obligated to provide all information necessary to ensure that the customer is adequately informed (all the information that a reasonable person would *want* to know if she were in the buyer's position). In many cases, reasonable customers would *want* to know a great deal of information. Often salespeople simply don't have the time to give all customers all the information Holley deems necessary for an acceptable exchange. Salespeople don't always know all the information that the buyer needs for an acceptable exchange. It cannot be a person's duty to do what is impossible—that statement that someone *ought* to do a certain act implies that she *can* do that act. Further, in many cases, salespeople don't know enough about the buyer's state of knowledge to know what information the buyer needs in order to be adequately informed. A salesperson might know that the buyer needs certain information in order to be adequately informed but not know whether or not the buyer possesses that information. One might reply that salespeople *should* know all the information necessary for an adequate exchange. However, on examination, this is not a plausible view. A salesperson in a large retail store cannot be expected to be knowledgeable about every product he sells. Often, it is impossible for realtors and used car salesmen to know much about the condition of the houses and cars they sell or the likelihood that they will need expensive repairs.

Second, Holley's theory implies that a salesperson in a store would be obligated to inform customers that a particular piece of merchandise in her store sells for less at a competing store if she knows this to be the case. (Presumably, she would *want* to know where she can get it for the lowest price, were she herself considering buying the product.) Not only do salespeople have no duty to provide this kind of information, (ordinarily) it would be wrong for them to do so.

Third, Holley's theory seems to yield unacceptable consequences in cases in which the buyer's alternatives are severely constrained. Suppose that a person with a very modest income attempts to buy a house in a small town. Her options are severely

constrained, since there is only one house for sale in her price range. According to Holley, there can't be an acceptable exchange in such cases, because condition number 2 is not satisfied. However, it's not clear what he thinks sellers ought to do in such cases. The seller can't be expected to remove these constraints by giving the buyer money or building more homes in town. Holley's view seems to imply that it would be wrong for anyone to sell or rent housing to such a person. This result is unacceptable.

## TOWARD A MORE PLAUSIBLE THEORY ABOUT THE ETHICS OF SALES

I believe that salespeople have the following moral duties regarding the disclosure of information when dealing with *rational adult consumers* (cases involving children or adults who are not fully rational raise special problems that I will not try to deal with here):

1. Salespeople should provide buyers with safety warnings and precautions about the goods they sell. (Sometimes it is enough for salespeople to call attention to written warnings and precautions that come with the goods and services in question. These warnings are unnecessary if the buyers already understand the dangers or precautions in question.)
2. Salespeople should refrain from lying and deception in their dealings with customers.
3. As much as their knowledge and time constraints permit, salespeople should fully answer questions about the products and services they sell. They should answer questions forthrightly and not evade questions or withhold information that has been asked for (even if this makes it less likely that they will make a successful sale). Salespeople are obligated to answer questions about the goods and services they sell. However, they are justified in refusing to answer questions that would require them to reveal information about what their competitors are selling. They are not obligated to answer questions about competing goods

and services or give information about other sellers.

4. Salespeople should not try to "steer" customers toward purchases that they have reason to think will prove to be harmful to customers (financial harm counts) or that customers will come to regret.

These are *prima facie* duties that can conflict with other duties and are sometimes overridden by other duties. A *prima facie* duty is one's actual duty, other things being equal; it is an actual duty in the absence of conflicting duties of greater or equal importance. For example, my *prima facie* duty to keep promises is my actual duty in the absence of conflicting duties of equal or greater importance. The above is a *minimal list* of the duties of salespeople concerning the disclosure of information. I believe that the following are also *prima facie* duties of salespeople, but I am much less certain that these principles can be justified:

5. Salespeople should not sell customers goods or services they have reason to think will prove to be harmful to customers or that the customers will come to regret later, without giving the customers their reasons for thinking that this is the case. (This duty does not hold if the seller has good reasons to think that the customer already possesses the information in question.)
6. Salespeople should not sell items they know to be defective or of poor quality without alerting customers to this. (This duty does not hold if the buyer can be reasonably expected to know about the poor quality of what he is buying.)

I have what I take to be strong arguments for 1–4, but I'm not so sure that I can justify 5 and 6. I believe that reasonable people can disagree about 5 and 6. (I have very little to say about 5 and 6 in the present essay. See Carson [2001] for a discussion of arguments for 5 and 6.)

There are some important connections between duties 2, 4, and 6. Lying and deception in sales are not confined to lying to or deceiving customers about the goods one sells. Many salespeople misrepresent their own motives to customers/clients. Almost all

salespeople invite the trust of customers/clients and claim, implicitly or explicitly, to be acting in the interests of customers/clients. Salespeople often ask customers to defer to their judgment about what is best for them. For most salespeople, gaining the trust of customers or clients is essential for success. Many salespeople are *not* interested in helping customers in the way they represent themselves as being. A salesperson who misrepresents her motives, and intentions to customers violates rule 2. This simultaneous inviting and betrayal of trust is a kind of treachery. In ordinary cases, rules against lying and deception alone prohibit salespeople from steering customers toward goods or services they have reason to think will be bad for them. It is difficult to steer someone in this way without lying or deception, e.g., saying that you believe that a certain product is best for someone when you don't believe this to be the case. Similar remarks apply to selling defective goods. Often, it is impossible to do this without lying to or deceiving customers. In practice, most or many violations of rules 4 and 6 are also violations of rule 2. . . .

### The Golden Rule

I think that the golden rule is most plausibly construed as a consistency principle (those who violate the golden rule are guilty of inconsistency). The following version of the golden rule can be justified.

GR. Consistency requires that if you think that it would be morally permissible for someone to do a certain act to another person, then you must consent to someone else doing the same act to you in relevantly similar circumstances.

### How the Golden Rule Supports My Theory

Given this version of the golden rule, any rational and consistent moral judge who makes judgments about the moral obligations of salespeople will have to accept rules 1–4 as *prima facie* duties. Consider each duty in turn:

1. All of us have reason to fear the hazards about us in the world; we depend on others to warn us of those hazards. Few people would survive to adulthood were it not for the warnings of

others about such things as oncoming cars, live electric wires, and approaching tornadoes. No one who values her own life can honestly say that she is willing to have others fail to warn her of dangers.

2. Like everyone else, a salesperson needs correct information in order to act effectively to achieve her goals and advance her interests. She is not willing to act on the basis of false beliefs. Consequently, she is not willing to have others deceive her or lie to her about matters relevant to her decisions in the marketplace. She is not willing to have members of other professions (such as law and medicine) make it a policy to deceive her or lie to her whenever they can gain financially from doing so.
3. Salespeople have questions about the goods and services they themselves buy. They can't say that they are willing to have others evade or refuse to answer those questions. We want our questions to be answered by salespeople or else we wouldn't ask them. We are not willing to have salespeople evade or refrain from answering our questions. (Digression. Rule 3 permits salespeople to refuse to answer questions that would force them to provide information about their competitors. Why should we say *this*? Why not say instead that salespeople are obligated to answer *all* questions that customers ask? The answer is as follows: A salesperson's actions affect *both* her customers and her employer. In applying the golden rule to this issue she can't simply ask what kind of information she would want were she in the customer's position [Holley poses the question in just this way]. Rule 3 can probably be improved upon, but it is a decent first approximation. A disinterested person who was not trying to give preference to the interests of salespeople, employers, or customers could endorse 3 as a policy for salespeople to follow. We can and must recognize the legitimacy of employers' demands for loyalty. The role of being an advocate or agent for someone who is selling things is legitimate within

certain bounds—almost all of us are willing to have real estate agents work for us. A rational person could consent to the idea that everyone follow principles such as rule 3.)

4. All of us are capable of being manipulated by others into doing things that harm us, especially in cases in which others are more knowledgeable than we are. No one can consent to the idea that other people (or salespeople) should manipulate us into doing things that harm us whenever doing so is to their own advantage. Salespeople who claim that it would be permissible for them to make it a policy to deceive customers, fail to warn them about dangers, evade their questions, or manipulate them into doing things that are harmful to them whenever doing so is advantageous to them are inconsistent because they are not willing to have others do the same to them. They must allow that 1–4 are *prima facie* moral duties.

Rules 1–4 are only *prima facie* duties. The golden rule can account for the cases in which 1–4 are overridden by other more important duties. For example, we would be willing to have other people violate rules 1–4 if doing so were necessary in order to save the life of an innocent person. In practice, violating 1, 2, 3, or 4 is permissible only in very rare cases. The financial interests of salespeople seldom justify violations of 1, 2, 3, or 4. The fact that a salesperson can make more money by violating 1, 2, 3, or 4 would not justify her in violating any of these unless she has very pressing financial obligations that she cannot meet otherwise. Often, salespeople need to meet certain minimum sales quotas to avoid being fired. Suppose that a salesperson needs to make it a policy to violate 1–4 in order to meet her sales quotas and keep her job. Would this justify her in violating 1–4? *Possibly*. But, in order for this to be the case, the following conditions would have to be met: a) she has important moral obligations such as feeding and housing her family that require her to be employed (needing money to keep one's family in an expensive house or take them to Disney World wouldn't justify violating 1–4); and b) she can't find another job

that would enable her to meet her obligations without violating 1-4 (or other equally important duties). Those salespeople who can't keep their jobs or make an adequate income without violating 1-4 should seek other lines of employment. . . .

## EXAMPLES

I will discuss several cases to illustrate and clarify my theory.

### Example A

I am selling a used car that I know has bad brakes; this is one of the reasons I am selling the car. You don't ask me any questions about the car, and I sell it to you without informing you of the problem with the brakes.

### Example B

I am selling a used car that starts poorly in cold weather. You arrange to look at the car early in the morning on a very cold day. I don't own a garage so the car is out in the cold. With difficulty, I start it up and drive it for thirty minutes shortly before you look at it and then cover the car with snow to make it seem as if it hasn't been driven. The engine is still hot when you come and the car starts up immediately. You then purchase the car, remarking that you need a car that starts well in the cold to get to work, since you don't have a garage.

### Example C

While working as a salesperson, I feign a friendly concern for a customer's interests. I say, "I will try to help you find the product that is best suited for your needs. I don't want you to spend any more money than you need to. Take as much time as you need." The customer believes me, but she is deceived. In fact, I couldn't care less about her welfare. I only want to sell her the highest priced item I can as

quickly as I can. I don't like the customer; indeed, I am contemptuous of her.

In example A, I violate rule 1 and put the buyer and other motorists, passengers, and pedestrians at risk. In example B, I violate rules 2 and 5. In example C, I violate rule 2. In the absence of conflicting obligations that are at least as important as the rules I violate, my actions in cases A-C are morally wrong.

### Example D: A Longer Case (an Actual Case)

In 1980, I received a one-year fellowship from the National Endowment for the Humanities. The fellowship paid for my salary, but not my fringe benefits. Someone in the benefits office of my university told me that I had the option of continuing my health insurance through the university if I paid for the premiums out of my own pocket. I told the benefits person that this was a lousy deal and that I could do better by going to a private insurance company. I went to the office of Prudential Insurance agent Mr. A. O. "Ed" Mokarem. I told him that I was looking for a one-year medical insurance policy to cover me during the period of the fellowship and that I planned to resume my university policy when I returned to teaching. (The university provided this policy free of charge to all faculty who were teaching.) He showed me a comparable Prudential policy that cost about half as much as the university's policy. He explained the policy to me. I asked him to fill out the forms so that I could purchase the policy. He then told me that there was a potential problem I should consider. He said roughly the following:

You will want to return to your free university policy next year when you return to teaching. The Prudential policy is a one-year terminal policy. If you develop any serious medical problems during the next year, Prudential will probably consider you "uninsurable" and will not be willing to sell you health insurance in the future. If you buy the Prudential policy, you may encounter the same problems with your university policy. Since you will be dropping this policy *voluntarily*, they will have the right to underwrite your application for re-enrollment. If you develop a serious health problem during the next year, their underwriting

decision could be "Total Rejection," imposing some waivers and/or exclusions, or (at best) subjecting your coverage to the "pre-existing conditions clause," which would not cover any pre-existing conditions until you have been covered under the new policy for at least a year.

If I left my current health insurance for a year, I risked developing a costly medical condition for which no one would be willing to insure me. That would have been a very foolish risk to take. So, I thanked him very much and, swallowing my pride, went back to renew my health insurance coverage through the university. I never bought any insurance from Mr. Mokarem and never had occasion to send him any business.

I have discussed this case with numerous classes through the years. It usually generates a lively discussion. Most of my students do not think that Mr. Mokarem was morally obligated to do what he did, but they don't think that what he did was wrong either—they regard his actions as supererogatory or above and beyond the call of duty.

### My View About Example D

On my theory, this is a difficult case to assess. If rules 1–4 are a salespersons's only duties concerning the disclosure of information, then Mr. Mokarem was not obligated to inform me as he did. (In this case, the information in question was information about a competing product—the university's health insurance policy.) If rule 5 is a *prima facie* duty of salespeople, then (assuming that he had no conflicting moral duties of greater or equal importance) it was his duty, all things considered, to inform me as he did. Since I am uncertain that 5 can be justified, I'm not sure whether or not Mr. Mokarem was

obligated to do what he did or whether his actions were supererogatory. This case illustrates part of what is at stake in the question of whether rule 5 is a *prima facie* duty of salespeople.

### NOTE

This essay is a revised and abridged version of material from two earlier essays, "Deception and Withholding Information in Sales," *Business Ethics Quarterly* 11 (2001): 275–306, and "Ethical Issues in Selling and Advertising," *The Blackwell Guide to Business Ethics*, ed. Norman Bowie (Oxford: Blackwell, 2002), 186–205. Many thanks to Ivan Preston for his very generous and helpful advice and criticisms. Everyone interested in these topics should read his work.

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